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Reforming Intelligence

THE PASSAGE OF THE
INTELLIGENCE REFORM AND
TERRORISM PREVENTION ACT

NATIONAL INTELLIGENCE UNIVERSITY

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The United States Government seized its biggest opportunity to restructure the Intelligence Community in almost 60 years by passing the Intelligence Reform and Terrorism Prevention Act of 2004. Proponents of the new act believed that only significant reform could address problems such as the inability of the Intelligence Community (IC) to detect and prevent the attacks on 11 September 2001 or to assess accurately Iraq's weapons of mass destruction (WMD) program. The new act created a Director of National Intelligence (DNI) to oversee the community's 15 components, at the time, and sought to settle debates that had raged in Washington for decades. But the shock of 9/11 and the war in Iraq finally created a unique sense of urgency. "We have come together with a unity of purpose because our nation demands it," stated the preface to the *9/11 Commission Report*, an instant best seller when released in July 2004. That landmark report set in motion the events that led to the passage of the act and served as a capstone to events of the previous three years – stalled bills on Capitol Hill, congressional inquiries, a close presidential election, blue-ribbon inquiries, and an active public discourse. Commission members and legislation supporters hoped that major intelligence reform would address institutional obstacles that had complicated the IC's struggle to adapt to new technologies and a changing national security environment. The new act would redraw boundaries between foreign and domestic intelligence, set new rules for intelligence and law enforcement, enhance the interplay between civilian and military intelligence, correct the shortfall in information sharing, and meet the needs of traditional and emergent intelligence functions. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), however, almost never happened. Here is the story of how it did.

Laurie West Van Hook
ODNI History Staff

The Intelligence Reform and Terrorism Prevention Act of 2004

The Unfinished Business of 1947



When Congress passed the National Security Act in July 1947, political compromise essential to its passage meant postponing the resolution of several politically and institutionally sensitive intelligence issues. As DNI, J. Michael McConnell termed it during a February 2008 hearing of the Senate Select Committee on Intelligence (SSCI) on DNI authorities, the 1947 legislation created a Director of Central Intelligence with weak authority – an “overseer” – rather than a commander of the nation’s intelligence capabilities. Congress, indeed, had declined to create a centralized intelligence system to focus instead on the pressing need to restructure the postwar defense establishment. The major portion of the 1947 National Security Act, therefore, did not deal with intelligence at all, but rather with consolidating the armed services under the secretary of defense and codifying the status of the Joint Chiefs of Staff. The 1947 act also codified the position of DCI that President Harry Truman had created in 1946 and gave this new official a right to “inspect” all intelligence created by the US Government. While dividing civilian and military intelligence, moreover, the legislation also separated the domestic and foreign intelligence spheres as well as the intelligence and law enforcement functions. These divisions, while perhaps politically necessary to pass legislation, also reflected a wider societal fear of a totalitarian state. Having fought fascism in World War II and then gearing up to fight communism in the Cold War, President Truman and Congress strongly believed that intelligence needs had to be balanced with Constitutional protections.

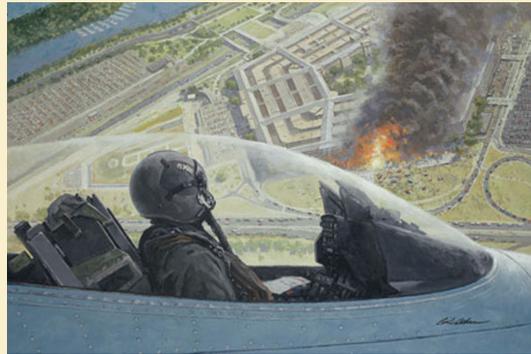
As the Intelligence Community grew, DCIs found it difficult to balance their two duties of running the Central Intelligence Agency (CIA) and managing the IC, and tended to focus on the former. Sharp limits on the DCI’s “community authorities” meant that IC components could heed, or not heed, community needs. Indeed, some experts and high-level practitioners have argued that nearly 60 years of not maximizing or upholding DCI authorities meant *de facto* they did not exist. At that same February 2008 SSCI hearing, McConnell stated that the 2004 legislation gave the new DNI the authority of a “coordinator” or “integrator,” the next two steps above that of an “overseer,” but well short of a true “director with directive authority.” Senator John D. Rockefeller IV (D-WV), SSCI Chair, noted, “Many aspects of [IRTPA] are a product of compromise rather than consensus. There were several points about which the House and the Senate could not agree. So rather than let negotiations collapse, certain issues were left ambiguous or unresolved, which is often not helpful.”

Between these legislative bookends of 1947 and 2004, approximately twenty commissions, committees, and panels appointed by either the legislative or executive branches studied the growing IC and made recommendations to improve its structure and function. Some studies had a lasting impact. The Dulles Report of January 1949, for example, provided useful suggestions for dramatic change, undertaken during the DCI tenure of General Walter Bedell “Beetle” Smith, in the wake of intelligence failures relating to both the start of the Korean War in June 1950 and the Chinese intervention in the war later that year. The 1971 Schlesinger Report, moreover, explicitly called for a “director of national intelligence” in order to strengthen community management. Though President Richard Nixon did not create a DNI, he did make James Schlesinger DCI in 1973 and empowered him to create a stronger “intelligence community staff,” which laid the foundation for the Community Management Staff (CMS) of the 1990s, and ultimately the DNI staff in 2005. In the 1970s, too, the congressional Pike and Church Committee investigations led to changes in Congress’s oversight role, particularly the creation of SSCI in 1976 and its counterpart, the House Permanent Select Committee on Intelligence (HPSCI) in 1977. Investigations into domestic spying and other clandestine activities led to new restrictions on intelligence activities of the Federal Bureau of Investigation in 1976, passage of the Foreign Intelligence Surveillance Act (FISA) in 1978, and legislation governing covert action in 1980.

The end of the Cold War added substantive new intelligence dilemmas to the long-running debate over managing the IC. The rise of terrorism targeted at Americans and the call for a “peace dividend” led to the Intelligence Community performing more missions with fewer resources. The IC-21 study and the Aspin-Brown Commission (on the “Roles and Capabilities of the US Intelligence Community”) in 1996 influenced legislation pressing the DCI to exercise stronger corporate management of the IC, giving him four new deputies and incrementally increasing his power over community budgets and personnel. Other reforms in the 1990s affected the various agencies more directly. For example, Congress created the National Imagery and Mapping Agency (NIMA) in 1996, renaming it the National Geospatial-Intelligence Agency (NGA) in 2003. President William Clinton signed a presidential directive shortly before leaving office that established a community-wide National Counterintelligence Executive (NCIX), an entity later moved to the DNI umbrella. The US Commission on National Security/21st Century, co-chaired by former Senators Gary Hart (D-CO) and Warren Rudman (R-NH), finished its two-year examination of US national

security in early 2001 and spoke of “distinctly new dangers” to the homeland. Indeed, Deputy DNI for Analysis Thomas Fingar, in a February 2008 speech in San Francisco, explained how post-Cold War threats belatedly transformed the national security outlook after 9/11. “For decades, national security, the military of our country, the activities of the Intelligence Community supported defense against foreign enemies, threats to the existence of our country, our way of life, survival of our nation, in existential terms. After 9/11, national security was redefined de facto to mean protecting every American citizen everywhere around the globe every day.”

The incoming administration of George W. Bush initiated a comprehensive review of intelligence in May 2001. The president’s authorizing directive, National Security Presidential Directive (NSPD) 5, called for two independent panels to conduct the survey – an internal panel of the deputy chiefs of current IC members and an external panel of knowledgeable and experienced individuals, currently outside the government, chaired by former National Security Adviser Lieutenant General Brent Scowcroft (USAF Ret.). The 9/11 attacks dramatically interrupted the panels’ joint work. The internal panel stopped work to return to their agencies to fight the war on terror. The external panel, known as the Scowcroft Commission, soldiered on, ultimately drafting that autumn a report with five themes that had begun to emerge even before the 9/11 attacks: the declining value in targeting technical collection on targets left over from the Cold War; the increasing need to invest in technology and analysis to counteract sophisticated adversaries; the effect of flat budgets and personnel downsizing on the need for outsourcing, exploiting open sources, and improving administrative efficiencies; the diminishing effectiveness of intelligence officers because of the unhealthy tension with congressional oversight; and the lack of balance between military and national intelligence. The final report of the Scowcroft Commission in February 2002, which DCI George Tenet read but never “officially” received, foreshadowed later recommendations of the 9/11 and WMD Commissions, congressional inquiries, and the President’s Foreign Intelligence Advisory Board (PFIAB), which Scowcroft chaired from 2001 to 2004. In late 2002, PFIAB recommended either making the DCI a true community leader or separating his “agency” and “community” roles, in order to create a “true” director of national intelligence “to manage and coordinate a transformed national intelligence community that includes agencies operating inside and outside of the United States.”



The Pentagon on 9/11

In the wake of 9/11, however, executive and legislative attention to intelligence focused more on homeland security and the build-up to the invasion of Iraq than on the issue of community management. President Bush appointed Governor Tom Ridge (R-PA) as the first assistant to the president for homeland security in October 2001 and created the Homeland Security Council (HSC). Congress passed the USA PATRIOT Act in October too. The Homeland Security Act, which the president signed into law in November 2002, increased the membership of the Intelligence Community by creating an intelligence analysis capability in the new Department of Homeland Security (DHS). The most significant early effort in community management reform came in November when the president signed a bill creating the independent and bipartisan National Commission on Terrorist Attacks Upon the United States – more commonly known as the 9/11 Commission. The new commission, chaired by former New Jersey Governor Thomas Kean and former Representative Lee Hamilton, looked into a wide range of topics related to the 9/11 attacks, including intelligence, immigration, emergency response issues, and legislative oversight. The commission’s early deliberations took place during the combat phase of Operation Iraqi Freedom, begun in March 2003, and its work was inevitably overshadowed for a time by the failure to find the weapons of mass destruction arsenal that so many policymakers and analysts believed Saddam Hussein had secreted away. The invasion also overshadowed the Senate confirmation of Dr. Stephen Cambone as the first under secretary of defense for intelligence (USD/I). Cambone’s mission included streamlining civilian and military organization, oversight, and intelligence requirements in the Department of Defense, marking a significant reform of the Pentagon’s management of its intelligence activities.

As the Iraq War turned into a grinding counter-insurgency in late 2003, criticism of the Intelligence Community and the Bush Administration for “missing the call” on Iraq’s weapons programs mounted and brought attention back to long-running debates over how to improve the IC. The Iraq Survey Group (ISG), a 1,400-member multinational team, tasked to look for weapons of mass destruction issued, in October 2003, an interim report – known as the Kay Report for group leader David Kay – which cited evidence of WMD-related program activities but no actual WMD. By early 2004, calls for intelligence

reform grew inside and outside the government. David Kay resigned on 23 January, stating his belief that WMD stockpiles did not exist. The presidential primary season generated discussion about whether intelligence leading up to the Iraq War had been incomplete, inaccurate, or manipulated. Democrats and Republicans could agree that something had gone wrong with intelligence before 9/11 and the Iraq War. Candidates and lawmakers from both parties drafted proposals for significant changes. Calls for another investigation over failed intelligence prompted the president to issue Executive Order (EO) 13328 in February 2004, establishing the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (soon known as the WMD Commission). It began meeting on 1 April under the bipartisan chairmanship of former judge, the Hon. Laurence Silberman and former Senator Charles Robb (D-VA).

The 9/11 Commission hearings generated interest in intelligence reform. Books such as Richard Clarke’s *Against All Enemies*, Steve Coll’s *Ghost Wars*, and Bob Woodward’s *Bush at War* received frequent mention in the questioning of witnesses that spring, illustrating the interplay of intelligence reform with military action in Afghanistan and Iraq and the ongoing public debate. The commission’s nationally televised hearings in March 2004 began less than two weeks after an al Qaeda affiliate simultaneously bombed several commuter trains in Madrid, Spain on 11 March – a stark reminder of the potential for more terrorist attacks. Testimony of Clinton and Bush cabinet officers showed how the IC agencies had tried to go on the offensive against terrorism but had difficulty sharing information and coordinating action. Secretary of Defense Donald Rumsfeld sensed the momentum growing behind the intelligence reform issue when he explained to the commission the need to preserve the relationship between his office and the DCI and cautioned against too much centralization in intelligence. “There may be ways we can strengthen intelligence,” Rumsfeld stated, “but centralization is most certainly not one of them.” DCI George Tenet had told the commission in early 2004 that contemplating the finer points of organizational reform was a luxury he could not afford while doing his daily job of protecting the nation. By April, however, he seemed about to change his mind, conceding in public testimony that the time might have come for “revolutionary change” in the Intelligence Community.



9/11 Commission Members

The momentum of that April took hold on the Hill, too, when Democratic members of HPSCI, led by ranking member Jane Harman, introduced H.R. 4104, the Intelligence Transformation Act, to create a “national intelligence director” (NID). Their bill reflected the evolving thinking over the last 15 months and went further than previous legislative proposals. It called for restructuring the IC’s senior leadership – a NID office, with a “dual-hatted” USD/I as an official under both the national intelligence director and the secretary of defense, required alternative analysis, a combined collection and analysis function, and an altered Milestone Decision Authority (i.e., the ability to determine when to move forward with technical or “acquisition” programs). While this bill, like many of its predecessors, made little progress within the legislative process, its timing and Representative Harman’s personal advocacy gave it more effect. Harman developed a good line of communication with future HPSCI Chair Peter Hoekstra (R-MI). She also spoke at length with 9/11 Commission Chairs Kean and Hamilton about the reforms proposed in the bill. The 9/11 Commission, which had great public support and

attention, looked like it might well influence the path of intelligence reform more than any single legislative proposal. Harman’s outreach proved well-timed, as it came just as the commission was drafting language on intelligence reform for the final report. Not surprisingly, perhaps, public anticipation of the *9/11 Commission Report* overshadowed June legislative proposals by SSCI ranking member Rockefeller and HPSCI Chair Porter Goss (R-FL), the July public release of a SSCI report after months of partisan wrangling, and the retirement of George Tenet.



Rep. Jane Harman, HPSCI Ranking Member

The *9/11 Commission Report* Catalyzes Reform Efforts

The 22 July public release of the *9/11 Commission Report* altered the intelligence reform debate. Overnight, the question changed from whether the government would reform intelligence to how radical those reforms would be. DCI Tenet’s retirement two weeks earlier had removed from the stage an influential opponent of separating the DCI’s roles of managing an agency and managing a community. The presidential campaign season had begun in earnest with two nominating conventions on the horizon. In fact, the *9/11 Commission Report* offered sweeping proposals for changing the community, including creating a NID and a National Counterterrorism Center (NCTC); transferring paramilitary operations from CIA to Defense; declassifying the intelligence budget; and improving legislative oversight, information sharing, CIA mission, FBI intelligence capabilities, and security clearance processing. When the presumptive Democratic presidential candidate Sen. John Kerry (D-MA) publicly endorsed all of the *9/11 Commission Report’s* recommendations on the day of its release, he made intelligence reform an issue in the larger campaign, forcing President Bush’s campaign as well as Senate and House candidates to develop and publicize their own positions on changing the Intelligence Community.

The NSC Principals Committee (PC) also focused in on reform. At its meeting on 20 July, two days before the report’s release, the PC did not address reform. But priorities soon changed at their next meeting on 26 July, with the forces for reform in Washington now galvanized. According to an intelligence official’s notes of that meeting, positions of the major principals quickly emerged. The vice president sought a careful, serious effort that fully involved the principals. The acting DCI sought to do no harm, particularly since the IC had, in his view, moved forward since 2001. The secretary of defense saw a big opportunity. The attorney general expressed concern that reforming intelligence in wartime would prove difficult, likening it to performing “surgery while galloping on a horse.” Nevertheless, the principals reached a working consensus that intelligence reform now proved necessary and would have to be led by the administration. Additional meetings in late July produced



9/11 Commissioners Thomas Kean and Lee Hamilton deliver the 9/11 Commission Report to President Bush

study papers that addressed issues raised by the *9/11 Commission Report*. Could the DCI's authorities be enhanced instead of creating a NID, for example, or could the Terrorist Threat Integration Center (TTIC) be transformed into a NCTC? One former senior intelligence official participating in the meetings, however, found the whole topic of intelligence reform surreal. PC meetings involved few "gritty or granular" discussions of intelligence reform, he said, resembling instead "watching oneself have an appendectomy by people who had never been to medical school." He worried that officials from outside the intelligence system spoke, rather abstractly, of how intelligence should be fixed without fully understanding the system's strengths and weaknesses. Many senior administration officials, however, believed that the political climate demanded intelligence reform and to do nothing would result in actual harm to the IC's capabilities.

A fast-paced environment, by Washington standards, then developed in the days after the *9/11 Commission Report's* release and the principals' decision to press ahead with reform. For several weeks, numerous meetings, dozens of drafts, long hours, and seemingly longer discussions about the relative merits of presidential directives, executive orders, and legislation occupied the time of senior officials and staff downtown and in the cabinet departments and senior intelligence offices. The National Security Act provided necessary authorities for the DCI, but the question remained whether decades of not maximizing or backing those authorities meant de facto they did not exist and whether they could or should be enhanced. Presidential support, in the form of executive orders or presidential directives, may not be enough, but it might obviate the need for legislation.

In the end, the president decided to lead, rather than follow, intelligence reform. Considering the unique visibility for intelligence reform and the hotly contested national election, one NSC senior staff member reasoned that any president would "ignore the issue at his peril." President Bush publicly launched his reform effort with a Rose Garden speech on 2 August. He noted that his administration had already acted in response to 9/11, with the creation of the Department of Homeland Security and the signing of the USA PATRIOT Act, and promised a more comprehensive response to the 9/11 Commission's proposals in the near future. Most significant for the Intelligence Community, the president endorsed the idea of a NID, to the surprise of Acting DCI John McLaughlin. The president called on Congress to create the position, give it a role over foreign and domestic intelligence, and restructure congressional oversight of intelligence. Ten days later, Bush nominated HPSCI Chair Porter Goss

as the 19th DCI, prompting speculation about whether Goss, who would be confirmed in September, would be the first NID. Despite the grand atmosphere of the presidential statement, however, early drafts of executive orders circulating among the cabinet level agencies produced little comment, until a White House lawyer suggested that Chief of Staff Andrew Card get involved. Card let it be known that any presidential orders should be completed before the Republican National Convention in early September. Most agencies then commented in earnest, according to the same attorney, who wondered if some had really grasped that orders would, in fact, be issued.

By the 16 August Principals Committee meeting, four draft orders had emerged on the topics of NCTC creation, information sharing, civil liberties and privacy, and most important for the emerging debate, strengthening IC management. Consensus remained elusive, however, as options for the scope and structure of a national intelligence director position proliferated. Cabinet members differed over the NID's management prerogatives, budget powers, and authorities over the IC. Memorandums about strengthening CIA's core capabilities and studying paramilitary operations continued circulating, as did other ideas for presidential directives, which eventually lost momentum once legislation moved forward in September. The four final executive orders ultimately reflected the dynamic nature of negotiations and the complex intelligence reform debate, right up to their signing. As the last hours approached for finalizing the orders, conference calls lasted long into the night, and final comments flooded the drafters' offices in the White House. For example, a broad definition of information sharing put forward in the drafts of one order prompted heated discussions among principals and aides. Only by narrowing the definition did a consensus emerge at the last minute.

On Friday, 27 August, President Bush signed four Executive Orders and two Homeland Security Presidential Directives (HSPD). Cabinet members had reached agreement before Card's deadline. The capstone of the four was EO 13355, "Strengthened Management of the Intelligence Community," which made sweeping amendments to EO 12333, originally issued by President Ronald Reagan in December 1981. This new charter for the DCI incorporated the legally stronger term "shall" in conjunction with his obligation to ensure a unified national intelligence effort, upgraded the DCI to the "principal" rather than "primary" intelligence adviser to the president, and expanded the DCI's advising capacity from "national foreign intelligence" to "intelligence matters" – presumably ending the domestic-foreign divide instituted in 1947 and giving the DCI a stronger

voice. Although EO 13355 did not include enforcement mechanisms to carry out the enhanced DCI authority, it represented the widest scope of powers ever granted to a DCI.



President Bush's Rose Garden speech on 2 August

The other three executive orders would also influence the debates to come on Capitol Hill. Executive Order 13354, “National Counterterrorism Center,” built on the early work begun by TTIC, which it folded into the new NCTC tasked to analyze and integrate all intelligence possessed by the government pertaining to terrorism and counterterrorism, save purely domestic counterterrorism information. The DCI would oversee NCTC and appoint its director. Executive Order 13556, “Strengthening the Sharing of Terrorism Information to Protect Americans,” mandated better information sharing in the war on terror. Executive Order 13353, “Establishing

the President’s Board on Safeguarding Americans’ Civil Liberties,” created a board, to be led by the deputy attorney general, to advise the president on civil liberties protections issues. Finally, two Homeland Security Presidential Directives – HPSD-11, “Comprehensive Terrorist-Related Screening Procedures,” and HSPD-12, “Policy for a Common Identification Standard for Federal Employees and Contractors” – built on previous efforts to strengthen homeland protection. In November, follow up memorandums sought to build on the August orders. Two memorandums to the DCI and attorney general strengthened CIA and FBI capabilities, respectively, and one to the secretaries of state and defense, the attorney general, and the DCI detailed organizational responsibility for conducting certain operations.

In essence, the four EOs served as a public commitment by the president to stand more fully behind the head of the IC – as the law already provided for but that in practice had happened only intermittently since the National Security Act’s original passage. At the White House background briefing for the press on 27 August, a “senior administration official” – actually a composite of three officials – placed the four orders in context. The “official” stated that the president had gone as far as he could without legislation to enhance the powers of the DCI. The briefers, however, declined to speculate on what powers the

president might endorse for a congressionally-mandated NID. They also steered clear of a question about giving a NID total budget authority.

With the ink still wet on the orders, and many in the press and on the Hill agreeing that they only constituted an interim step to achieving the level of reform recommended by the 9/11 Commission, White House staffers received instructions to draft a bill that would take the next step. Within a few days, they drafted a 23-page bill. Though short by Hill standards, its length represented an attempt to write a more comprehensive and “timeless” piece of legislation that would provide the new NID with considerable flexibility since no one could truly predict threats and intelligence needs in coming years. Shorter, general legislation, White House staff believed, would better address criticism of the IC as inflexible and incapable of responding to the next big threat. In producing a draft, moreover, the authors discussed several potential organizational charts, and wrestled anew with questions that had floated around Washington for months. Should there be a secretary of intelligence, an enhanced DCI, or a NID? Should, for instance, the three “national” intelligence agencies with their important military support missions – NGA, NRO, and NSA – remain in DOD? The directors of NSA and NGA saw merit in moving their respective agencies under a new NID. Their boss, Secretary of Defense Rumsfeld, however, did not. The bill’s drafters avoided too much detail, such as a specific organizational chart or a specific number of deputy NIDs, believing that such stipulations would only confine a NID’s ability to deal effectively with unknown contingencies. But as one of the drafters recalled, they also spent a lot of time explaining the intricacies of how the intelligence system worked on a daily basis to many of the high level officials now involved in the discussions, but who did not work with intelligence regularly. A great deal of “educating” people needed to take place, to help them understand some of the more complex issues, such as the time consuming budget reprogramming process, which, in effect, prevented reprogramming.

By 2 September, White House staff had drafted a bill dramatically amending the National Security Act and readied it for executive branch coordination. It ended, for instance, the distinctions between foreign and domestic intelligence as well as civilian and military intelligence. It used, instead, the term “national intelligence” and defined it as “all intelligence of any form and any type, to include, without limitation, information gathered inside or outside the United States.” The bill called for a NID and a deputy NID, appointed by the president, with the advice and consent of the Senate, and mandated that not more than one

of those individuals would be an active or retired commissioned officer of the armed forces. The NID would serve as the head of the IC and act as the principal adviser to the president, NSC, and HSC for intelligence relating to national security. The bill also called for increased information sharing within and between IC elements, gave the NID concurrent authority for personnel appointments made by other agency heads, and accorded the NID the power to guide collection tasking and priorities.

In one respect, the draft bill mirrored an unresolved debate in the executive branch that would soon cause controversy on Capitol Hill. On budget authorities, however, the draft kept some issues unresolved, which exemplified that the one who controls the money really has the power. The overall intelligence budget had always been classified, with most of it embedded in the larger defense budget to help protect that classification. To give the NID his or her own appropriation, as some wanted, not only raised the issue of declassification of the “top line,” which the president opposed, but also tipped the sensitive balance between the head of the IC and the secretary of defense with regard to who controls the money in reality. With intelligence money embedded in the defense budget, it took several oversight committees and many months to reprogram funds across intelligence activities, which ultimately meant DCIs used reprogramming less than they might have to keep the IC responsive to emerging intelligence needs and threats. The White House bill also gave



The White House

the NID authority to develop the National Foreign Intelligence Program (NFIP), increased a NID’s ability to reprogram funds within the intelligence budget (with OMB approval), and provided for the NID to participate in the secretary of defense’s development of the Pentagon’s tactical intelligence budget. But it also noted in bold print that “budget language is draft and is not meant to reflect any decision by the president on budgetary matters.” This had been a sensitive issue for 60 years, and it cut to the heart of the institutional tension between the DCI and the secretary of defense.

Within a week, as many drafts as days passed, and the drafters sought to build on agency feedback and concerns. Some drafts created a Joint Intelligence Council of key cabinet officials and a Joint Select Committee on Intelligence, which would replace the current congressional oversight structure. The issue of moving NGA, NSA, and NRO out of DOD and instead have these agencies report directly to a NID gained serious attention, but did not end up in the final draft. The final White House bill included the president’s decision that the “top line” of the intelligence budget remain classified, left open the possibility that the same person could serve as both NID and D/CIA, and omitted restructuring congressional oversight sensing that it would prove too provocative for Congress. The interagency review and redrafting process amounted to a fast, on-the-job education for some decision-makers about the daily intricacies of the intelligence system, solidified the White House’s position, and helped prioritize intelligence reform goals. At the same time, some DCI staff members saw with dismay that White House drafts would give the new NID no clear and direct authority over either the CIA or the IC’s analytic and operational missions. These concerns, while serious, soon moved down Pennsylvania Avenue. The White House quietly passed its legislation to the Senate and House leadership on 16 September, and the president’s advisers drew a collective breath to watch the debates over new legislation unfold in Congress.

Circumstances Demand Intelligence Reform Legislation

In Capitol Hill, Senate leaders had also read the political tea leaves quickly and took swift bipartisan action in the hours after the release of the *9/11 Commission Report*. Minority Leader Tom Daschle (D-SD) stood next to Majority Leader Bill Frist (R-TN) on the Senate floor as Frist announced, “The threat of terrorism will be with us for a long time. . . . We need to fix the problems and address the shortcomings cited by the commission so that we can make America safer.” Frist and Daschle agreed that day to sidestep both the Senate intelligence and armed services committees, which they feared would clash too much on the issue of intelligence reform, both internally and with each other. They assigned the legislative lead instead to the Senate Governmental Affairs Committee (SGAC), led by Susan Collins (R-ME) and Joseph Lieberman (D-CT), who had displayed bipartisan collegiality and success in crafting Homeland Security legislation in 2002.

With the SGAC clearly in the lead, Senators Collins and Lieberman pledged to report IC reform legislation to the Senate by 1 October. They quickly began meeting with community members to learn about the daily realities of the intelligence enterprise, reached out to the chair and ranking members of numerous Senate committees, and began rare recess hearings on 30 July with 9/11 Commission Chairmen Kean and Hamilton as their first witnesses. The Senate, indeed, had no shortage of bold ideas. On 27 August, SSCI ranking member Rockefeller sent Collins and Lieberman his own outline for intelligence reform, which proposed a NID with unified budget, tasking, and personnel authorities over all IC elements, including NSA, NRO, NGA, and DIA (save during times of war). Rockefeller contrasted his proposal with that of SSCI Chair Pat Roberts (R-KS) whose plan broke up the CIA into three separate entities for analysis, clandestine operations, and science and technology, but also took the DOD entities, such as NSA, out of Pentagon control and placed them under a new intelligence chief with greater centralizing authority.



*Sen. Susan Collins, SGAC Chair,
and Sen. Joseph Lieberman, SGAC
Ranking Member*

In contrast to the Senate approach, which House Democrats favored, House Republican leaders expressed concern over some of the bolder ideas being floated around, fearing that the Senate might do positive harm to intelligence capabilities. House Republicans took a more cautious approach; their intelligence and armed services committees also scheduled hearings, but seemed to favor a slower route toward legislating reform. The House’s pace frustrated some of its members. Indeed, HPSCI ranking member Jane Harman wrote Chairman Porter Goss in late July expressing her dismay with the lack of detailed discussion of the 9/11 Commission recommendations in their schedule of committee hearings for August. She accused the HPSCI chair of proposing “vague topics such as ‘the requirement for imagination and creativity’ . . . The 9/11 commissioners, the families of the victims, and the rest of the country want Congress to consider and vote on real legislation.”

Once intelligence reform legislation was seriously in play on Capitol Hill, executive branch agencies with major stakes in its outcome detailed senior employees as technical experts to congressional staffs, particularly the SGAC and both Armed Services Committees. While technically not “drafting” legislation themselves, these officers did yeoman service and worked excruciatingly long hours in commenting on proposals and explaining the day-to-day workings of the Intelligence Community to committee members and their staffs. New budget authorities, for instance, literally could not have been written without advice from the DCI’s Community Management Staff, facilitated by a technical expert detailed to the SGAC. In addition, former staff members of the 9/11 Commission reinforced the work of committee staffs once the commission concluded its own work in August 2004.

Senators Collins and Lieberman unveiled their own intelligence reform legislation, S. 2845, on 15 September, which Harman and the other HPSCI Democrats endorsed. Their bill gave the NID total budget authority for the NFIP, but left NSA, NGA, and NRO in the secretary of defense’s chain of command. It also created a NCTC, established a civil liberties protection board and an information sharing network, and allowed the NID to create national intelligence centers. Senator Collins spoke of the need for a national intelligence director with strong authority in budget and personnel, and warned that anything less would risk “creating another level of bureaucracy.” Senator Lieberman believed the committee bill would produce “revolutionary changes.” “Under our plan, when somebody asks, ‘Who’s in charge?’ the question will not be met with

blank stares and nonanswers, which greeted the 9/11 Commission every time they asked somebody that question.” Chairmen Kean and Hamilton of the 9/11 Commission, showing the close ties they maintained with the SGAC leaders, publicly welcomed the bill as a “significant breakthrough.”

The House, however, continued its own approach to reform legislation. The day after the SGAC reported its bill to the full Senate on 23 September, several influential House Republicans – Speaker Dennis Hastert (IL), Majority Whip Tom DeLay (TX), new HPSCI Chair Pete Hoekstra (MI), HASC Chair Duncan Hunter (CA), and Judiciary Chair Jim Sensenbrenner (WI) – introduced a competing bill, H.R. 10. The 355-page House bill dwarfed its 191-page Senate counterpart and lacked bipartisan support. H.R. 10 showed a preference for giving more power to the Pentagon over defense intelligence agencies, increasing the Department of Justice’s power to monitor terrorists, and included strengthened deportation authorities. The bill also differed from S. 2845 in the NID’s power over budgets, planning, and personnel. H.R. 10’s differences with S. 2845 looked so great that some observers called it a “grab-bag” of negotiating points assembled to give House negotiators maximum leverage in conference with the Senate. The two chambers did agree, however, on one issue. Neither S. 2845 nor H.R. 10 included provisions to restructure congressional oversight, despite the *9/11 Commission Report’s* strong recommendation.

The different approaches to drafting legislation, by the House Republicans on the one hand and the House Democrats and the Senate on the other, in a sense, reflected a larger debate in Washington over the pace of reform. Were wholesale changes to the intelligence structure rash and premature or long overdue? Many of the concepts in reform proposals that had fostered conversation for months had, in fact, been decades in the making. The idea of a director of national intelligence, for example, had been proposed in 1971 and echoed concerns about the overbroad scope of the DCI’s job that had been voiced since 1955. Nonetheless, some observers – particularly in the intelligence agencies – viewed the impetus to reform as a mad

rush precipitated by the *9/11 Commission Report* and the pressure of the presidential election season. At SSCI hearings, 9/11 Commission members Kean, Hamilton, and former Navy Secretary John Lehman (USN Ret.) appeared, and all emphasized the need to move beyond the president’s four executive orders. To counter reform critics who said that passing a bill during the fall legislative session – and during a presidential election campaign – risked moving too quickly, Kean responded that the 9/11 Commission represented a continuity in the 30-year debate over intelligence reform. Lehman, for his part, proposed following a model from the late 1940s when the National Security Act framework of 1947 had received “fine tuning” in 1949. Passage of intelligence reform legislation in 2004 could itself be “fine tuned” in a few years time, he argued, as it was implemented and put to the test.

The findings of the 9/11 Commission were not the only influence on members as the Senate and House debated dozens of amendments to their respective bills. The continuing Iraq War and the question of how the Intelligence Community had been so badly mistaken about Saddam Hussein’s weapons of mass destruction loomed over the proceedings and made more than one member favor the idea of giving the CIA new oversight in the form of a NID. The public release on 6 October of the Iraq Survey Group’s 1,000-page final conclusions, the Duelfer Report (named for Kay’s successor Charles Duelfer), reminded members of Congress about the WMD controversy at a key moment. That same day, the Senate passed S. 2845 by a vote of 96-2, after adopting approximately two dozen amendments. The White House had issued a Statement of Administration Policy the day before the vote, essentially supporting the bill but expressing concern that it gave insufficient authorities to the NID and excluded key “preservation of authorities” language proposed in the draft White House bill, which would have preserved the chain of command between cabinet secretaries and IC components in their departments. Two days after the Senate passed S. 2845, the House passed H.R.10 by a vote of 282-134, after defeating an amendment that would have substituted the House bill with a nearly identical version of the Senate bill.

Contention and Compromise

The differences between the House and Senate bills – and the presidential election in 19 days – made compromise daunting as the two chambers’ conferees first met on 16 October. The issues for negotiation were so numerous that the non-partisan Congressional Research Service needed approximately three weeks to produce a side-by-side bill comparison – a date after the congressional recess and election. Not surprisingly, the House Democrat and Senate conferees remained far apart from the House Republican conferees. Even within the House Republican leadership, members remained divided over their level of support for the Senate bill, with some favoring provisions in S. 2845. For days, movement on many issues stalled, such as the NID’s authority to determine the intelligence budget and move personnel or funds around the IC, the relationship between the NID and the D/CIA, Milestone Decision Authority for large acquisition projects, human intelligence collection, and oversight of foreign liaison relationships. The interests of powerful committee chairs collided since many of these issues overlapped their committees’ jurisdictions. Cries of partisanship and an inability to reform oversight echoed in the press. The 9/11 Family Steering Committee, for instance, accused House Republicans of stalling, attempting to derail the bill, and generally being “obstructionists.” They demanded that the “president immediately take time from his campaign to ensure that legislation critical to this nation’s safety is enacted.”

Senator Collins and 9/11 Commission Chair Kean separately urged the president to get involved in the negotiations. On 18 October, the White House sent a letter, signed by National Security Adviser Condoleezza Rice and OMB Director Joshua Bolten, to the principal conferees urging them to pass a bill. Rice and Bolten offered the White House’s views on no fewer than 25 points of contention, although their major points amounted to three: the president preferred the stronger budget provisions in S. 2845, wanted to keep the intelligence budget classified (per H.R. 10), and requested including the “preservation of authorities” language from the draft White House bill. The administration’s letter illustrated a rarely seen feature of the negotiations over intelligence reform. In many ways, the debates were truly government-wide discussions, with participants from not only both houses of Congress but also from the executive branch. In an unusual step, White House representatives attended many House-Senate conference meetings, and it was not uncommon for technical advisers from the executive branch agencies to sit in on sessions.

All sides sought allies in the government and in the media. At the request of House Armed Services Committee Chair Duncan Hunter, for instance, Chairman of the Joint Chiefs of Staff General Richard Myers wrote a letter to Hunter expressing support for the H.R. 10 provision placing the secretary of defense between the NID and the DOD-based intelligence agencies, including the NSA, NRO, and NGA. When Hunter published the letter, not a few observers concluded that Myers had suggested that enhanced budget authority for the NID would hurt American troops during a time of war. The Myers letter – sent outside the normal channels but at the request of Hunter (to whom Myers had a legal obligation to answer) – favored the House approach. For some involved in the negotiations, the letter represented merely one of many obstacles in working through the conference issues. For others, it further polarized the debate. Moving intelligence reform forward without playing a “zero sum game” proved to be a significant challenge for conference negotiators. Conferee Senator Frank Lautenberg (D-NJ) said of his fellow Senate negotiators: “We’re trying hard to effect an agreement, but the fact of the matter is that it has been rough sledding all the way. General Myers’ letter does not help build consensus. In fact, it hardened the attitude of those in the House.”

With little movement in the conference process by late October and the presidential election looming, President Bush answered the pleas of the 9/11 Commission and families to press Congress for an agreement, but without success. On Sunday, 24 October, he telephoned Speaker of the House Hastert and Senate Majority Leader Frist and urged them “to get the intelligence reform legislation to him as quickly as possible.” The president’s request, however, had little practical effect. On the same day, Senate leaders revealed that House Republicans had offered a new proposal that seemed to be taking negotiations in the wrong direction. Collins and Lieberman led a bipartisan Senate rejection of that proposal, publicly complaining that “the House bill would create a weakened intelligence director, which 9/11 Commission Chair Kean has said would be worse than no



Gen. Richard Myers, Chairman of the Joint Chiefs of Staff

intelligence director at all.” For their part, House Republican conferees remained emboldened as they revealed a 23 October memorandum from former 9/11 Staff Director Philip Zelikow that seemed to agree with many provisions of the House offer. Commission members distanced themselves from Zelikow’s statements, and Senator Collins said in an interview that she was “stunned” by his “not helpful” comment. But House Republicans had made their point that even the 9/11 Commission could not speak with one voice on intelligence reform.

As the 2 November presidential election arrived without a conference report, observers wondered if intelligence reform legislation would die when a lame duck Congress returned to Washington after the election recess. Some feared it would, while others hoped it would. President Bush soon ended the speculation. Two days after his reelection, he held a press conference to lay out his second-term goals. Intelligence reform stood first on the list, and he urged Congress “to pass an effective intelligence reform bill that I can sign” into law. His call revived the conference negotiations and re-energized congressional and executive branch staff and members of the 9/11 Commission, some of whom had been uncertain of presidential support for intelligence reform up to that point.

Within a week of the election, conferees inched closer to a final bill. Senate negotiators agreed to drop a provision for declassifying the overall intelligence budget, but continued to insist on giving the NID greater budget authority than

House Republicans could tolerate. House Republican negotiators, in contrast, preferred to give the NID authority to oversee and manage the IC budget, but insisted that day-to-day spending remain with the Pentagon and other cabinet departments. The Senate also agreed to limit the NID’s authority to reprogram funds or transfer personnel across agencies to 10% of an agency’s budget. The House had initially insisted on a 5% cap, while the Senate did not want any cap. Senator Collins considered the concession substantial, albeit necessary to get this close to a bill.



The Capitol

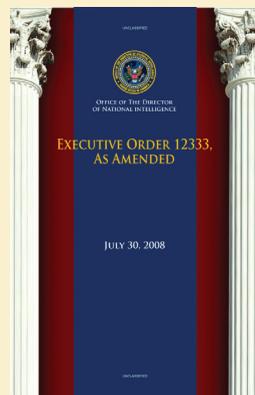
The remaining differences, however, have been characterized as “fall on the sword” issues, especially those involving the budget and chain of command for IC components that reported to both the DCI and the secretary of defense. With the Thanksgiving recess looming, prospects for voting on intelligence reform legislation looked bleak, despite a majority of members of Congress and the White House now voicing support for legislation. Representative Sensenbrenner, for example, continued his insistence on including immigration provisions. Once more, accusations flew in the media. Members of Congress began vigils at ground zero in New York. Senate leaders and 9/11 Commission members and families publicly appealed to the White House for help. Senator Collins spoke to Condoleezza Rice about appealing directly to the president. Reflecting back on Chairman Myers’ October letter, Senator John McCain (R-AZ) said, “I don’t know if the word ‘embarrassment’ is right, but I don’t think I’ve seen a situation before where you had a majority of votes for a piece of legislation in Congress that was strongly supported by the president of the United States, and it doesn’t get voted on.”

Senator Frist stated on a Sunday news show on 21 November, “For us to do the bill in early December, it will take significant involvement by the president and the vice-president.” SSCI Chair Roberts, also on a Sunday news show, noted that the president “has to make it very clear that the commander in chief is in favor of this bill.” When asked about his recent comment about the chances for a bill’s approval in the next couple of weeks, Roberts responded, “Well, I said slim or none, and slim left town.” Appearing with Roberts, HPSCI Ranking Member Harman threw down the rhetorical gauntlet to those still opposed to the bill. “Well, if thought is that we will change the bill further, and therefore it will be more palatable to these committee chairs who oppose it, that will unglue all the careful compromises and the blood on the floor and all of the metaphors you can pick that went into this.” Holding up a piece of paper, Harman continued, “The compromise that was worked out about making sure that the chain of command between the warfighter, the secretary of defense, and the president would not be interfered with was drafted by the counsel to the vice president of the United States. This is the handwritten language that was presented on Sunday [November 14]. Everyone, including the chairman of the House Armed Services Committee, agreed to it. But yesterday, somehow that wasn’t enough.”

Senator Collins, recently back from a short trip to South Africa, had grown apparently frustrated and unsure about whether the Senate bill and the conferees had relinquished too much to ensure passage. The NSA, NRO, and NGA remained

under the authority, direction, and control of the secretary of defense, in spite of having an important national mission. While the NID would hold more budget control than the DCI, the Pentagon still developed budgets for joint and tactical military intelligence, and the intelligence budget remained classified and within the defense budget. The NID had to consult with cabinet heads in developing the proposed National Intelligence Program and would share personnel management, Milestone Decision Authority, and tasking with the secretary of defense. Finally, the NCTC director could not execute operations within military intelligence components. While the DCI system had been improved upon, many people advocating change believed it did not go far enough.

During the Thanksgiving recess and into early December, talks focused on the “preservation of authorities,” or chain of command language in section 1018, as the final obstacle to agreement, in an attempt to bring together the interests of the armed services, judiciary, and intelligence committees and their executive branch patrons. On Thursday, 2 December, General Myers cryptically stated in a press conference that his public concerns had been resolved, a statement that hinted at movement on the budget issue and potentially undercut opponents of the bill who feared it would divert intelligence from battlefield commanders. But the challenge remained to find compromise language that would resolve the issue enough to pass legislation. Over that first weekend in December, negotiators and White House staffers resorted to flipping through a thesaurus, looking for the right word to capture the essence of “preservation” without giving the NID too much or too little authority over the intelligence components. When one side accepted a proposed compromise word, the other rejected. With their personal digital assistants (PDAs) at their sides, staffers contacted their principals for immediate reactions to proposed wording. Finally, the idea that the NID’s authority “does not abrogate” the chain of command between a cabinet secretary and his or her intelligence components emerged as a compromise proposal. Senators Collins and Lieberman’s staffers contacted them on their PDAs in Maine and at the theater, respectively. They both accepted the “does not abrogate” formulation, and then key House negotiator Duncan Hunter accepted it. Finally the vice president, who had gotten more involved in final negotiations and attended the same theater as Lieberman, accepted the language. But the preceding words in that section, requiring the president to “issue guidelines” to ensure the NID’s authority “does not abrogate” a cabinet secretary’s statutory responsibilities, laid the foundation for future disagreements, large and small, about authorities, and ultimately required revision of EO 12333.



*Executive Order 12333,
as amended, 30 July 2008*

On 5 December, however, with all the parties at the White House and on Capitol Hill believing they had not lost this crucial point, the deal was done.

Even with the relief of a conference report agreement, one last hurdle remained as the House prepared to vote on 7 December. HPSCI Chair Hoekstra reflected on the proceedings in his call for affirmative votes on the bill: “This conference report is the product of what may go down in the annals of this institution as one of the most difficult and certainly one of the most involved conferences ever. . . . The negotiations have been tough, long, and sometimes extremely contentious.” Some House Republicans, however, still objected to the bill. Judiciary Committee Chair Sensenbrenner, despite Hastert’s promise of a low number in the next legislative session for an immigration bill when finalizing the conference report, continued his vocal opposition. His allies looked for a procedural means to derail the legislation.

A HPSCI staff member recalled a “sweating bullets” 60 seconds as the floor vote approached that day. When time for debate expired, both proponents and opponents of the legislation would try to use a “motion to recommit.” Under House rules, a motion to recommit a bill to committee effectively kills it, but a “motion to recommit with instructions” is a last chance to amend a bill. Sensenbrenner, if given the chance, hoped to offer a motion to recommit with instructions that would replace S. 2845 with H.R. 10, thus killing the conference report and any chance for intelligence reform in the 108th Congress, which would adjourn the following day. But House rules also allowed the minority side – in this case the Democrats – the first chance to offer a motion to recommit, provided they acted quickly. If they did not act within one minute, Sensenbrenner and his allies stood ready with their own motion to recommit with instructions, which might just pass – no one was certain. Harman had anticipated this scenario and arranged for Representative Steny Hoyer (D-MD) to stand near the microphone and offer a motion to recommit S. 2845, knowing the motion would be defeated, and the House would then have to move on to a vote on the conference report. With a contingent of 9/11 families sitting in the House balcony, Hoyer offered the motion to recommit, which the chamber defeated. The House moved on to a vote, 336-75-22, with Sensenbrenner and 66 other Republicans and 8 Democrats voting against S. 2845.

With the fireworks over, on 8 December, the Senate passed the S. 2845 conference report by a vote of 89-2. The exhausted co-sponsors in both houses spoke of their relief. Senator Collins said, “We are rebuilding the architecture that was designed for a different enemy, in a different time, a structure that was designed for the Cold War and has not proved agile

enough to deal with the threats of the 21st century.” Senator Lieberman added, “No one has been ultimately responsible for the deadly mistakes that have been made. This legislation changes all that. The dots will be connected.” Perhaps befitting such a contentious piece of legislation, other observers believed the new law would not make a big difference. SSCI Chair Roberts said that the legislation gave the DNI “marginally improved budget authorities over our intelligence community agencies.” HPSCI Chair Hoekstra said, “We did not get everything we wanted.” HASC Chair Hunter saw the new legislation as a catastrophe averted. He described the conference negotiations as a holding action against a political stampede started in the Senate that would have hurt the nation’s armed services had it not been for the House’s objections.

President Bush signed the legislation into law as P.L. 108-458, the Intelligence Reform and Terrorism Prevention Act, on 17 December. The law established a director of national intelligence (or DNI – the unattractive acronym NID replaced at the last minute by a person in the White House Counsel’s office) and separated the DCI’s two roles, allowing the DNI to focus on the community and the CIA director to focus on running his agency. The law also created a Senate-confirmed principal deputy DNI (PDDNI) and general counsel, moved several offices to the ODNI, and established a civil liberties protection officer and an associate DNI for science and technology. The CIA kept its role in managing human intelligence and liaison activities.



President Bush signs IRTPA into law on 17 December 2004

The law called for implementing Title I of the legislation, establishing the DNI, within six months. Speculation quickly began about who would be the first DNI, who would present the President’s Daily Brief in the Oval Office every day, and whether it would prove possible to truly reform the intelligence establishment. President Bush swore in the first DNI, Ambassador John D. Negroponte, on 21 April 2005. Lieutenant General Michael Hayden (USAF) assumed the position of PDDNI and earned his fourth star. The new Office of the Director of National Intelligence (ODNI) stood up its temporary headquarters on 22 April in cramped spaces in the New Executive Office Building.

Conclusion: Progress and Unfinished Business

Several practical challenges remain for the nation and the Intelligence Community as IRTPA continues to be implemented. Separating the two roles of the DCI on paper has been more easily implemented than delineating the day-to-day specifics of that division. The legislative directions to bring domestic and foreign intelligence closer together and to resolve the long-standing tension between the DCI – now DNI – and the secretary of defense’s intelligence authorities have required considerable leadership attention. The IC continues its struggle to keep up with technological innovations in collection. Other challenges include transforming analysis, anticipating future threats, increasing critical language capabilities, and improving hiring and security clearance processing. Congress, which sidestepped the issue of reforming intelligence oversight in 2004, is still determining what constitutes success in intelligence reform and the oversight process.

Intelligence reform can never be legislated or implemented in a vacuum. Threats to national security do not stand still, and the nation needs a flexible and adaptable intelligence enterprise. Political compromise, though necessary to pass legislation, changes the form and content of any reform effort, and usually dilutes the original intent behind that effort. The legacy of political decisions made to pass the 1947 National Security Act constrained intelligence reform over the next several decades and created systemic weaknesses. It is fair to ask if compromises made to ensure passage of IRTPA will require future amendment, as the 1947 act underwent in 1949. In the February 2008 hearing on DNI authorities, Senators questioned DNI McConnell about his understanding of DNI authorities with regard to directing the 16 intelligence agency directors. Sen. John Warner (R-VA), a long time member of the intelligence and armed services committees, offered to McConnell, “You don’t have that line authority that we somehow felt that we were intending to give you.” The DNI responded, “No, sir, I do not.”

Concerns over the limits of IRTPA, however, should not diminish its remarkable origin and significance for US intelligence. The act stands as a landmark piece of national security legislation comparable to the 1947 National Security Act and the 1986 Goldwater-Nichols Act that reformed the Defense establishment, and which proponents of intelligence reform legislation in 2004 often invoked as a model. Like those statutes, the drafting and passing of IRTPA forced elected officials and government executives to rethink and modify strongly held positions for the sake of a greater good.

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