

INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR
2012

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Mrs. FEINSTEIN, from the Select Committee on Intelligence, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 1458]

The Select Committee on Intelligence, having considered an original bill (S. 1458) to authorize appropriations for Fiscal Year 2012 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon and recommends that the bill do pass.

CLASSIFIED ANNEX TO THE COMMITTEE REPORT

On February 14, 2011, acting pursuant to Section 364 of the Intelligence Authorization Act for Fiscal Year 2010 (Public Law 111-259), the Director of National Intelligence (DNI) publicly disclosed that the President's aggregate request for the National Intelligence Program (NIP) for Fiscal Year 2012 is \$55 billion. Other than for limited unclassified appropriations, primarily the Intelligence Community Management Account, the classified nature of United States intelligence activities precludes any further disclosure, including by the Committee of the details of its budgetary recommendations. Accordingly, the Committee has prepared a classified annex to this report that contains a classified Schedule of Authorizations. The Schedule of Authorizations is incorporated by reference in the Act and has the legal status of public law. The classified annex is made available to the Committees of Appropriations of the Senate and the House of Representatives and to the President. It is also available for review by any Member of the Senate subject to the provisions of Senate Resolution 400 of the 94th Congress (1976).

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

The following is a section-by-section analysis and explanation of the Intelligence Authorization Act for Fiscal Year 2012 that is being reported by the Committee.

TITLE I—BUDGET AND PERSONNEL AUTHORIZATIONS

Section 101. Authorization of appropriations

Section 101 lists the United States Government departments, agencies, and other elements for which the Act authorizes appropriations for intelligence and intelligence-related activities for Fiscal Year 2012.

Section 102. Classified Schedule of Authorizations

Section 102 provides that the details of the amounts authorized to be appropriated for intelligence and intelligence-related activities and the applicable personnel levels (expressed as full-time equivalent positions) for Fiscal Year 2012 are contained in the classified Schedule of Authorizations and that the classified Schedule of Authorizations shall be made available to the Committees on Appropriations of the Senate and House of Representatives and to the President.

Section 103. Personnel Ceiling Adjustments

Section 103 is intended to provide additional flexibility to the DNI in managing the civilian personnel of the Intelligence Community. Section 103(a) provides that the DNI may authorize employment of civilian personnel (expressed as full-time equivalent positions) in Fiscal Year 2012 in excess of the number of authorized full-time equivalent positions by an amount not exceeding 3 percent (rather than the 5 percent leeway requested by the Administration) of the total limit applicable to each IC element under Section 102. The DNI may do so only if necessary to the performance of important intelligence functions.

Section 103(b) provides additional flexibility when the heads of IC elements determine that work currently performed by contract personnel should be performed by government employees. It does so by authorizing the DNI to authorize employment of additional full-time equivalent personnel in a number equal to the number of full-time equivalent contract personnel currently performing that work. Any exercise of this authority should be implemented in accordance with a plan that includes adequate support for personnel. Exercise of this authority should result in an actual reduction of the number of contract personnel and not a shift of resources to hire other contract personnel.

The DNI must report the decision to allow an IC element to exceed the personnel ceiling or to convert contract personnel under Section 103(a) and (b) in advance to the congressional intelligence committees.

During consideration of the Fiscal Year 2008 request, the congressional intelligence committees learned that practices within different elements of the Intelligence Community on the

counting of personnel with respect to legislatively-fixed ceilings were inconsistent, and included not counting certain personnel at all against personnel ceilings. The committees requested that the IC Chief Human Capital Officer (CHCO) ensure that by the beginning of Fiscal Year 2010 there would be a uniform and accurate method of counting all IC employees under a system of personnel levels expressed as full-time equivalents. The committees also expressed their view that the DNI express the personnel levels for civilian employees of the Intelligence Community as full-time equivalent positions in the congressional budget justifications for Fiscal Year 2010. The DNI has done so. In addition, the DNI has issued a policy to ensure a uniform method for counting IC employees. Subsection (c) confirms in statute the obligation of the DNI to establish these guidelines.

Section 104. Intelligence Community Management Account

Section 104 authorizes appropriations for the Intelligence Community Management Account (ICMA) of the DNI and sets the authorized full-time equivalent personnel levels for the elements within the ICMA for Fiscal Year 2012.

Subsection (a) authorizes appropriations of \$585,187,000 for Fiscal Year 2012 for the activities of the ICMA. Subsection (b) authorizes 800 full-time equivalent personnel for elements within the ICMA for Fiscal Year 2012 and provides that such personnel may be permanent employees of the Office of the Director of National Intelligence (ODNI) or detailed from other elements of the United States Government.

Subsection (c) authorizes additional appropriations and full-time equivalent personnel for the classified Community Management Account as specified in the classified Schedule of Authorizations and permits the funding for advanced research and development to remain available through September 30, 2013.

TITLE II—CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM

Section 201. Authorization of appropriations

Section 201 authorizes appropriations in the amount of \$513,700,000 for Fiscal Year 2012 for the Central Intelligence Agency (CIA) Retirement and Disability Fund. For Fiscal Year 2011, Congress authorized \$292,000,000. While that level was consistent with prior authorizations, it did not fully fund, as prior authorizations had not fully funded, the obligations of the Fund. The Fiscal Year 2012 increase is based on the Administration's determination, which the Committee supports, that the obligations of this retirement and disability system should be fully funded.

TITLE III—GENERAL INTELLIGENCE COMMUNITY MATTERS

Section 301. Restriction on conduct of intelligence activities

Section 301 provides that the authorization of appropriations by the Act shall not be deemed to constitute authority for the conduct of any intelligence activity that is not otherwise authorized by the Constitution or laws of the United States.

Section 302. Increase in employee compensation and benefits authorized by law

Section 302 provides that funds authorized to be appropriated by this Act for salary, pay, retirement, and other benefits for federal employees may be increased by such additional or supplemental amounts as may be necessary for increases in compensation or benefits authorized by law.

Section 303. Enhancement of authority for flexible personnel management among the elements of the intelligence community

Section 303 adds a subsection to Section 102A of the National Security Act of 1947 to promote the ability to manage all the elements of the IC as a single cohesive community. The new Subsection 102A(v) enables the DNI, with the concurrence of the head of the covered department concerned and in coordination with the Director of the Office of Personnel Management, to convert competitive service positions within an IC element of the covered department to excepted positions and to establish new positions in the excepted service within an IC element of a covered department. Under Section 303, an incumbent occupying a position on the date of enactment selected to be converted to the excepted service shall have the right to refuse the conversion. Once such individual no longer occupies the position, the position may be converted.

Because of their unique intelligence, investigative and national security missions, most IC elements are in the excepted civil service. However, civilian employees in several smaller IC elements are still covered under competitive service rules. The ability to convert those positions to the excepted service will enable the IC to maintain a system throughout the Intelligence Community that is responsive to the needs of the IC both for secrecy and the ability to quickly respond to personnel requirements. The DNI has requested a similar authority in the past. Under Section 303, the covered departments are the Department of Energy, the Department of Homeland Security, the Department of State, and the Department of Treasury.

Although new positions in the excepted service may be created within an element of the Intelligence Community within the covered departments under this authority, the personnel ceilings referred to in Section 102(a) still apply to the number of personnel in an element. The Committee does not intend for this conversion authority to be used to increase the number of full-time equivalent personnel in an intelligence element above the applicable personnel ceilings.

Section 304. Cost estimates

Section 304 amends Section 506A of the National Security Act of 1947 to require that independent cost estimates include all costs associated with a major system acquisition even when a service or capability to deliver end-to-end functionality will be provided by another

Intelligence Community agency or element. This additional requirement in the preparation of the independent cost estimate will assist Congress and the Executive Branch in evaluating the full cost of an acquisition, including the costs to process, exploit, disseminate, and store the information such major system collects. The amendments made by Section 304 become effective 180 days after enactment.

Section 305. Preparation of nuclear proliferation assessment statements

As set forth in the Atomic Energy Act, the United States may enter into a Civilian Nuclear Agreement (or “123 Agreement”) with another nation or multinational organization. After negotiating the terms of the 123 Agreement, the Administration submits the terms to Congress for review along with a Nuclear Proliferation Assessment Statement (NPAS). Under current law, the NPAS is drafted by the State Department, in consultation with the Director of Central Intelligence; the Act has not been amended to reflect the establishment of the Director of National Intelligence. In multiple reports, the Government Accountability Office has identified various problems with this process, including insufficient time for consultation with the Intelligence Community, a lack of adequate formal interagency guidance for NPAS development, and ambiguity as to whether IC comments were fully incorporated into the final NPAS. Section 305 modifies the NPAS process in an effort to eliminate or mitigate these problems.

Currently, each NPAS must analyze the consistency of the 123 Agreement with other requirements of the Atomic Energy Act and the adequacy of the safeguards and peaceful use assurances that ensure the technology will not be used for military or nuclear explosive purposes. Section 305 provides a new role for the DNI in the NPAS process to ensure that Intelligence Community concerns are more fully incorporated into each statement. Section 305 requires the Secretary of State and the DNI to provide an unclassified NPAS to the President. The first two sections of the NPAS, which mirror the current requirements, shall be prepared by the Secretary of State, in consultation with the Director of National Intelligence. A newly-required third section shall be prepared by the DNI, in consultation with the Secretary of State, and provide a comprehensive analysis of the country’s export control system with respect to nuclear-related matters. A classified annex shall accompany the NPAS. The NPAS and its classified annex shall be provided to the congressional intelligence committees as well as the congressional foreign relations committees.

Section 306. Detainees held at United States Naval Station, Guantanamo Bay, Cuba

The Committee believes that, given the intelligence and security issues that may relate to a transfer of a detainee from Guantanamo, additional time is needed for Congress to assess the information provided pursuant to the current congressional notification requirements and ensure that any concerns are addressed prior to transfer. Moreover, as the recidivism rate among former Guantanamo detainees has increased over time, it is important for Congress to understand the terms of any assurances provided by the receiving country with respect to monitoring the transferred detainee. Therefore, Section 306 modifies the notification requirements in Section 552(e) of the Department of Homeland Security Appropriations, 2010 (Public Law 111-83) and

Section 428(e) of the Department of Interior, Environment and Related Agencies Appropriations, 2010 (Public Law 111-88) to require 30 days notice to Congress, rather than 15 days, of a transfer of a detainee to another country. In addition, the notification shall include the terms of any monitoring assurance provided by the receiving country and identify the agency or department of the United States that is to ensure any agreement between the United States and the receiving country is carried out.

Section 307. Updates of intelligence relating to terrorism recidivism of detainees held at United States Naval Station, Guantanamo Bay, Cuba

As the recidivism rate among former Guantanamo Bay detainees has increased over time, the Committee believes there should be a regular unclassified summary of intelligence relating to recidivism of detainees formerly held at Guantanamo Bay made public by the DNI.

Section 334 of the Intelligence Authorization Act for Fiscal Year 2010, Public Law 111-259, addressed this concern initially by requiring the Director of National Intelligence, along with the CIA Director and the Director of the Defense Intelligence Agency, to make publicly available, on a one-time basis, an unclassified summary that includes the intelligence relating to former Guantanamo detainees. At the same time, the President is required under Section 319 of the Supplemental Appropriations Act of 2009, Public Law 111-32, to submit classified quarterly reports to Congress that include classified information about detainees' recidivist activities.

Section 307 requires the semiannual updating of the Section 334 report. The semiannual updates required under this section will be an update of the Section 334 report and provide an unclassified summary of intelligence relating to recidivism of detainees currently or formerly held at Guantanamo Bay and an assessment of the likelihood that such detainees will engage in terrorism or communicate with persons in terrorist organizations. The initial update shall be made publicly available not later than 10 days after the date that the first report following enactment is submitted to members and committees pursuant to Section 319 of the Supplemental Appropriations Act, 2009. The summary will be prepared by the DNI, in consultation with the Director of the CIA and the Director of the Defense Intelligence Agency, and will include the number of confirmed or suspected recidivists.

Section 308. Submission of information on Guantanamo Bay detainee transfers

Section 308 requires that not later than 45 days after the date of enactment, the DNI, in coordination with the Secretary of State, shall submit information to the congressional intelligence committees concerning the transfer or potential transfer of individuals who are or have been detained by the United States at Naval Station, Guantanamo Bay, Cuba. This information is to include the following: (1) an assessment of the sufficiency of the monitoring undertaken by each foreign country to which a detainee has been transferred; (2) any written or verbal agreement between the Secretary of State and the government of a foreign country that describes monitoring and security assurances related to a detainee transferred to such country; and (3) each Department of State cable, memorandum, or report relating to or describing the threat such an individual may or may not pose.

Section 309. Enhanced procurement authority to manage supply chain risk

Section 309 authorizes the heads of those elements of the Intelligence Community outside the Department of Defense to take certain procurement actions under certain circumstances to reduce the risk that an adversary may sabotage, maliciously introduce unwanted functions, or otherwise subvert information systems so as to surveil, deny, disrupt or otherwise degrade them. Section 309 is based on Section 806 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383).

Section 309(a) defines the following terms: covered agency, covered item of supply, covered procurement, covered procurement action, covered system, and supply chain risk. The definitions of these terms are substantially the same as the same terms in Public Law 111-383.

Under subsection (b), the head of a covered agency is authorized to carry out a covered procurement action and limit the disclosure of information concerning the basis for such action. Covered procurement actions are subject to the conditions in subsection (c), which include appropriate consultation with procurement officials within the agency and a determination that the use of the authority is necessary to protect national security. In addition, there must be a determination that less intrusive measures are not reasonably available.

The head of the covered agency must give notice to the congressional intelligence committees of a determination, including a summary of the basis for a determination to take a covered procurement action. Subsection (c) provides that the authority under the section is in addition to any authority under any other provision of law. The authority provided in Section 309 is not intended to limit other procurement authorities available to an intelligence agency head to protect the national security.

The requirements of Section 309 go into effect 180 days after enactment and expire on the date that Section 806 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 expires, which will occur in January 2014. In the Committee Comments in this report, under the heading of Cyber Supply Chain Risk, the Committee requests that the Office of the National Counterintelligence Executive coordinate the production of an interagency report that will assist in determining what further measures are required.

Section 310. Report on burial allowances

Section 310 provides that the Director of the Office of Personnel Management, in consultation with the DNI and the Secretaries of Labor and Defense, shall submit a report on current burial allowances for federal civilian or military personnel. The report shall include recommendations, if any, for legislation to provide for burial allowances at a level which adequately addresses the cost of burials and provides for equitable treatment across the United States Government.

Following the tragedy at Khowst, Afghanistan, the CIA conducted a review of the benefits available to the survivors of CIA employees who are killed in the line of duty. According to the CIA, the review included a comparison of CIA's existing benefits with the benefits offered by the Department of Defense to survivors of service members killed in the line of duty. The CIA found that its burial allowance was substantially less than that offered by DoD and does not adequately cover the cost of average burial expenses today.

Currently, according to the CIA, the DoD offers approximately \$6,900 for burial in a civilian cemetery where the service member's family arranges preparation and casket. The burial allowance for CIA employees is governed by the Federal Employees Compensation Act (FECA), 5 USC 8134, which dates back to 1966, and which is administered by the Secretary of Labor. Under subsection 8134(a), "If death results from injury sustained in the performance of duty, the United States shall pay, to the personal representative of the deceased or otherwise, funeral and burial expenses not to exceed \$800, in the discretion of the Secretary of Labor." In addition to this allowance, \$200 is paid "to the personal representative of a deceased employee . . . for reimbursement of the costs of termination of the decedent's status as an employee of the United States." Subsection 8133(f). This amount is not adjusted for inflation and does not cover adequately cover the actual costs of funeral and burial expenses today, which are, according to CIA estimates, on average between \$12,000 and \$15,000.

The Committee believes it is important to respond to the problem identified by the CIA in a manner that addresses inadequacies in burial allowances for all federal civilian or military personnel who die in the line of duty. The Committee understands the Administration concurs in the need to act comprehensively. In order to do so, Congress requires the information and recommendations called for by Section 310. Section 310 requires that the report be submitted by September 1, 2011, so the information and recommendations can be used in reconciling the Senate and House authorizations. Accordingly, the Committee requests that the Administration prepare and submit this report without waiting for final action on this bill.

Section 311. Modification of certain reporting requirements

The Congress frequently requests information from the Intelligence Community in the form of reports, the contents of which are specifically defined by statute. The reports prepared pursuant to these statutory requirements provide Congress with an invaluable source of information about specific matters of concern.

The Committee recognizes, however, that congressional reporting requirements, and particularly recurring reporting requirements, can place a significant burden on the resources of the Intelligence Community. The Committee is therefore reconsidering these reporting requirements on a periodic basis to ensure that the reports that have been requested are the best mechanism for the Congress to receive the information it seeks. In some cases, annual reports can be replaced with briefings or notifications that provide the Congress with more timely information and offer the Intelligence Community a direct line of communication to respond to congressional concerns.

In response to a request from the Director of National Intelligence, the Committee examined a set of recurring reporting requirements nominated by the Intelligence Community. Section 311 eliminates certain reports that were particularly burdensome to the Intelligence Community when the information in the reports could be obtained through other means. It also modifies reporting requirements to set a date certain for their repeal.

Because the majority of recurring reports provide critical information relevant to the many challenges facing the Intelligence Community today, the Committee has proceeded carefully in eliminating or modifying only five statutory reporting requirements, all from past intelligence authorization acts or the Intelligence Reform and Terrorism Prevention Act of 2004. The Committee believes that these modifications will help the Intelligence Community to allocate its resources properly towards areas of greatest congressional concern.

A number of reporting obligations which directly or indirectly impose tasks on the Intelligence Community arise from legislation reported or managed by committees other than the congressional intelligence committees. The Committee urges the Intelligence Community to work with those committees, and for committees to be responsive to the Intelligence Community, in reviewing existing requirements for recurring reports with the goal of assuring that the Intelligence Community is able to apply its resources to informing Congress in the most efficient ways.

TITLE IV—MATTERS RELATING TO ELEMENTS OF THE INTELLIGENCE COMMUNITY

Subtitle A—Office of the Director of National Intelligence

Section 401. Temporary appointment to fill vacancies within Office of the Director of National Intelligence

Section 401 permits the President to make temporary appointments to fill vacancies in offices within the Office of the Director of National Intelligence that require Senate confirmation (except the DNI, for whom by Section 103A(a)(6) of the National Security Act of 1947 the Principal Deputy DNI is next in line) with an individual who serves in another element of the Intelligence Community. A similar provision was requested by the DNI.

The Vacancies Act (5 USC 3345(a)(1)) provides that upon a vacancy in a Senate-confirmed position (1) the first assistant of the office may begin serving as the acting officer immediately and automatically upon the occurrence of the vacancy; (2) another officer who has already received Senate confirmation may be directed by the President to serve as the acting officer; and (3) certain other senior agency officials may be designated by the President to serve in an acting capacity. Given the relatively small size of the ODNI, the fact that a significant number of the personnel within the ODNI are on detail to the office from other elements of the Intelligence Community, and the fact that positions in the ODNI to which the Vacancy Act applies serve the entire Intelligence Community (such as the Director of the National Counterterrorism Center or the Inspector General for the Intelligence Community), an individual

employed within the Intelligence Community but outside the ODNI may be best suited to fill a key leadership position temporarily.

Section 401 addresses this issue by expanding the President's choice for appointment under the third category of the Vacancies Act to include senior officials from any element of the Intelligence Community. Nothing in Section 401 modifies or precludes the utilization of sections 3345(a)(1) or (2) of title 5 to fill vacancies.

Section 402. Application of certain financial reporting requirements to the Office of the Director of National Intelligence

Section 402 provides a limited grace period for the ODNI in meeting the requirements of 31 USC 3515 until Fiscal Year 2013. The DNI in requesting this legislative provision stated that the grace period will allow time for the implementation of system improvements as well as process changes in the financial management system currently supporting the ODNI. Together these efforts are intended to yield financial statements that meet the prescribed legal and audit standards.

Although the ODNI under 31 USC 3515 is required to prepare and submit to the Congress and the Director of the Office of Budget and Management an audited financial statement for the preceding fiscal year by the following March 1st, Section 369 of the Intelligence Authorization Act for Fiscal Year 2010, enacted on October 7, 2010, directs the DNI "to develop a plan and schedule to achieve a full, unqualified audit of each element of the intelligence community not later than September 30, 2013." Section 402 will align the statutory requirement for auditability with the plan for achieving auditability set forth in the Fiscal Year 2010 Act.

Section 403. Public availability of information regarding the Inspector General of the Intelligence Community

Section 403 requires the DNI to establish and maintain on the publicly accessible ODNI website information relating to the Inspector General (IG) for the Intelligence Community including methods to contact the IG. Section 403 is based on a similar requirement in Section 8L of the Inspector General Act, as added by the Inspector General Reform Act of 2008, 5 USC App., and is similar to Section 415. The information about the IG is to be obvious and facilitate accessibility to the IG. Given that most of the IG's reports will be classified, Section 403 does not require that IG reports and audits be posted on the publicly accessible website.

Section 404. Technical correction to the Executive Schedule

Section 404 amends 5 USC 5315 to establish the salary level of the Chief Information Officer of the Intelligence Community at Level IV of the Executive Schedule the level of other chief information officers in the federal government with comparable duties and responsibilities. The Chief Information Officer of the Intelligence Community is a position established in Section 103G of the National Security Act, added by section 303 of Public Law 108-487, the Intelligence

Authorization Act for Fiscal Year 2005, and amended by Section 404 of Public Law 111-259, the Intelligence Authorization Act for Fiscal Year 2010.

Subtitle B—Central Intelligence Agency

Section 411. Foreign language proficiency requirements for Central Intelligence Agency officers

Section 411 makes amendments in Section 104A(g) of the National Security Act of 1947 which imposes foreign language requirements on certain personnel within the CIA. Section 411 is intended to tie the need for foreign language skills to officers in occupations where foreign language ability is most important, rather than to specific positions, within the Directorate of Intelligence career service or National Clandestine Service career service. It is intended to eliminate the need for the Director of the CIA to approve waivers for the promotion, appointment, or transfer of personnel such as attorneys or human resources officers for whom the requirement is not intended to apply. Section 411 sets the language proficiency at the objective level of level 3 on the Interagency Language Roundtable Language Skills Level or a commensurate proficiency level. Section 411 requires the Director of the CIA to report to the congressional intelligence committees on the number of personnel transferred into the Directorate of Intelligence career service or National Clandestine career service who did not meet the foreign language requirements of Section 104A(g). It also makes technical corrections to delete outdated references to the Directorate of Operations.

Section 412. Acceptance of gifts

Section 412 is a provision, like Section 310, that arose out of the CIA's review of benefits available to the survivors of CIA employees killed in the line of duty following the December 2009 attack at Khowst, Afghanistan. The CIA concluded that the Director of the CIA did not have the authority under Section 12 of the CIA Act to accept and use gifts for purposes related to the welfare, education and recreation of those survivors. Under current law, the Director of CIA may "accept, hold, administer, and use gifts of money, securities and other property whenever the Director determines it would be in the interest of the United States . . . for purposes relating to the general welfare, education, or recreation of employees or dependents of employees of the Agency or for similar purposes"

Section 412 amends Section 12 of the CIA Act to authorize the Director (or the Director's designee) both to accept gifts and to use them for the welfare of employees injured in the line of duty without legal concern whether those actions are for the general welfare of the CIA employee population as a whole. It also provides that gifts may be used for the assistance of the family of CIA officers who were injured or who died from hostile or terrorist activities or in connection with other intelligence activities having a substantial element of risk. All of the authority under Section 12 shall be made according to regulations developed by the CIA Director in consultation with the Director of the Office of Government Ethics, consistent with all relevant ethical constraints and principles. The Committee intends for gifts to be accepted under this

section by the CIA on behalf of the CIA employees concerned, and not directly by such employees or their family members.

Section 413. Public availability of information regarding the Inspector General of the Central Intelligence Agency

Section 413 requires the Director of the CIA to establish and maintain on the publicly accessible CIA website information relating to the CIA IG including methods to contact the IG. Section 413 is based on a similar requirement in the Inspector General Reform Act, 5 USC App. 8L, and is similar to Section 403. The information about the IG is to be obvious and facilitate accessibility to the IG. Given that most of the IG's reports will be classified, Section 413 does not require that IG reports and audits be posted on the publicly accessible website. Section 413 is based upon a request of the CIA IG.

Section 414. Recruitment of personnel in the Office of the Inspector General

Section 414 requires the Director of the CIA, in consultation with the Inspector General of the CIA, to conduct a study of the personnel issues of the Office of the Inspector General. The study shall include identification of any barriers and disincentives to the recruitment or retention of experienced investigators within the Office of the Inspector General. The Director shall compare the personnel authorities of the CIA Inspector General with the personnel authorities of other federal Inspectors General, including a comparison of the benefits available to experienced investigators within such offices with those available to investigators within the Office of the CIA Inspector General, and shall take such administrative actions as may be appropriate to address such disparities. The Director shall report to the congressional intelligence committees on the administrative actions taken based on the results of the study and the Director's recommendations for legislative action, if any, within 90 days of enactment. By including Section 414, it is the Committee's intent that unwarranted barriers and disincentives should not be allowed to prevent the CIA's Office of the Inspector General from recruiting and retaining the best possible workforce to carry out its important functions.

Subtitle C—National Security Agency

Section 421. Confirmation of appointment of the Director of the National Security Agency

Section 421 amends the National Security Agency Act of 1959 to provide that the Director of the National Security Agency (NSA) shall be appointed by the President by and with the advice and consent of the Senate. Under present law and practice, the President appoints the Director of the NSA. The appointment has been indirectly subject to confirmation through Senate confirmation of the military officers who have been promoted into the position. Section 421 will make explicit that the filling of this key position in the Intelligence Community should be subject to confirmation.

The Committee has had a long-standing interest in ensuring Senate confirmation of the heads of the NSA, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency. The Committee moves forward on the requirement for Senate confirmation of the Director of NSA in this Act in light of NSA's critical role in the national intelligence mission, particularly with respect to activities which may raise privacy concerns.

Through advice and consent, the Senate can enable the Congress to fulfill more completely its responsibility for providing oversight to the intelligence activities of the United States Government and ensure the responsibilities and foreign intelligence activities of the NSA receive appropriate attention.

The requirement for confirmation of the Director of NSA will not increase the number of Senate-confirmed officials. The Director of the NSA is now also the Commander of the U.S. Cyber Command and therefore subject to confirmation. Accordingly, Section 421 does not alter the role of the Committee on Armed Services in reviewing and approving the promotion or assignment of military officers. Through a sequential referral the Armed Services and Intelligence Committees will assure that all aspects of the appointment, both with respect to the Cyber Command and intelligence collection, will be considered.

Section 421(c) makes clear that the requirement for Senate confirmation applies prospectively. Therefore, the Director of the NSA on the date of enactment will not be affected by this section, which will apply initially to the appointment and confirmation of his successor.

Section 422. Additional authorities for National Security Agency security personnel

Section 422 amends Section 11 of the National Security Agency Act of 1959 to authorize NSA security personnel to transport apprehended individuals from NSA premises to law enforcement officials. Under current law, when NSA security personnel apprehend an individual, they must wait with the individual until local law enforcement personnel arrive to complete the transfer of custody. This can require NSA personnel to wait, frequently for hours, often with the apprehended individual in a security vehicle, for the transfer to local law enforcement. According to the DNI, from 2004 to 2009, on 448 occasions, the apprehension of an individual engaged NSA personnel and transportation resources for over 2 hours.

Section 422 provides a limited expansion of authority for NSA security personnel to transport apprehended individuals to local law enforcement within 30 miles of NSA premises. The Committee intends that this authority be used sparingly by NSA security personnel under a well-established regime of administrative controls and management oversight, and only with prior consent from the accepting jurisdiction.

Subtitle D—Other Elements

Section 431. Appropriations for defense intelligence elements; accounts for transfer; transfer

Section 431 authorizes the Secretary of Defense to transfer defense appropriations into an account or accounts established by the Secretary of the Treasury for receipt of such funds. These accounts may receive transfers and reimbursement from transactions between the defense intelligence elements and other entities, and the Director of National Intelligence may also transfer funds into these accounts. Appropriations transferred pursuant to this section shall remain available for the same time period, and for the same purposes, as the appropriations from which transferred. This section is intended to ensure improved auditing of defense intelligence appropriations.

Section 432. Federal Bureau of Investigation participation in the Department of Justice leave bank

Section 432 provides for participation of employees of the Federal Bureau of Investigation (FBI) in the Department of Justice's Voluntary Leave Bank Program. The Voluntary Leave Bank Program allows federal employees to donate to and to receive donations from a leave "bank" to cover absences necessitated by extraordinary medical conditions. Current law does not allow participation by FBI employees in the Department's program, although the FBI is part of the department. While 5 USC 6372(c) would allow FBI to establish its own voluntary leave bank program, the Director of the FBI has determined that it would be more cost effective and efficient to allow FBI employees to participate in the larger Department of Justice program and has requested a legislative provision to accomplish this objective for the overall benefit of the Bureau and its personnel. Under Section 432, the Director may consider the protection of sources and methods in allowing for participation in the leave bank program. In providing for leave bank opportunities to cover absences necessitated by extraordinary medical conditions, the Committee expects the Director will consider any impact on operations of the Bureau when making a decision on whether to allow FBI employees to take part in the program.

Section 433. Intelligence community membership of the Office of Intelligence and Analysis of the Department of Homeland Security

Section 433 amends Section 3(4)(K) of the National Security Act of 1947 in order to include the Office of Intelligence and Analysis of the Department of Homeland Security (DHS) within the term "intelligence community" for purposes of the Act. This provides for a more specific reference to the DHS component, in addition to the intelligence element of the Coast Guard, that is part of the Intelligence Community as Congress has done in Section 3(4)(I) and (J) for the State and Treasury Department elements of the Intelligence Community.

TITLE V—OTHER MATTERS

Section 501. Conforming the FISA Amendments Act of 2008 sunset with other FISA sunsets

Section 501 conforms the sunset for Title VII of FISA, as added by the FISA Amendments Act of 2008 (Public Law 110-261), now scheduled to occur on December 31,

2012, to June 1, 2015, the date recently set by Public Law 112-14 for the other sunset provisions in the Foreign Intelligence Surveillance Act of 1978.

Title VII of FISA establishes procedures for collection, pursuant to orders of the Foreign Intelligence Surveillance Court, of foreign intelligence through the targeting of persons reasonably believed to be located outside of the United States. Section 702 governs collection targeted against persons other than United States citizens or permanent residents of the United States. Sections 703 and 704 establish procedures, requiring probable cause determinations by the FISA Court, for collection against United States persons outside of the United States. In addition to the judicial oversight established by these sections of Title VII, Section 702 requires periodic assessments by the Attorney General, the Director of National Intelligence, and the Inspectors General of the Department of Justice and each element of the Intelligence Community that is authorized to acquire foreign intelligence under Title VII. Also, Section 707 mandates comprehensive semiannual reports by the Attorney General to the congressional intelligence and judiciary committees on the implementation of Title VII. All of these important collection and oversight provisions will be repealed at the end of this Congress unless the sunset date for them is extended.

The alignment of all the remaining sunset dates in FISA – those recently extended by Congress to June 1, 2015 and the sunset for Title VII – will provide Congress with an opportunity to examine comprehensively all expiring authorities at the same time rather than in a piecemeal fashion. By addressing the Title VII sunset now, rather than waiting until next year, Congress will help assure the stability of the foreign intelligence collection system during the critical times immediately ahead.

It should also be clear what is not involved in this sunset extension. Title VIII of FISA, which was added by Title II of the FISA Amendments Act of 2008, established procedures for immunity for electronic communication service providers who furnished assistance to an element of the Intelligence Community during the President’s Surveillance Program between 2001 and 2007. These immunity provisions are not subject to a sunset. They have been subject, however, to judicial review as provided for in Title VIII of FISA. The judgment of the United States District Court for the Northern District of California upholding the constitutionality of Title VIII of FISA is now before the United States Court of Appeals for the Ninth Circuit. In re: National Security Agency Telecommunications Records Litigation, 633 F. Supp. 2d 949 (N.D. Cal. 2009), appeal pending, Case No. 09-16676 (9th Cir.). Nothing in the sunset extension and alignment in Section 501 of the bill will have any effect on this litigation or the underlying immunity provision of Title VIII of FISA.

Section 502. Technical amendments to the National Security Act of 1947

Section 502 updates certain references in sections 3(6), 506(b) and 506A of the National Security Act of 1947 from the “Director of Central Intelligence” and the “National Foreign Intelligence Program” to the “Director of National Intelligence” and the “National Intelligence Program.”

Section 503. Technical amendments to Title 18, United States Code

Section 503 updates references in 18 USC 351(a) to the Director and Deputy Director of Central Intelligence and provides that the amended section includes the DNI, the Principal Deputy DNI, and the Director and Deputy Director of the CIA among officials covered by the provision.

COMMITTEE COMMENTS

Space Launch

The Committee remains concerned over the increasing costs of space launch, in particular, the Air Force's Evolved Expendable Launch Vehicle (EELV). These costs have increased dramatically since the submission of the Fiscal Year 2011 budget request, and are expected to continue to rise despite significant efforts to curtail costs. Particularly troublesome are the monopolistic state of EELV providers and the current structure's perpetuation of the barriers to entry for alternative launch providers. Removing these barriers could increase competition and lower costs.

The Committee notes the ongoing debate over the future of the nation's space launch capabilities, with the national security space community and the National Aeronautics and Space Administration (NASA) both having strong equities and providers of choice. Congressional intent for NASA's space launch systems was expressed in the National Aeronautics and Space Administration Authorization Act of 2010 (Public Law 111-267). The Committee is concerned, however, that maintaining two separate launch infrastructure and industrial bases, both of which rely nearly entirely on heavy government funding, is fiscally unsustainable. Approaching launch from a whole-of-government perspective will pay great benefits to the taxpayer.

The Committee believes that it is in the nation's economic and security interests to promote U.S. space launch providers that are, or are positioning themselves to be, competitive in the commercial and civil markets. The EELV providers have demonstrated little success in this regard, leaving them nearly entirely reliant on U.S. government customers who are forced to bear the cost.

Today the national security space community currently has no certified alternative to the EELV program for most of its launch needs. Other U.S. launch providers, however, show promise as they compete for commercial, civil, and national security launch business and develop larger systems, one of which is in the EELV capability class. These providers must demonstrate the reliability so well documented with the EELV program in order to justify launching critical, and expensive, national security payloads. Regardless, every effort should be made to support them in this regard, and the Committee is encouraged by some steps taken by the Air Force to do just that.

The Committee has grave concerns about the proposed strategy to reduce cost increases for the EELV systems by committing to block buys of booster cores for years to come. Block buys for the next couple of years may have significant merit and should be considered. However, the Committee is concerned that committing the nation to the EELV with substantial block buys of boosters for years to come will result in a saturated market, probably through the end of this decade, thereby prolonging an unnecessary barrier to entry for the other U.S. launch providers to compete with the EELV.

The government should position itself such that if alternative launch providers can show similar reliability and performance to EELV with substantial cost savings, the government would have the flexibility to respond to this development. The Committee, therefore, encourages the Air Force to reduce the quantity of EELV block buys planned to support launches beginning in 2015 to no more than five booster cores per year for no more than four years.

The Committee also questions the cost of maintaining a Delta-IV Heavy lift capability. Barring a coherent strategy to evolve the Delta-IV Heavy to meet NASA requirements, there are very few requirements for this system. Therefore, the Committee wishes to understand the potential savings of doing away with a Delta-IV Heavy launch capability. Consistent with language in the classified annex accompanying this bill, the Committee requests that the Air Force and the National Reconnaissance Office certify expected cost savings to the EELV Launch Capability contract under three scenarios relating to the Delta-IV Heavy: (1) removing launch requirements from Cape Canaveral, (2) removing launch requirements from Vandenberg AFB, and (3) removing all launch requirements.

Evolutionary Acquisition for Space Efficiency (EASE)

The Committee has concerns about the Defense Department's Evolutionary Acquisition for Space Efficiency (EASE) strategy. In a detailed study, the Office of the Secretary of Defense laid out the rationale for EASE. The merits of EASE include encouraging program funding stability, reducing technical risk, reaping the benefits of block buy procurements, stabilizing portions of the industrial base, and encouraging greater use of fixed price contracts.

The Committee recognizes the wisdom in many of these steps. However, the Committee notes that the study of space acquisitions leading to the EASE strategy focused on industrial base and funding issues, but paid little attention to a critical factor in major system acquisitions: program management. The ramifications of implementing EASE likely will include a chilling effect on competition and the *de facto* instantiation of favored contractors for particular systems. Furthermore, those favored contractors will be chosen not on their merits, but by the fact that they are the incumbents today. These incumbents also happen to be the larger industrial contractors.

The Committee finds that when wisely applied, by competent program management, competition pays huge dividends. The Committee has also noted the dramatic capabilities of the medium and small sized industrial contractors, who will be largely relegated to providing

payloads and other subsystem work to the larger prime contractors whose incentive to reduce costs and innovate will be eroded by the EASE construct.

More fundamentally, EASE seems to be a departure from the philosophy outlined in previous strategies, such as the DNI's *Vision 2015*, which recommends shifting from "large, expensive collection platforms towards smaller, netted collection systems." The joint report of the Defense Science Board and Intelligence Science Board, *Integrating Sensor Collected Intelligence*, had similar recommendations, including that "future acquisition programs disaggregate sensors from platforms with the goal of acquiring more platforms with potentially less capable, and therefore less costly, sensors and plan to achieve increased performance by integrating data from multiple sensors/platforms."

Although the Committee acknowledges some of the merits of EASE, it encourages the Executive Branch to focus at least as much attention on improving program management. In this way, the positive effects of competition and the further development of smaller, more efficient contractors can be garnered.

Intelligence Community Performance Measurement

In an era of stable or shrinking budgets, the Intelligence Community must seek out unneeded redundancies and strive for efficiency. The regular accounting of goals, metrics, and accomplishments across the entire Intelligence Community—such as that produced annually in the Intelligence Community's *Summary of Performance and Financial Information Report*—is helpful in finding efficiencies, avoiding unneeded duplication, and making the intelligence enterprise more nimble. The Committee believes that the office of the Assistant DNI for Systems and Resource Analyses (SRA) plays a critical function in aggressively identifying and realizing savings. The SRA undertakes cross-cutting analyses to find efficiencies, performs major issue studies to streamline community activities, and has found significant cost savings that can be directed to critical priorities. The SRA has only been in existence for a short time, but has already made a significant impact, resulting in significant savings in the Fiscal Year 2012 budget. The Committee supports the work of this office and expects it to continue to perform its necessary and valuable functions.

Given the secrecy of components of the intelligence budget, it is important to have constant and effective oversight of the Intelligence Community – by the executive branch, as well as by the congressional oversight committees. In response to a question for the record from Senator Warner after the Committee's National Intelligence Program Budget Hearing, on March 29, 2011, about how the Intelligence Community complies with the GPRM Modernization Act of 2010 (Public Law 111-352), the ODNI indicated that the Intelligence Community currently already reports quarterly to the Office of Management and Budget on its *Priority Goals*—focused on what the Community seeks to achieve in the next 18-24 months. These quarterly reports demonstrate progress against the Intelligence Community's most important mission objectives. The ODNI further stated that it would be able to provide such quarterly updates to the Committee. Accordingly, the Committee requests the ODNI to furnish the Committee copies of such quarterly reports starting with the second quarter of Fiscal Year 2011, as well as any

subsequent reports. The Committee expects to receive these reports no later than three months after enactment of this legislation.

National Counterterrorism Center

The National Counterterrorism Center (NCTC) is responsible for strategic operational planning for counterterrorism activities across the U.S. Government, including interagency coordination of operational activities and the assignment of roles and responsibilities. The Director of NCTC is further charged with aligning counterterrorism resources against the U.S. Government's National Strategy for Counterterrorism and producing assessments on the capabilities and gaps related to these activities.

Given the current fiscal issues facing the United States and the growing pressures to reduce government spending, the Committee is concerned about the rising costs associated with the expansive counterterrorism enterprise. It is important for Congress to understand how counterterrorism resources align with mission priorities and objectives.

No later than 90 days from the date of enactment, the Committee requests that the Director of the NCTC submit a report to the congressional intelligence committees assessing the state of the U.S. Government's counterterrorism enterprise from NCTC's perspective, including a full description of the resources utilized and how they are tied to counterterrorism strategy and objectives. The Committee believes efficient resource allocation to meet government-wide counterterrorism objectives is critical and encourages NCTC to work with the Committee on a long-term solution to sharing such information with Congress.

Maintenance and Disposition of ODNI Records

As part of its legislative requests for this Fiscal Year 2012 Authorization, the Administration asked for legislation to authorize the CIA, at the request and direction of the DNI, to maintain and dispose of the records of the administrative and business activities of the ODNI, as the CIA has done since the establishment of the ODNI in 2005. The original reason for this arrangement, as described to the Committee, was that the ODNI lacked the financial, administrative, and technical capabilities to maintain these records on its own. There has never been express statutory authority for this arrangement.

The Committee has concluded that the ODNI should maintain and dispose of its own records rather than delegating this responsibility to the CIA. It recognizes that a period of time will be required for the ODNI to undertake the responsibility for its own records. The Committee requests that the ODNI inform the congressional intelligence committees about the time and resources that will be required to accomplish this. In any event, the Committee expects the transition to be completed within two years.

Intelligence Community in United States Export Control Regime

The global power and reach of the United States have depended in large measure on the country's ability to develop cutting-edge technologies and foster innovative industries faster than other nations. National creativity, technological innovation, and scientific prowess have enabled the United States to develop systems and capabilities that provide a clear technological advantage over adversaries in almost every category of scientific or technological endeavor.

Likewise, overseas exports of U.S. technologies contribute to the nation's economic prosperity and foreign trade balance. The ongoing demand for superior U.S. technologies in most of the world's markets and the continued willingness of foreign governments to make concessions in return for technology transfers, provide additional weight to American diplomatic efforts abroad. At the same time, the pace of technological innovation is increasing overseas, as is the development of sophisticated manufacturing.

The nation's technological edge, especially in strategic defense systems, aeronautical and missile technologies, nuclear, space, and cyberspace programs must be protected. The Intelligence Community, in cooperation with other agencies of the Federal Government, is well positioned to determine the threat that any potential technological export might pose to U.S. systems, U.S. technological dominance, or U.S. national security.

Therefore, the Committee requests that no later than 180 days after the date of enactment, the DNI shall provide to the congressional intelligence committees a report that provides a full description of the IC's participation in, and contributions made to, the export control decision-making processes of the United States government.

This report should address, but not be limited to, the following information: which IC agencies contribute to the export control review process; the level at which agency contributions are made, including hours of personnel effort involved; the process for identifying and closing intelligence gaps related to understanding foreign technological capabilities and potential threats; the opportunities that may exist for new collection and analysis activity; the authorities under which IC agencies provide input into the export control process; the training available on export control processes for IC personnel; and any recommendations for improvements that should be made in the decision making processes involving the Intelligence Community.

Cyber Supply Chain Risk

The Committee is concerned about the counterintelligence risk posed by foreign manufacturers and suppliers of telecommunications equipment and services to U.S. customers. While it is neither possible nor desirable, from an economic standpoint, to foreclose access to U.S. markets, the Committee believes that U.S. customers of telecommunications equipment and services—including the United States government—should incorporate counterintelligence concerns into their procurement decisions. For example, the Committee believes that there should be enhanced authority to manage supply chain risks for civilian procurements, including Intelligence Community procurements, in addition to the authority that Congress recently provided for Department of Defense procurements. The Committee provides for such enhanced authority for Intelligence Community procurements in Section 309.

A necessary precursor to private and U.S. government customers incorporating counterintelligence concerns into their procurement decisions is having access to timely counterintelligence threat information. Accordingly, to assist in determining what further measures are required, the Committee requests the Office of the National Counterintelligence Executive (NCIX), in coordination with other Intelligence Community agencies and the Department of Homeland Security, to coordinate and produce a report on counterintelligence threats to the U.S. telecommunications infrastructure, including any risks associated with purchasing equipment and services from foreign manufacturers and suppliers. The report should be submitted to the congressional intelligence committees within 180 days of enactment. The Committee also requests that the NCIX, in coordination with the Department of Homeland Security, to produce a plan for sharing counterintelligence risk information about telecommunications supply chains with federal and state agencies and the private sector within 90 days of completion of the coordinated report on counterintelligence threats. The Committee provides additional background and guidance on these directions in the Classified Annex.

Intelligence Advanced Research Projects Activity

The Committee views the role of the Intelligence Advanced Research Projects Activity (IARPA) as important to the success of IC research and technology investment and maintenance of the U.S. Government's strategic advantage. To date IARPA has been hampered by its narrow contracting authorities. Its current ability to issue solicitations and make selections works well, but other contracting authorities seem to be inadequate.

Once IARPA identifies an entity with a promising research proposal, it requires nine months or more to put a contract in place. Some sources of innovative research, such as small businesses, cannot afford to wait nearly a year for an opportunity to work with IARPA. They may go out of business or move on to other opportunities in the intervening months.

The Committee has tasked its Technical Advisory Group (TAG) to examine IARPA, including reviewing the activity's contracting abilities. Moreover, the Committee requests that the DNI reevaluate the authorities delegated to the Director of IARPA and look for additional opportunities to delegate additional authorities to better support IARPA's mission and provide to the Committee within 60 days of enactment of this legislation.

Information Integration

The Committee remains impressed with the vision of the Information Integration Program (I2P). The I2P was initiated in the summer of 2008 as an informal means of determining areas within the information technology systems of the Intelligence Community that could be altered to better enable information sharing and access, and then providing the guidance and resources to enable these changes to take place. I2P has a primary goal of demonstrating how improved connectivity between and among intelligence agencies could help IC components perform their mission better. While cost savings may be an ancillary benefit, the mission focus of I2P proved to be an attractive motivation for IC personnel.

Despite the substantial promise of I2P, progress has been slow. Several years since the inception of the program, the IC still lacks a community-wide authorization and attributes service and an IC-wide login. Appropriate authorization and attributes are necessary to provide agencies with the ability to grant access selectively to their data to personnel across the IC, while protecting their sensitive material. Such a technology would help meet the requirement for discoverability of intelligence information by giving agencies confidence that their sensitive data can be protected. The Committee requests that the ODNI identify ways to achieve more quickly the capability for analysts to discover all relevant data across the Intelligence Community and provide the results to the Committee within 60 days of enactment of this legislation.

Core Contractors

The Committee for some time has been concerned about the dramatic increase in the use of contractors by the Intelligence Community since 9/11. While contractors can serve an important role in providing expertise and filling an emerging need quickly, the Committee notes that contractor personnel costs tend to be substantially more than government personnel rates. Therefore, the Committee commends the Intelligence Community for its efforts to reduce core contractors and to convert core contractors where appropriate to government employees. However, data reviewed by the Committee indicates that some elements of the IC have been hiring additional contractors after they have converted or otherwise removed others, resulting in an overall workforce that continues to grow.

In order to keep core contractors from increasing in number, the Committee has recommended in the classified annex that the number of core contractors in each element of the Intelligence Community should be capped at the Fiscal Year 2010 levels in Fiscal Year 2012. Additionally, the Committee believes that the all elements of the IC should be able to track the number of its core contractors on a regular basis. Currently, most IC agencies have only the capability to compile data on contractors once a year to respond to the ODNI core contractor review. The Committee believes that IC elements should be able to determine their use of core contractors on a weekly or monthly basis.

Report on Elevating Marine Corps Intelligence Chief to O-9 Rank

The head of Marine Corps Intelligence presently is ranked O-7 while other service intelligence chiefs hold O-9 rank. The Committee is concerned that it is not possible for Marine Corps Intelligence to receive equal consideration when the Corps' service intelligence chief is ranked lower than other service chiefs, and that having a lower ranked senior officer will be a disincentive for Marines who might otherwise pursue an intelligence career.

As Marine Corps Intelligence takes on more missions and expands its capability, the Committee believes the Department of Defense and the Marine Corps should consider elevating the position of Director of Intelligence (DIRINT) United States Marine Corps to O-9 rank.

Therefore, within six months of the enactment of this bill, the Committee requests the United States Marine Corps to deliver a report to the congressional intelligence and armed

services committees on the costs and implications of elevating DIRINT, Marine Corps to O-9 rank and a timeline in which such could happen.

CIA's Homefront Program and IC Support to Deploying Employees

The Committee supports the development of a program to provide support to CIA employees who deploy to the war zones, and their families. A significant number of CIA personnel have served in war zones such as Afghanistan, Iraq, and elsewhere. The Committee is encouraged by the preliminary development of the "Homefront Program," through which the CIA has provided support to those who serve in war zones and their families. The Committee encourages the CIA to continue to implement this program, and to examine ways that it may be improved and expanded. The Committee encourages the CIA's Directorate of Support to review a range of possible enhancements intended to improve further the family assistance program, and to propose a comprehensive plan for doing so.

The Committee further encourages the ODNI and components of the Intelligence Community to share best practices from the Defense Department's support programs for employees deploying to war zones and their families. The Committee requests the ODNI provide the Committee with a brief synopsis of existing Intelligence Community efforts and ways they may be improved.

Independent review of security implications of "cloud" based architecture

The Committee recognizes that the federal government is taking steps to move information technology systems (including those in the Intelligence Community) to a more efficient and effective "cloud" based architecture. Nonetheless, the security concerns of moving sensitive and critical data onto cloud-based systems persist, especially given recent widely-publicized incidents of cyber-attacks against US government and commercial networks.

The Director of the National Security Agency, General Keith Alexander, recently indicated that cloud computing could actually reduce security risks by moving information to a centralized configuration that would allow for tighter control over access and more rapid responses to cyber incidents. In written testimony to the House Armed Services Committee on March 16, 2011, he stated, "This [cloud] architecture would seem at first glance to be vulnerable to insider threats — indeed, no system that human beings use can be made immune to abuse— but we are convinced the controls and tools that will be built into the cloud will ensure that people cannot see any data beyond what they need for their jobs and will be swiftly identified if they make unauthorized attempts to access data."

The Committee therefore requests the Office of the Director of National Intelligence to commission an independent review of the efficiency and security implications of moving sensitive government information – including information dependent upon or residing upon classified networks – to a cloud-based architecture. The Committee would like to see the results of such a review within six months.

Classification review of historical records

Under Executive Order 13526, the Executive Branch has a system in place for determining whether older classified materials contain sensitive information that warrant continued classification. While no such obligation rests on the Legislative Branch, the Committee has taken recent action to address the declassification review of Committee records based on their age. For example, Section 702 of the Intelligence Authorization Act for Fiscal Year 2010 authorized the DNI, at the request of one of the congressional intelligence committees and in accordance with that committee's procedures, to conduct a classification review of materials that are not less than 25 years old and were created or provided to the committee by an executive branch entity.

Section 702 enables the Committee to determine whether a portion of its historical records of congressional oversight of the Intelligence Community may be made public in a manner consistent with national security. The Committee is now considering whether portions of the Committee's oversight work, using that executive branch information among other sources, may also be released in a manner consistent both with national security and Senate practice concerning historical records. In all cases, the final decision about any release of historical records remains with the Committee.

Senate Resolution 400 of the 94th Congress (1976), which established the Committee, transferred to the Committee the records of the Select Committee on Governmental Operations with Respect to Intelligence Activities, generally known as the Church Committee. That committee helped to establish the groundwork for our current system of intelligence oversight, including the creation of the congressional intelligence committees. The Church Committee released a substantial public record before concluding its work in 1976, but some parts of its report as well as hearings and depositions on significant matters remain classified.

The Committee accordingly requests that the Director of National Intelligence provide guidance to the Committee on how to design and prioritize an approach to the review and release, where appropriate, of early records. The approach should also consider all costs associated with any declassification review and potential release of information. The Committee notes that the Senate Historian has worked with Senate committees on the review of classified historical records such as those involved in the Committee on Foreign Relations' twenty-volume publication of its executive sessions from 1947-1968 (see S. Prt. 111-23, the 1968 volume released in 2010). The Committee may invite the participation of this Senate office within the boundaries of clearance requirements.

COMMITTEE ACTION

On July 28, a quorum being present, the Committee met to consider the bill and amendments. The Committee took the following actions:

Votes on amendments to committee bill, this report and the classified annex

By unanimous consent, the Committee made the Chairman and Vice Chairman's bill and classified annex the base text for purposes of amendment. The Committee also authorized the staff to make technical and conforming changes in the bill, report, and annex, following the completion of the mark-up.

By a voice vote, the Committee agreed to a managers' amendment by Chairman Feinstein and Vice Chairman Chambliss to: (1) amend the section of the bill (Section 305) pertaining to nuclear proliferation assessment statements to clarify that these statements, rather than the nuclear cooperation agreements, shall be submitted to the congressional intelligence committees; (2) amend the bill to provide the heads of intelligence elements outside the Department of Defense additional procurement authorities to manage supply-chain risk (Section 309); and (3) include a provision in the classified annex.

By a vote of 8 ayes to 7 noes, the Committee adopted an amendment by Vice Chairman Chambliss to require the DNI, in coordination with the Secretary of State, to produce information concerning monitoring and security assurances for detainees transferred from the U.S. Naval Station, Guantanamo Bay, Cuba, and each State Department cable, memorandum, or report relating to or describing the threat a detainee may or may not pose (Section 308). The votes in person or by proxy were as follows: Chairman Feinstein—no; Senator Rockefeller—no; Senator Wyden—no; Senator Mikulski—no; Senator Nelson—aye; Senator Conrad—no; Senator Udall—no; Senator Warner—no; Vice Chairman Chambliss—aye; Senator Snowe—aye; Senator Burr—aye; Senator Risch—aye; Senator Coats—aye; Senator Blunt—aye; Senator Rubio—aye.

By a vote of 7 ayes to 8 noes, the Committee rejected an amendment by Senator Wyden as modified by Chairman Feinstein to require the Inspector General of the Department of Justice to submit a report within one year on implementation of the FISA Amendments Act of 2008. The votes in person or by proxy were as follows: Chairman Feinstein—aye; Senator Rockefeller—aye; Senator Wyden—aye; Senator Mikulski—aye; Senator Nelson—no; Senator Conrad—aye; Senator Udall—aye; Senator Warner—aye; Vice Chairman Chambliss—no; Senator Snowe—no; Senator Burr—no; Senator Risch—no; Senator Coats—no; Senator Blunt—no; Senator Rubio—no.

By unanimous consent, the Committee agreed to an amendment to the classified annex by Senator Burr as amended by Chairman Feinstein.

By unanimous consent, the Committee agreed to an amendment to the classified annex by Senator Blunt.

By voice vote, the Committee agreed to an amendment to the classified annex by Senator Rubio.

By voice vote, the Committee agreed to an amendment to the classified annex by Senator Rubio.

By voice vote, the Committee rejected an amendment by Senator Wyden and Senator Udall calling for a report from the Attorney General and the DNI pertaining to interpretations of domestic surveillance law.

Vote to report the committee bill

The Committee voted to report the bill as amended, by a vote of 14 ayes and 1 no. The votes in person or by proxy were as follows: Chairman Feinstein—aye; Senator Rockefeller—aye; Senator Wyden—no; Senator Mikulski—aye; Senator Nelson—aye; Senator Conrad—aye; Senator Udall—aye; Senator Warner—aye; Vice Chairman Chambliss—aye; Senator Snowe—aye; Senator Burr—aye; Senator Risch—aye; Senator Coats—aye; Senator Blunt—aye; Senator Rubio—aye.

COMPLIANCE WITH RULE XLIV

Rule XLIV of the Standing Rules of the Senate requires publication of a list of any “congressionally directed spending item, limited tax benefit, and limited tariff benefit” that is included in the bill or the committee report accompanying the bill. Consistent with the determination of the Committee not to create any congressionally directed spending items or earmarks, none have been included in the bill, the report to accompany it, or the classified schedule of authorizations. The bill, report, and classified schedule also contain no limited tax benefits or limited tariff benefits.

ESTIMATE OF COSTS

Pursuant to paragraph 11(a)(3) of rule XXVI of the Standing Rules of the Senate, the Committee deems it impractical to include an estimate of the costs incurred in carrying out the provisions of this report due to the classified nature of the operations conducted pursuant to this legislation. On August 1, 2011, the Committee transmitted this bill to the Congressional Budget Office and requested it to conduct an estimate of the costs incurred in carrying out unclassified provisions.

EVALUATION OF REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds that no substantial regulatory impact will be incurred by implementing the provisions of this legislation.

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 CHAIRMAN FEINSTEIN

The Committee is reporting out this Fiscal Year 2012 Intelligence Authorization bill in time for it to be enacted before the beginning of the next fiscal year, meaning that for the first time since 2004 the Committee will be exercising its full ability to direct and influence the Intelligence Community's activities and budget. By contrast, there were no enacted intelligence authorization bills for fiscal years 2006 through 2009, and the enacted legislation for 2010 and 2011 were passed after, and midway through, their respective years.

The Committee's action with this legislation is an important further step toward re-establishing a regular cycle of annual intelligence authorization acts, and with it the ability of the Senate Intelligence Committee to have meaningful oversight, legislative input, and budget authorization.

The legislative portion of the bill contains practical measures, many in response to Administration requests, to improve the operations and governance of the Intelligence Community. Of perhaps even greater importance, the budgetary part of the bill contained in the classified annex sets forth an authorization roadmap for the prudent use of fiscal resources in advance of the consideration of Fiscal Year 2012 appropriations for intelligence activities, one that recognizes the nation's financial situation.

The bill and the accompanying classified annex are the product of months of collaborative work within the Committee to obtain broad agreement. I again thank all the Members of the Committee for their efforts and suggestions in putting the bill together. In particular, I thank Vice Chairman Chambliss for his partnership and close collaboration.

As is described in the Committee's report, however, there is a provision in the bill—Section 308, "Submission of Information on Guantanamo Bay Detainee Transfers," that was added at markup by an 8-7 vote. Believing that the provision is ill-advised on a number of grounds, I was among those voting no.

Section 308 provides that within 45 days of enactment the Director of National Intelligence, in coordination with the Secretary of State, shall submit to the House and Senate Intelligence Committees three categories of information about the transfer or potential transfer of individuals who are or have been detained at Guantanamo.

The State Department has communicated its strong objection to this provision on the grounds that it will require the Department to provide, through the Director of National Intelligence, a large amount of documents and other materials that go beyond what is traditionally shared with the Congress, including the foreign relations committees.

The Intelligence Committee has done significant oversight on the matter of detention operations at Guantanamo, the transfer of detainees from Guantanamo to other countries, and the threat that former detainees pose to our national security. There are additional provisions in this

legislation, as well as the classified annex, intended to further the Committee's and the Intelligence Community's efforts as they relate to Guantanamo.

It is important, however, for our Committee to respect the responsibilities of other Senate committees, in this case the Committee on Foreign Relations, just as we would wish Senate committees to be respectful of our responsibilities. I am also concerned that the provision's demand for "each Department of State cable, memorandum, or report" will damage the Department's ability to conduct diplomatic discussions. Within our responsibility for intelligence oversight, we can and should require and receive from the Intelligence Community the products of its intelligence collection and analysis concerning former detainees. And we can work cooperatively with the Committee on Foreign Relations to ensure we are collectively conducting oversight over the intelligence and foreign relations aspects of Guantanamo detainee transfers. I do not believe that this provision is the best way to achieve that goal.

In a second 8-7 vote, the Committee rejected an amendment to obtain additional information on implementation of the FISA Amendments Act of 2008 through a requirement for an assessment and report by the Department of Justice Inspector General, in consultation with the Inspectors General of Intelligence Community elements, on several matters concerning the implementation of title VII of FISA, as added by the FISA Amendments Act of 2008.

I supported the amendment in order to obtain information needed to fulfill our oversight responsibilities on legislation which the committee authored, especially given the sunset of some of these authorities and the need for Congress to consider them again legislatively. While I regret the amendment was not adopted, I will seek to ensure through hearings and other oversight activities that our Members receive additional information about implementation of the Act.

DIANNE FEINSTEIN

ADDITIONAL VIEWS OF SENATORS WYDEN AND UDALL

In May of this year, when the Senate voted to renew the surveillance authorities contained in the USA PATRIOT Act with no modifications, we both expressed our concern that there is a significant discrepancy between what most Americans – including many members of Congress – think the Patriot Act allows the government to do and how government officials interpret that same law.

During the floor debate we offered an amendment, along with Senator Merkley of Oregon and Senator Tom Udall of New Mexico, that would have expressed the sense of Congress that it is entirely appropriate for particular intelligence collection techniques to remain secret, but that the laws that authorize intelligence collection – and the US government's official interpretation of these laws – should be understandable to the public, so that these laws can be the subject of informed public debate and discussion. Our amendment also would have directed the Attorney General to make certain official legal interpretations available to the public.

The four of us discussed our amendment on the floor of the Senate with the Chair of the Intelligence Committee, Senator Feinstein. Senator Feinstein took our concerns seriously and proposed to hold a hearing on this issue, so that the Committee could consider our amendment in the context of the FY2012 Intelligence Authorization bill. We appreciate the seriousness with which Senator Feinstein responded to our concerns and followed through on her commitment to ensure that the Committee examined this issue thoroughly.

After substantial discussion and consideration, we remain very concerned that the US government's official interpretation of the Patriot Act is inconsistent with the public's understanding of the law. During a July 2011 committee hearing, the General Counsel of the National Security Agency acknowledged that certain legal pleadings by the executive branch and court opinions from the Foreign Intelligence Surveillance Court regarding the Patriot Act are classified. We have had the opportunity to review these pleadings and rulings, and we believe that most members of the American public would be very surprised to learn how federal surveillance law is being interpreted in secret.

In our view, the executive branch's decision to conceal the US government's official understanding of what this law means is unacceptable, and untenable in the long run. Intelligence agencies need to have the ability to conduct secret operations, but they should not be allowed to rely on secret laws. Furthermore, we note that the government has relied on secret interpretations of surveillance laws in the past, and the result in every case has been eventual public disclosure, followed by an erosion of public trust that makes it harder for intelligence agencies to do their jobs. This outcome can only be prevented by ensuring that the government's interpretation of the law is always consistent with the public's understanding.

During the Intelligence Committee's consideration of this authorization legislation, we offered a modified version of the amendment that we proposed to the Patriot Act with Senators Merkley and Tom Udall in May 2011. Our amendment repeated the statement that the US

government's official interpretation of surveillance laws should be understandable to the public, but rather than direct executive branch officials to make any information public, it simply directed them to report to the congressional intelligence committees on the problems posed by this reliance on secret legal interpretations, and a plan for addressing such problems. We regret that our amendment was not adopted, but we plan to keep pursuing opportunities to address what remains, in our view, a very serious problem.

The full text of the amendment as we offered it in committee is below:

Committee Amendment Proposed by
Mr. Wyden, for himself and Mr. Udall of Colorado

At the appropriate place, insert the following:

SEC. __. REPORT ON SECRET INTERPRETATIONS OF SURVEILLANCE LAW.

(a) Findings.—Congress makes the following findings:

(1) In democratic societies, citizens rightly expect that their government will not arbitrarily keep information secret from the public but instead will act with secrecy only in certain limited circumstances.

(2) The Government of the United States has an inherent responsibility to protect the citizens of the United States from foreign threats and sometimes relies on clandestine methods to learn information about foreign adversaries, and these intelligence collection methods are often most effective when they remain secret.

(3) The citizens of the United States recognize that their government may rely on secret intelligence sources and collection methods to ensure national security and public safety, and such citizens expect intelligence activities to be conducted within the boundaries of publicly understood law.

(4) It is essential for the public in the United States to have access to enough information to determine how government officials are interpreting the law, so that voters can ratify or reject decisions that elected officials make on their behalf.

(5) It is essential that Congress have informed and open debates about the meaning of existing laws, so that members of Congress are able to consider whether laws are written appropriately and may be held accountable by their constituents.

(6) It is critical that officials of the United States not secretly reinterpret public laws in a manner that is inconsistent with the public's understanding of such laws and not describe the execution of such laws in a way that misinforms or misleads the public.

(7) Significant interpretations of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), as modified by the USA PATRIOT Act (Public Law 107–56; 115 Stat. 272), which represent the Government of the United States official interpretations of the law, are currently being kept secret from the public because the executive branch has determined that such interpretations are classified.

(8) While it is entirely appropriate for particular intelligence collection techniques to be

kept secret, it is critical that the laws that authorize such techniques and the Government of the United States official interpretations of such laws not be kept secret but instead be transparent to the public, so that such laws may be the subject of informed public debate and consideration.

(b) Report.—Not later than 60 days after the date of the enactment of this Act, the Attorney General and the Director of National Intelligence shall submit to the congressional intelligence committees a report that includes—

(1) a detailed assessment of the problems posed by the reliance of government agencies and departments on interpretations of domestic surveillance authorities that are inconsistent with the understanding of such authorities by the public; and

(2) a plan for addressing such problems with regard to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), and, particularly, with the amendments to such Act made by the USA PATRIOT Act (Public Law 107–56; 115 Stat. 272).

We also offered a second amendment, which would have directed the Inspector General of the Department of Justice to estimate the number of Americans who have had the contents of their communications reviewed under the FISA Amendments Act of 2008.¹

In July 2011, we wrote to the Director of National Intelligence and asked how many Americans have had their communications reviewed under this law. The Director's office replied promptly, and told us that "it is not reasonably possible to count the number of Americans whose communications may have been reviewed under the authority of the [FISA Amendments Act]". While we accept that it might be difficult for intelligence personnel to determine the exact number of Americans whose communications have been reviewed, we believe that it is necessary to get an estimate of this number so that Congress can understand how the law has been implemented.

It is important to remember that section 702 of the Foreign Intelligence Surveillance Act, which was created by the FISA Amendments Act, was specifically written to cover the surveillance of foreigners outside the United States. In fact, it requires the Attorney General to develop procedures to ensure that individuals targeted under this authority are believed to be outside the United States. So understanding approximately how many people inside the United States have had their communications reviewed under this authority is essential to determining whether this law is working as Congress intended or not.

Since the Director of National Intelligence has not been able to provide us with an estimate of how many Americans have had their communications reviewed, we believe it is

¹ This bill contains a provision that extends the surveillance authorities granted by the FISA Amendments Act, which are currently scheduled to expire in 2012, to 2015. Senator Wyden voted against the bill in committee because of the inclusion of this provision. Senator Udall supported the overall bill in committee, but agrees that it is very important for Congress to obtain this information.

appropriate to direct an independent entity with auditing expertise to attempt to estimate this number. The Office of the Inspector General of the Department of Justice has conducted a number of in-depth audits and investigations of various classified surveillance programs over the past several years, and these investigations have identified important issues and uncovered significant facts. Classified versions of these reports have been submitted to Congress, and unclassified versions have been made available to the public, and this has helped to better inform the debate regarding these surveillance programs. We believe that the Office of the Inspector General's past work (including investigative work directed by the FISA Amendments Act itself) demonstrates that it is capable of carrying out this review.

Our amendment also would have directed the Inspector General to review instances where government personnel have failed to comply with the FISA Amendments Act, and estimate the number of people inside the United States, if any, who have had their communications reviewed as a result of these compliance violations. It is a matter of public record that there have been incidents in which intelligence agencies have failed to comply with the FISA Amendments Act, and that certain types of compliance violations have continued to recur. We believe it is particularly important to gain an understanding of how many Americans may have had their communications reviewed as a result of these violations.

We understand that some of our colleagues are concerned that our amendment did not explicitly state that the final report of the Inspector General's investigation should be classified. We respectfully disagree that this is necessary. In our view, while it is entirely appropriate for the details of particular intelligence collection programs to remain classified, disclosing the approximate total number of Americans who have had their communications reviewed would not seem to present a threat to US national security, and to our knowledge no intelligence agency has suggested that it would. In any event, we are confident that the executive branch will seek to classify any information that it believes needs to be secret, and that it is not necessary for Congress to direct that particular reports be classified.

We regret that this amendment was also not adopted, but we will continue to attempt to obtain the answers to the questions that it sought to resolve, and we look forward to working with our colleagues on this effort.

The full text of our amendment, as modified and offered in committee, is below:

Committee Amendment Proposed by
Mr. Wyden, for himself and Mr. Udall of Colorado

At the appropriate place, insert the following:

SEC. __. REPORT ON THE IMPLEMENTATION OF THE FISA AMENDMENTS ACT OF 2008.

(a) Requirement for Report.—Not later than one year after the date of the enactment of this Act, the Inspector General of the Department of Justice shall submit to the entities described in

subsection (b) a report on the implementation of the amendments made by the FISA Amendments Act of 2008 (Public Law 110–261; 122 Stat. 2436).

(b) Entities Described.—The entities described in this subsection are the following:

(1) Congress.

(2) The Attorney General.

(3) The Director of National Intelligence.

(4) The court established under section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803).

(c) Content.—The report required by subsection (a) shall include the following:

(1) An assessment of the extent to which acquisitions made under section 702 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1881a) have resulted in the acquisition or review of the contents of communications of persons located inside the United States, including—

(A) the number of persons located inside the United States who have had the contents of their communications reviewed under such section 702; or

(B) if it is not possible to determine such number, the estimate of the Inspector General of the Department of Justice of such number made using representative sampling or other analytical techniques.

(2) To the extent that any significant interpretations of such section 702 are classified, the assessment of the Inspector General whether any acquisitions made pursuant to such interpretations have resulted in the review of the contents of communications of persons located inside the United States, including, an estimate of the number, if any, of persons located inside the United States who have had the contents of their communications reviewed under such interpretations.

(3) A review of the Inspector General of incidents of non-compliance with the amendments made by the FISA Amendments Act of 2008 (Public Law 110–261; 122 Stat. 2436), with a particular focus on types of non-compliance incidents that have recurred, including an estimate of the number, if any, of persons located inside the United States who have had the contents of their communications reviewed due to such a non-compliance incident.

(d) Consultation.—The Inspector General of the Department of Justice may consult with the Inspectors General of elements of the intelligence community in preparing the report required by subsection (a).

(e) Access.—The Inspector General of the Department of Justice shall have all appropriate access needed to prepare the report required by subsection (a).

RON WYDEN
MARK UDALL