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NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

JUNE 29, 2007.—Ordered to be printed

Mr. ROCKEFELLER, from the Select Committee on Intelligence, submitted the following

R E P O R T

[To accompany S. 1547]

together with

ADDITIONAL VIEWS

The Select Committee on Intelligence, to which was referred the bill (S. 1547) to authorize appropriations for fiscal year 2008 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass. The Committee is also favorably reporting with proposed identical amendments, but without a separate written report, a related referred bill (S. 1548) which is described below.

On June 5, 2007, the Committee on Armed Services reported S. 1547, the National Defense Authorization Act for Fiscal Year 2008, together with several companion measures each of which is comprised of a division of S. 1547. The provisions of S. 1548, the Department of Defense Authorization Act for Fiscal Year 2008, are identical to Division A of S. 1547.

On June 12, 2007, pursuant to section 3(b) of Senate Resolution 400 of the 94th Congress, Chairman Rockefeller wrote to the Majority Leader to request the sequential referral to the Intelligence Committee of S. 1547 and S. 1548. The basis for the request was that the bills contain matters that are within the jurisdiction of the Intelligence Committee. As prescribed by section 3(b)(4) of Senate

Resolution 400, "committees to which legislation is referred are not permitted to make changes or alterations to the text of the referred bill and its annexes, but may propose changes or alterations to the same in the form of amendments."

On June 13, 2007, the two bills were referred to this Committee. In accordance with section 3(b)(1), the period of a sequential referral begins when proposed legislation "including annexes" is referred. On June 19, 2007, the Intelligence Committee received the classified annex to S. 1547.

Section 1023. Procedures for Combatant Status Review Tribunals

The Committee proposes two amendments to Section 1023(a) of S. 1547 and S. 1548 (the two sections are identical). Section 1023(a) of each bill amends the Detainee Treatment Act of 2005 to establish requirements for procedures that govern Combatant Status Review Tribunals (CSRTs). The purpose of the tribunals is to determine the status of detainees being held by the Department of Defense (DoD), including whether the detainees are "unlawful enemy combatants."

Both of our Committee's amendments are designed to clarify and underscore the protection given to classified information during the proceedings of CSRTs, including the protection of intelligence sources and methods, and are consistent with the overall intention in that regard of the Committee on Armed Services.

One of the procedures established by Section 1023(a) concerns the reasonable opportunity of detainees to obtain witnesses and other evidence. As reported by the Committee on Armed Services, the procedures available to detainees in CSRTs are to be "similar to" the procedures available in military commission proceedings as found in section 949j of title 10, United States Code. The first of our Section 1023(a) amendments recommends that the reasonable opportunity afforded to a detainee to obtain witnesses and other evidence should be "consistent with" and not merely "similar to" the military commission procedures. This change makes clear that the procedures governing a detainee's access to witnesses and other evidence should be no less rigorous than those applicable to a military commission, particularly where access to classified information is concerned.

The Committee's second recommended change to Section 1023(a) relates to the detainee's ability to have access to a summary of classified information during his CSRT proceeding. The Committee recommends that the phrase "an unclassified summary" be inserted in place of "a summary." This insertion is consistent with the language currently used in section 949j(c) of title 10. The Committee's intention is that, under no circumstances, should Congress mandate that a detainee have access to classified information. It is our understanding that this is fully consistent with the intention of the Committee on Armed Services.

Section 1063. Communications between the Intelligence Community and the Committees on Armed Services

The Committee proposes that Section 1063 of S. 1547 and S. 1548 (the two sections are identical) be deleted.

Section 1063 is entitled "Communications with the Committees on Armed Services of the Senate and the House of Representa-

tives." Subsections (a) and (b) establish rules on responses to requests by the Armed Services Committees to elements of the Intelligence Community for kinds of documents or other intelligence information. Subsection (c) prohibits requirements for approval, comments, or review in the executive branch of testimony, legislative recommendations, or comments by Intelligence Community elements to the Armed Services Committees.

We share with the Armed Services Committee the conviction that it is critically important that all elements of the Intelligence Community provide timely responses to requests for documents that Congress needs to perform its responsibilities. We also share the conviction that it is essential for testimony on intelligence matters to be independent. Indeed, the Intelligence Reform and Terrorism Prevention Act of 2004 makes the precise point that the Director of National Intelligence is responsible for ensuring that national intelligence provided to the Senate and House and their committees should be "timely, objective, [and] independent of political considerations." Section 102A(a)(2) of the National Security Act of 1947, 50 U.S.C. 403–1(a)(2).

But if experience since enactment of the Intelligence Reform Act demonstrates a need to supplement that requirement with auxiliary procedures, those procedures should be considered in a setting that evaluates the issues across the board. The Senate has vested in the Intelligence Committee jurisdiction over the Office of the Director of National Intelligence. Legislation that alters the relationship between the Director of National Intelligence and other parts of the Executive Branch, or governs the relationship between the DNI and congressional committees, should be considered comprehensively and not, with all respect to our colleagues on other committees, separately and perhaps differently by the various committees of the Senate that may have an interest in intelligence information.

In doing so, the Intelligence Committee must be and is mindful, of course, of the requirement of section 3(d) of Senate Resolution 400 that nothing in S. Res. 400 changes the authority of any standing committee to obtain full and prompt access to the product of the intelligence activities of any department or agency relevant to a matter within the jurisdiction of that committee. However, Congress should not enact separate rules for its various committees outside the Intelligence Committees, which is the precedent that Section 1063 would establish.

Section 1064. Repeal of Standards for Disqualification from Issuance of Security Clearances by the Department of Defense.

The Committee proposes that Section 1064 of S. 1547 and S. 1548 (the two sections are identical) be deleted.

Section 1064 repeals section 986 of title 10, United States Code. Under section 986, DoD may not grant or renew a security clearance for covered individuals who meet criteria set forth in the section. The covered individuals are officers or employees of DoD, active duty or active status members of the Army, Navy, Air Force or Marine Corps, and officers or employees of DoD contractors. There are four grounds for disqualification: (1) any past conviction of a crime in any court of the United States and resulting incarceration of not less than one year; (2) current mental incompetence,

as determined by a DoD approved mental health professional; (3) currently being an unlawful user of, or being addicted to, a controlled substance; and (4) any past discharge or dismissal from the Armed Forces under dishonorable conditions.

The Committee understands DoD's desire to have more flexibility to give clearances to otherwise qualified individuals who are currently barred from receiving or renewing their security clearances. Because of the extremely sensitive nature of DoD's military and intelligence activities, however, the Committee is concerned that a blanket repeal of section 986 could lead to unintended compromises or mishandling of classified information. Further, the Committee believes that the waiver authority that is currently provided in section 986 is sufficient to give DoD the flexibility and discretion it needs in handling cases involving convictions or dishonorable discharges. With respect to the two remaining categories, it is the Committee's opinion that an individual who is currently using illicit substances or is mentally incompetent is not suited for access to classified information.

The Committee believes that the issue of security clearances, including grounds for disqualification and waiver procedures, should be examined carefully in close coordination with DoD (and other appropriate offices in the Executive Branch) and the Office of the Director of National Intelligence.

COMMITTEE ACTION

On June 26, 2007, by voice vote the Committee agreed to adopt the Chairman and Vice Chairman's mark for S. 1547 and S. 1548 which contained a recommendation that Section 1063 of each be deleted.

On June 26, 2007, by voice vote the Committee agreed to an amendment by Vice Chairman Bond to recommend an amendment to Section 1023 of S. 1547 and S. 1548 on the opportunity of detainees to obtain witnesses and other evidence in the proceedings of Combatant Status Review Tribunals.

On June 26, 2007, by voice vote the Committee agreed to an amendment by Vice Chairman Bond to recommend an amendment to Section 1023 of S. 1547 and S. 1548 to provide that any summary of classified evidence provided to a detainee in a Combatant Status Review Tribunal proceeding shall be unclassified.

On June 26, 2007, by a vote of 10 ayes and 5 noes, the Committee agreed to an amendment by Vice Chairman Bond to strike Section 1064 of S. 1547 and S. 1548. The votes in person or by proxy were as follows: Chairman Rockefeller—no; Senator Feinstein—aye; Senator Wyden—no; Senator Bayh—no; Senator Mikulski—no; Senator Feingold—no; Senator Nelson—aye; Senator Whitehouse—aye; Vice Chairman Bond—aye; Senator Warner—aye; Senator Hagel—aye; Senator Chambliss—aye; Senator Hatch—aye; Senator Snowe—aye; Senator Burr—aye.

On June 26, 2007, by a vote of 5 ayes and 10 noes, the Committee rejected an amendment by Vice Chairman Bond to recommend that a provision be added to S. 1547 and S. 1548 that the Under Secretary of Defense for Intelligence shall also serve as the Director of Defense Intelligence in the Office of the Director of National Intelligence. The votes in person or by proxy were as follows: Chairman Rockefeller—no; Senator Feinstein—no; Senator

Wyden—no; Senator Bayh—no; Senator Mikulski—no; Senator Feingold—no; Senator Nelson—no; Senator Whitehouse—no; Vice Chairman Bond—aye; Senator Warner—no; Senator Hagel—no; Senator Chambliss—aye; Senator Hatch—aye; Senator Snowe—aye; Senator Burr—aye.

On June 26, 2007, a quorum for reporting being present, by a vote of 15 ayes and 0 noes the Committee voted to report S. 1547 and S. 1548, as proposed to be amended, favorably. The votes in person or by proxy were as follows: Chairman Rockefeller—aye; Senator Feinstein—aye; Senator Wyden—aye; Senator Bayh—aye; Senator Mikulski—aye; Senator Feingold—aye; Senator Nelson—aye; Senator Whitehouse—aye; Vice Chairman Bond—aye; Senator Warner—aye; Senator Hagel—aye; Senator Chambliss—aye; Senator Hatch—aye; Senator Snowe—aye; Senator Burr—aye.

ESTIMATE OF COSTS

On June 27, 2007, the Committee transmitted S. 1547 and S. 1548 to the Congressional Budget Office and requested it to conduct an estimate of the costs, if any, resulting from the proposed amendments.

EVALUATION OF REGULATORY IMPACT

In accordance with paragraph 11(b) of the Standing Rules of the Senate, the Committee finds that no substantial regulatory impact will be incurred by implementing the proposed amendment.

CHANGES IN EXISTING LAWS

In the opinion of the Committee, it is necessary to dispense with the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

ADDITIONAL VIEWS OF SENATORS ROCKEFELLER, WYDEN, AND FEINGOLD

At the request of the Department of Defense, the Committee on Armed Services included a provision in the National Defense Authorization Act for Fiscal Year 2008 (S. 1547 and also in its companion measure S. 1548) that would repeal Section 986 of Title 10 of the United States Code, a title uniquely within the jurisdiction of that committee. The provision, Section 1064 of S. 1547 and S. 1548, concerns security clearances for DoD personnel. On the sequential referral to us of these bills, our committee has voted to request the Senate to reinstate Section 986, thereby overriding the joint judgment of DoD and the Armed Services Committee on this matter. Having voted at our markup to defer to the views of DoD and the Armed Services Committee, we offer these few words of explanation.

Section 986 of Title 10 applies to all officers or employees of DoD, all members of the Armed Forces on active duty or in an active status, and all officers or employees of DoD contractors. It does not apply to officers, employees, or contractors of the CIA or any other element of the Intelligence Community outside of DoD, or to any of the other departments or agencies of the government or their contractors.

For the large universe of civilian and military personnel to which it applies, Section 986 bars the grant of security clearances to anyone who at any time in the past had been incarcerated for more than a year for a criminal conviction or had been discharged dishonorably from the Armed Forces. It also bars security clearances for anyone who is currently an unlawful user of or is addicted to a controlled substance, or is mentally incompetent as determined by a DoD approved mental health professional.

Section 986 contains a waiver provision if there are mitigating circumstances. The waiver may be exercised only in accordance with standards and procedures prescribed under an order or guidance issued by the President. Notwithstanding the waiver provision, DoD has told the Armed Services Committees that "[t]hese DoD-specific criteria unduly limit the ability of the Department to manage its security clearance program and may create unwarranted hardships for individuals who have rehabilitated themselves as productive and trustworthy citizens."

We have been advised that there is no comparable statute applicable to any other department or agency of the government. Throughout the government, the regular security clearance procedures established by the President under Executive Order 12968 make clear that "agencies may investigate and consider any matter that relates to the determination of whether access is clearly consistent with the interests of national security."

Moreover, following enactment of Section 986 in 2000 (and its amendment in 2004), Congress, in title III of the Intelligence Reform and Terrorism Prevention Act of 2004, has sought to chart a new government-wide direction for security clearances. An important feature of that title requires the President to select a single unit in the executive branch that is responsible for developing and implementing "uniform and consistent" policies and procedures for security clearances. One goal of that effort is to ensure reciprocal recognition of access to classified information among U.S. agencies. A security clearance statute, such as Section 986, that establishes rules only applicable in one department, runs counter to that overall congressional goal.

As all other members, we would be deeply concerned about the grant of security clearances to persons who have been imprisoned for more than a year or who are current drug users, to take two of the categories in section 986. But we have heard no reason to question the adequacy of the security clearance process established under presidential order, nor to question the joint assessment of DoD and the Armed Services Committee that national security can be protected without this one DoD-specific statute.

JOHN D. ROCKEFELLER IV.
RON WYDEN.
RUSSELL D. FEINGOLD.

ADDITIONAL VIEWS OF SENATORS BOND, CHAMBLISS, HATCH, SNOWE, AND BURR

The Select Committee on Intelligence renewed an important precedent by requesting sequential referral of S. 1547, the National Defense Authorization Act for Fiscal Year 2008, and S. 1548, the Department of Defense Authorization Act for Fiscal year 2008. These bills warranted review by the Intelligence Committee due to a number of provisions that are within the jurisdiction of the Intelligence Committee and directly affect the Intelligence Community.

The Committee acted expeditiously to report favorably on these bills and proposed several significant alterations in the form of amendments. These additional views will discuss an amendment adopted by the Committee, which would prevent the repeal of a statute designed to restrict certain individuals within the Department of Defense (DoD) from receiving security clearances.

Section 1064 of the DoD authorization bill repeals, in its entirety, Section 986 of title 10, which bars certain individuals from receiving security clearances from DoD. Concerned about the negative impact of removing this bar, Vice Chairman Bond offered an amendment to strike Section 1064, thereby reinstating Section 986. While the Committee accepted the proposed amendment by a vote of 10 to 5, we believe the seriousness of the issues involved merits further comment.

Under Section 986, DoD may not grant or renew a security clearance for an individual who meets any of the following criteria: (1) has been convicted of a crime, with a sentence and incarceration of more than one year; (2) is an unlawful user of, or is addicted to a controlled substance; (3) is mentally incompetent; or (4) has been dishonorably discharged from the Armed Forces. We believe these prohibitions are reasonable and narrowly tailored to address certain individuals who do not appear to be suited to access classified information.

Section 986 does allow a waiver to be granted, in a meritorious case, where the prohibition is based on a conviction or dishonorable discharge. This makes sense for select cases where individuals have changed their ways and become responsible citizens. There is, however, no waiver for individuals who are currently using drugs or are mentally incompetent. This also makes sense. We cannot imagine any reasonable argument to justify giving such individuals access to some of the Nation's most closely guarded secrets.

Proponents of Section 1064, including the Administration, have argued that the procedure for obtaining a waiver is "onerous" and may discourage agencies or individuals from pursuing a meritorious waiver. Section 986, however, does not mandate any procedure for considering or granting a waiver. Rather, this statute clearly states that the standards and procedures are to be established by Executive order or other Presidential guidance. Thus, to

the extent that DoD believes that the waiver process is too cumbersome or does not provide sufficient flexibility, DoD should seek changes in the implementing guidance issued by the Executive branch.

In recent years, there have been some noteworthy and unfortunate leaks of sensitive intelligence programs. These leaks have compromised classified information and likely led to our enemies changing their tactics to thwart our collection efforts. Because such leaks can cause irreparable harm to our intelligence programs, reasonable measures such as Section 986 that protect classified information should be preserved.

Section 986 has significant implications for the Intelligence Community as there are a number of Intelligence Community components within DoD. Further, we believe that we should give serious consideration to extending similar security clearance restrictions to the rest of the Intelligence Community. Rather than risk compromising our intelligence sources and methods, we believe that this statute serves as a good starting point for fully exploring further options in this area.

CHRISTOPHER S. BOND.
SAXBY CHAMBLISS.
ORRIN G. HATCH.
OLYMPIA J. SNOWE.
RICHARD BURR.

ADDITIONAL VIEWS OF SENATORS BURR, BOND, CHAMBLISS, HATCH, AND SNOWE

The DoD Authorization Act for Fiscal Year 2008 is a very important piece of legislation. Its importance is heightened during our nation's ongoing struggle against terrorism and the threats of extremist groups. Our Armed Services and Intelligence Community are facing this threat head on. They continue to perform admirably and deserve our full support.

Congress can provide that support by ensuring that our defense and intelligence leaders work together in a coordinated and synchronized manner. During the Committee's markup of the DoD Authorization Act, Vice Chairman Bond offered an amendment that would do just that. The amendment would have established a role for the Under Secretary of Defense for Intelligence (USDI) as Director of Defense Intelligence within the Office of the Director of National Intelligence (ODNI). Much to our disappointment, despite near unanimity that it was a good idea, the Committee chose not to adopt this amendment.

The Secretary of Defense and Director of National Intelligence through a memorandum of agreement have established the role of USDI as the Director of Defense Intelligence within the ODNI. But, relying solely on this document to confirm the USDI's new, dual-hatted role makes coordination of defense and intelligence leaders too dependent upon a cooperative relationship between the principals in the Department of Defense and the Intelligence Community.

There is wide recognition that this is an important relationship that should be formalized. In a statement on May 24, 2007, the ODNI explained that the agreement was made

> . . . in recognition of the crucial importance of coordinated intelligence efforts to the national security of the United States. The defense intelligence components provide a full range of intelligence products and analysis to a broad spectrum of consumers; from military forces in the field to senior policy makers across the federal government. These efforts are intertwined with the national intelligence efforts overseen by the DNI.

The USDI explains the significance of this dual-reporting relationship well in his own words:

> The creation of the Office of the Director of Defense Intelligence is in recognition of the importance of coordinated intelligence efforts to the national security of the United States. This office will serve to strengthen the relationship between the DNI and the DoD. The objective here is to facilitate staff interaction and promote synchronization.

We are concerned that a memorandum of agreement is not a sufficient instrument to ensure this new and important relationship will last. The memorandum stipulates that either party can unilaterally terminate this relationship with 30 days written notice. A future DNI who is not interested in working cooperatively with the DoD could easily marginalize or ignore the USDI, because the memorandum leaves no legal recourse to force the DNI to cooperate. Conversely, if DoD or a future USDI loses interest in working closely with the DNI, a statutory requirement would make it much harder for the USDI to disengage. If these principals successors are even marginally less collegial, it is not hard to imagine how this relationship might break down, unless it was required by law.

Most members of the Committee expressed support for statutorily creating this position and believe it will ensure proper Congressional oversight. Despite this, the amendment was not adopted. Senator Warner assured the Committee that during future consideration of the bill, the Senate Select Intelligence Committee's views would be heard and taken into account by the members of the Senate Armed Services Committee. We strongly support this, and hope that the Senate consider that the time is right to make certain that the new Director of Defense Intelligence position is permanent.

Enshrining in statute the USDI's dual-hatted role as the Director of Defense Intelligence in the ODNI sends a clear signal to the bureaucracies of both DoD and the Intelligence Community that this relationship is important to Congress and is here to stay.

RICHARD BURR.
CHRISTOPHER S. BOND.
SAXBY CHAMBLISS.
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