



# Intelligence Authorization Legislation: Status and Challenges

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## Summary

Since President Bush signed the FY2005 Intelligence Authorization bill (P.L. 108-487) in December 2004, no subsequent intelligence authorization legislation was enacted until the FY2010 bill was signed by President Obama in October 2010 (after the end of FY2010) becoming P.L. 111-259. Although the National Security Act requires intelligence activities to be specifically authorized, this requirement has been satisfied in recent years by one-sentence catchall provisions in defense appropriations acts authorizing intelligence activities. This procedure meets the statutory requirement but has, according to some observers, weakened the ability of Congress to oversee intelligence activities.

Annual intelligence authorization acts were first passed in 1978 after the establishment of the two congressional intelligence committees and were enacted every year until 2005. These acts provided specific authorizations of intelligence activities and were accompanied by reports that provided detailed guidance to the nation's intelligence agencies. However, in practice, the absence of intelligence authorization acts has meant that key intelligence issues have been addressed in defense authorization acts and defense appropriations acts that focus primarily on the activities of the Department of Defense.

Several members have maintained that this procedure has been characterized by misplaced priorities and wasteful spending estimates that could run into billions. One example is the eventual cancellation of a highly classified and very costly overhead surveillance system that had been approved without support from the two intelligence committees.

Some also argue that the ability to link together the collection and analytical efforts of intelligence agencies must extend well beyond the Defense Department given the challenges of the 21<sup>st</sup> century and that intelligence authorization legislation is essential to ensure the effectiveness of this linkage. When Congressional approval of intelligence programs is limited to defense authorizations and appropriations legislation, the result arguably can be an overemphasis on military missions by the Intelligence Community.

Other observers counter, however, that, even without intelligence authorization acts, Congress makes its views known to the Intelligence Community and that defense authorization and appropriations acts provide adequate legislative authority for major acquisition efforts of agencies that are in large measure integral parts of the Defense Department.

Although the October 2010 legislation was enacted too late to authorize spending during FY2010, the Act did include long-sought legislation provisions and reflected congressional determination to return to annual intelligence authorization acts.

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## Introduction

*No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.* [U.S. Constitution, Article I, Section 9]

Over the years Congress has devised complex procedures for appropriations and authorization, but the pattern has been to separate the authorization and appropriation process and to establish separate committees to address the separate functions. Although intelligence spending has historically been shrouded in secrecy, the Constitution, statutory law, and legislative branch procedures apply to intelligence agencies as they do for all government departments and agencies.

It is the purpose of this report to assess the effects of the absence of intelligence authorization legislation subsequent to FY2005 and indicate the substantial but limited effects of the FY2010 Intelligence Authorization Act (P.L. 111-259). It is recognized that the statutory requirements have been met by the catchall provisions in appropriations acts. The report will not focus on the reasons why Congress did not pass intelligence authorization; it is sufficient to note that members did not choose to compromise disagreements either amongst themselves or with the White House on issues they considered important. In the absence of authorization legislation, intelligence activities continue to be carried out, and expensive and complex intelligence systems continue to be approved; but the process is somewhat different from that intended when the intelligence committees were established in the late 1970s and there are significant implications for congressional oversight of intelligence activities and, arguably, for the nation's intelligence effort as a whole.

## Background

To carry out the Constitutional duty of funding government activities, Congress has established a two-step process. First, it authorizes an agency or program. Secondly, Congress appropriates funds for the authorized agency or program. The separation of authorization and appropriations legislation provides Congress with an opportunity to permit one set of committees (authorizing committees) to address the needs of programs in their jurisdictions while another set of committees (appropriations committees) is designed to consider the finances of the Federal Government as a whole and guard against excess spending. In general, authorizing committees and their staffs develop extensive expertise in their agencies. Appropriations committees focus on allocating funds within an overall budget total. Appropriations committees are more limited in staff and generally do not delve into the detailed activities of government departments. Authorization committees however have enough staff to undertake more detailed evaluations of agency programs and monitor implementation of congressional guidance.

Appropriations bills (or continuing resolutions) must be enacted every year, but agencies and activities may be authorized on a standing basis. Such authorizations are provided to most agencies that carry out their designated responsibilities year after year. Some important agencies and programs, however, are authorized on an annual basis. In the 1960's, the size and complexity of defense programs led to a congressional determination to authorize the nation's defense effort on an annual basis and, since that time, the purview of national defense authorization acts has been expanded to include specific policy directions for all types of military activities and programs, ranging from personnel to procurement of major weapons systems. Defense

authorization bills became a main focus of legislative interest and have guaranteed that congressional concerns are continuously addressed by the Defense Department.<sup>1</sup>

In the 1970s similar procedures would be established for intelligence agencies. A standing authorization for the Central Intelligence Agency (CIA) was provided by the National Security Act of 1947 (P.L. 80-235) and this was thought to be adequate. There was no perceived need for annual authorizations for CIA for over a quarter century and the activities of other intelligence agencies were authorized as part of their parent department's authorization. In the mid-1970s, however, Congress, concerned about intelligence agencies operating behind a wall of secrecy, and at times engaged in improper activities, created the two intelligence committees to provide oversight. The respective rules that established the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI) provided that "no funds would be expended by national intelligence agencies unless such funds shall have been previously authorized by a bill or joint resolution passed by the Senate [House] during the same or preceding fiscal year to carry out such activity for such fiscal year."<sup>2</sup> (Both resolutions provided an exception for continuing appropriations bills or resolutions.) In 1985, section 504 of the National Security Act was tightened to require appropriated funds available to an intelligence agency could be obligated or expended for an intelligence or intelligence-related activity only if "those funds were specifically authorized by the Congress for use for such activities."<sup>3</sup>

After the establishment of the two intelligence committees, the appropriations committees came to defer more to them; one senior member of the House Appropriations Committees has been quoted as explaining in 1983, "Our subcommittee has backed off and done less as [HPSCI] has become more important. My own view is if you've got a committee dealing day in and day out with intelligence, that's the way it should be."<sup>4</sup>

Today, the intelligence committees have extensive staffs—approximately 40 each for SSCI and HPSCI. The House committee has subcommittees devoted to terrorism, human intelligence, analysis and counterintelligence; intelligence community management; technical and tactical intelligence; and oversight and investigations. The Senate committee is not divided into subcommittees. Both committees annually conduct numerous classified hearings and a few unclassified hearings relating to intelligence activities and programs. Most intelligence spending

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<sup>1</sup> Prior to that time there had standing authorizations for specific levels of military forces; much of the impetus for annual authorization bills derived from efforts by the Army and Air Force to obtain hundred of sites in the U.S. for anti-aircraft missiles; there was a perception that neither the Executive Branch or the appropriations committees were effectively overseeing the process. The eventual result was annual defense authorization bills with large and detailed accompanying reports that provided congressional guidance for all types of military activities and programs.

<sup>2</sup> S.Res. 400 from the 94<sup>th</sup> Congress, section 12; H.Res. 658 from the 95<sup>th</sup> Congress, section 11(I).

<sup>3</sup> 50 USC 414(a)(1). The requirement for "specific authorization" was added to the National Security Act by the Intelligence Authorization Act for FY1986 (P.L. 99-169), Section 401(a). The report accompanying the House version of H.R. 2419 (which became P.L. 99-169), stated that, "Specifically authorized is defined to mean that the activity and the amounts to be spent for that activity have been identified in a formal budget request to the Congress and that Congress has either authorized those funds to be appropriated and they have been appropriated, or, whether or not the funds have been requested, the Congress has specifically authorized a particular activity, and authorized and appropriated funds for that activity." U.S. Congress, 99<sup>th</sup> Congress, 1<sup>st</sup> session, House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 1986*, H.Rept. 99-106, Part 1, May 15, 1985, p. 8. A concern existed at the time that funds had been used by the Reagan Administration for intelligence activities in Central America that lacked congressional support or even awareness.

<sup>4</sup> Quoted by Frank Smist, Jr., *Congress Oversees the United States Intelligence Community, 1947-1989* (Knoxville, TN: University of Tennessee Press, 1990), p. 245.

is appropriated by the defense appropriations legislation which is prepared by the defense appropriations subcommittees which each have approximately 15-20 staff members to cover the entire defense budget.

The first intelligence authorization bill that became law was that for FY1979 (P.L. 95-370); the Senate had passed an authorization bill the year before but the House, not then having its own intelligence committee, took no action on the bill. From FY1979 to FY2005 annual intelligence authorization bills were enacted although on many occasions the intelligence authorization acts were not signed until well into the fiscal year for which they authorized funds.<sup>5</sup> P.L. 108-487, the Intelligence Authorization Act for FY2005, was signed on December 24, 2004, but since then no intelligence authorization bill has subsequently become law.

When appropriations legislation has passed prior to enactment of intelligence authorization bills, Congress has met the requirement for specific authorization of intelligence activities through the use of a “catchall” provision in defense appropriations acts. For example, section 8080 of the Consolidated Security, Disaster, and Continuing Appropriations Act, 2009 (P.L. 110-329) enacted on September 30, 2008 states:

Funds appropriated by this Act, or made available by the transfer of funds in this Act, for intelligence activities are deemed to be specifically authorized by the Congress for purposes of section 504 of the National Security Act of 1947 (50 U.S.C. 414) during fiscal year 2009 until the enactment of the Intelligence Authorization Act for Fiscal Year 2009.

This provision meets the requirements of the National Security Act while acknowledging the potential for subsequent passage of an intelligence authorization act. Similar provisions have been included in other defense appropriation acts and in various supplementary appropriations bills since, almost always, appropriation bills are enacted prior to intelligence authorization bills.<sup>6</sup>

A section of some 60 words has thus been routinely substituted for bills that along with their accompanying reports (with classified annexes), that normally run to hundreds of pages. Undoubtedly, the Executive Branch gives consideration to congressional concerns, even those expressed informally, but the report language and guidance contained in an intelligence authorization bill undoubtedly does not have the prescriptive effects of enacted legislation.

Since the enactment of P.L. 108-487, the Intelligence Authorization Act for FY2005 on December 23, 2004, the two intelligence committees have reported authorization bills (of which some have been passed by the respective chambers and one of which—that for FY2008—passed by both houses only to be vetoed by the President). Each of these bills was accompanied by a report that provided extensive guidance for intelligence agencies and addressed a number of issues that the committees considered important. Such issues included a requirement for Senate confirmation of the Deputy CIA Director as well as the directors of the NRO, NGA, and NSA, the establishment of a Space Intelligence Center, and providing additional authorities to the Director of National Intelligence (DNI) along with a provision that requires reports when acquisition costs for intelligence systems pass certain cost growth thresholds. Important to some members was the inclusion of provisions establishing an Inspector General for the entire Intelligence Community.

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<sup>5</sup> The act for FY1991 was not signed until the eleventh month of the fiscal year, on August 14, 1991, an earlier bill having been pocket-vetoed.

<sup>6</sup> Intelligence authorization bills for only three fiscal years (1979, 1983, and 1989) were enacted prior to the beginning of those years.

The Senate bill for FY2009, S. 2996, sought to provide the DNI greater flexibility to coordinate the Intelligence Community response to an emerging threat that “should not depend on the budget cycle and should not be constrained by general limitations in appropriations law (e.g. 31 U.S.C. 1346) or other prohibitions on interagency financing of boards, commissions, councils, committees, or similar groups.”<sup>7</sup> These bills did not become law and intelligence programs have been authorized by defense authorization legislation since FY2005.<sup>8</sup>

In 2009, the both the House and Senate intelligence committees reported intelligence authorization bills for FY 2010 (H.R. 2701 and S. 1494 respectively). Each contained provisions that would require Senate confirmation of additional intelligence leaders and establish a statutory inspector general for the entire Intelligence Community. However, provisions in H.R. 2701 that would require more extensive notifications of covert actions drew strong objections from the Administration. S. 1494 was passed the Senate on September 16, 2009, by a voice vote, but floor consideration of the House bill did not occur.

FY2010 intelligence authorization legislation did become law, albeit without specific authorization of intelligence programs; it is discussed below.

## **Funding for a Changed Intelligence Environment**

The need for closer integration of the nation’s intelligence effort was a principal finding of the various assessments of the performance of the Intelligence Community prior to the 9/11 attacks and Operation Iraqi Freedom. The assessments concluded that intelligence agencies had not effectively coordinated the acquisition and dissemination of available intelligence.<sup>9</sup> In response, the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) established the position of DNI (and the Office of the DNI (ODNI)) with wide-ranging authorities over all intelligence agencies. The provisions included responsibility for preparing and ensuring the effective execution of the National Intelligence Program (NIP) which includes acquisition for major intelligence systems.<sup>10</sup> The intent was to provide the DNI with significantly broader

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<sup>7</sup> U.S. Congress, 110<sup>th</sup> Congress, 2d session, Senate, Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2009*, S.Rept. 110-333, May 8, 2008, p. 24.

<sup>8</sup> In 2005, HPSCI notes that it lacks “full visibility over some defense intelligence programs that do not clearly fall into the Joint Military Intelligence Program (JMIP) or under Tactical Intelligence and Related Activities (TIARA) categories [predecessors of the MIP]. Specifically, the Committee notes that individual services may have intelligence or intelligence-related programs such as science and technology projects of information operations programs related to systems, precluding sufficient visibility for program oversight.” U.S. Congress, 109<sup>th</sup> Congress, 1<sup>st</sup> session, House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2006*, H.Rept. 109-101, June 2, 2005, p. 16. The real-world problem is that intelligence and intelligence-related programs can be components of other military programs, greatly complicating the use of categories designed for aligning congressional oversight responsibilities. The Department of Defense (DOD) attempted to address this issue in a recent directive on the MIP; “The term [MIP] excludes capabilities associated with a weapons system whose primary mission is not intelligence.” DOD Directive 5205.12, November 14, 2008, *Military Intelligence Program (MIP)*, November 14, 2008, Section 3.a.

<sup>9</sup> National Commission on Terrorist Attacks Upon the United States, Final Report, *The 9/11 Commission Report*, Washington: Government Printing Office, [2004], pp. 407-411; U.S. Congress, 107<sup>th</sup> Congress, 2<sup>nd</sup> session, Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, S.Rept. 107-351/H.Rept. 107-792, December 2002, pp. 33-117; U.S., Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States*, March 31, 2005, pp. 311-350.

<sup>10</sup> 50 USC 403-1(c).

coordinative responsibilities and authorities than had been exercised by the former Director of Central Intelligence (DCI). The DCIs had not only responsibilities for the entire Intelligence Community but were also in direct charge of the CIA; the Intelligence Reform Act created a separate position of CIA Director, leaving DNIs responsible for coordinating the interagency intelligence effort.

The NIP includes funding for the largest intelligence agencies—the Central Intelligence Agency (CIA), the National Security Agency (NSA), the National Reconnaissance Office (NRO) and the National Geospatial-Intelligence Agency (NGA). The Military Intelligence Program (MIP)—which is separate from the NIP—consists of the intelligence efforts that are designed (and funded) to support the needs of the Department of Defense (DOD) and its components. Most of the major intelligence agencies serve both national and military consumers and the largest agencies, except the CIA,<sup>11</sup> are part of DOD.

After the DNI prepares a consolidated NIP and it is approved by the White House, it is forwarded to Congress as part of the Administration's overall annual budget submission along with relevant Congressional Budget Justification Books (CBJBs). The two intelligence committees review the NIP, holding hearings and preparing intelligence authorization legislation and accompanying committee reports. The two armed services committees also review national intelligence programs that are undertaken by DOD agencies (which constitute the bulk of the NIP largely due to the costs involved in satellite and signals intelligence systems). To facilitate and encourage cooperation between armed services and intelligence committees, the rules that established the intelligence committees provided that some members (at least one on HPSCI and two on SSCI) serve on both committees. Although there is considerable overlap between the oversight responsibilities of armed services and intelligence committees, intelligence authorization bills provide Congress with a means to address the entire intelligence effort from a perspective broader than that of the Defense Department.

A central challenge in overseeing intelligence activities is that budgeting and acquisition procedures were designed during the Cold War era when there were sharp distinctions between national and tactical intelligence and national-level consumers were largely limited to senior Washington policymakers. Today, in many cases, intelligence agencies serve an increasingly diverse variety of consumers throughout the government. Systems designed and operated to support policymakers in multiple agencies, such as reconnaissance satellites, are known as “national-level” systems. In many cases, however, they also produce information of direct interest to military commanders and a variety of other Federal offices and, especially in regard to terrorist threats, even to state and local level officials. On the other hand, tactical military intelligence is designed (and funded) to be used by a single military service. Today, this information may also be of direct interest to national-level policymakers especially in crisis situations. Although the original lines of demarcation between national and tactical intelligence have long since lost much of their importance for consumers of intelligence products, these categories are embedded in law and regulations and serve as the basis for acquisition and budgeting efforts. The cost of intelligence activities for national-level consumers was \$47.5 billion for FY2008;<sup>12</sup> military

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<sup>11</sup> CIA activities are not under the jurisdiction of the armed services committees, but funding for the CIA is “hidden” in defense authorization (and appropriations) legislation, i.e. the intelligence funds are not identified separately but are added to totals for other accounts.

<sup>12</sup> Office of the Director of National Intelligence, “DNI Releases Budget Figure for 2008 National Intelligence Program,” News Release No. 17-08, October 28, 2008.



intelligence which primarily supports military operations easily adds billions more although exact figures remain classified.

Both intelligence committees review the NIP, but responsibilities differ in regard to oversight of defense-wide and tactical intelligence systems. The House intelligence committee is responsible for authorizing “intelligence and intelligence-related activities of all ... departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense.”<sup>13</sup> The Senate intelligence committee is not assigned responsibility for tactical intelligence and intelligence-related activities which remain under the purview of the Senate Armed Services Committee (SASC). As a result, conference committees on intelligence authorization bills have always included members of the SASC.

The goal of the post-9/11 reform effort has been to encourage transformation from the agency-centric practices of the past to “a true Intelligence enterprise established on a collaborative foundation of shared services, mission-centric operations, and integrated mission management.”<sup>14</sup> In addition to well known threats from terrorist groups and hostile regional powers, the Intelligence Community should be organized to confront “a growing array of emerging missions that expands the list of national security (and hence, intelligence) concerns to include infectious diseases, science and technology surprises, financial contagions, economic compensation, environmental issues, energy interdependence and security, cyber attacks, threats to global commerce and transnational crime.”<sup>15</sup> Such a configuration of the Intelligence Community, if achieved, will involve systems and capabilities that extend well beyond DOD. The future evolution of the nation’s intelligence effort lies beyond the scope of this Report, but most observers believe that its focus should not be on strictly military concerns and that the range of collection efforts and of “customers” is much wider than in previous decades.

## **A Brief Case Study: The Challenge of Satellites and Other Overhead Surveillance Programs**

Some observers suggest that the absence of intelligence authorization legislation since FY2005 has had especially significant budgetary implications for overhead collection systems. For the national intelligence agencies in DOD—NSA, NGA, and the NRO—technical collection and processing systems are very expensive. Satellites, in particular often cost over \$1 billion each. Based on comments made by senior members of the Senate Intelligence Committee there have been major disputes over some programs with substantial budgets.<sup>16</sup> In 2004 media reports indicated that one classified satellite program originally opposed by the Senate intelligence committee, but supported by appropriations committees and HPSCI, almost doubled in cost from \$5 billion to nearly \$9.5 billion.<sup>17</sup> In 2007 SSCI’s report on the FY2008 authorization bill the

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<sup>13</sup> U.S. Congress, House of Representatives, Rule X(11)(b)(1)(D)(ii).

<sup>14</sup> Office of the Director of National Intelligence, *Vision 2015: A Globally Networked and Integrated Intelligence Enterprise*, [2008], p. 5.

<sup>15</sup> *Ibid.*, p. 4.

<sup>16</sup> Concerns have also been expressed by the Subcommittee on Oversight of the House Permanent Select Committee on Intelligence, “Initial Assessment on the Implementation of the Intelligence Reform and Terrorism Prevention Act of 2004,” July 27, 2006: “[M]any of the major acquisition programs at the National Reconnaissance Office, the National Security Agency, and the National Geospatial-Intelligence Agency have cost taxpayers billions of dollars in cost overruns and schedule delays.” (P. 14)

<sup>17</sup> Dana Priest, “New Spy Satellite Debated on Hill,” *Washington Post*, December 11, 2004, p. A1.

committee sharply criticized the space radar program (that apparently included both intelligence and non-intelligence components) and directed that no NIP funds be spent on the program.<sup>18</sup> Although that bill was not enacted, the program was eventually terminated in March 2008.

An October 2008 HPSCI report concluded: “there is no comprehensive space architecture or strategic plan that accommodates current and future national security priorities.”<sup>19</sup> Further, “the Intelligence Community and DOD seem at odds with each other over satellite program requirements. Without adequately defining the requirements of the combatant commanders, the Air Force and Intelligence Community are forced to hit an ever-moving or invisible target in managing overhead program requirements.”<sup>20</sup> Although some believe that “DOD needs its own space architecture to meet the needs of the war fighter,” executive branch [spokesmen have] stated several times that it is not in the best interest of the country to pursue separate national and military space architectures.”<sup>21</sup>

HPSCI’s report criticizes satellite programs that include funding by both the NIP and the Military Intelligence Program. The NIP is controlled by the DNI and SSCI and HPSCI have oversight responsibilities for it. The MIP, on the other hand, is controlled by the Secretary of Defense and the two armed services committees (with HPSCI having shared oversight of the MIP). HPSCI’s report indicates that there are also differences within DOD over some satellite surveillance programs that reflect different perspectives of the Undersecretary of Defense for Intelligence (who also reports to the DNI as well as the Secretary of Defense) and the Undersecretary of Defense for Acquisition, Technology and Logistics who is responsible for DOD acquisitions efforts.

Although the USD(I) advocates for intelligence, the USD(I) does not have acquisition decision authority within the DOD. The USD(AT&L) decides all acquisition matters.

The inability of the USD(I) to control the final acquisition decision for a program can lead to decisions over jointly funded programs that do not equally benefit the national and military customer.<sup>22</sup>

The reported difficulties in achieving consensus in DOD and the Executive Branch have been reflected in different organizational proposals made by different congressional oversight committees. For instance, the FY2007 Defense Authorization Act (P.L. 109-364) included a provision for the establishment of an operationally responsive space program office, separate from the NRO, that would develop space systems for combatant commanders<sup>23</sup> to address

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<sup>18</sup> US Congress, 110<sup>th</sup> Congress, 1<sup>st</sup> session, Senate, Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2008*, S.Rept. 110-75, May 31, 2007, p. 47.

<sup>19</sup> U.S. Congress, 110<sup>th</sup> Congress, 2<sup>d</sup> session, House of Representatives, Permanent Select Committee on Intelligence [Subcommittee on Technical and Tactical Intelligence], *Report on Challenges and Recommendations for United States Overhead Architecture*, H.Rept. 110-914, October 3, 2008, p. 2.

<sup>20</sup> *Ibid.*, p. 11

<sup>21</sup> *Ibid.*, p. 9

<sup>22</sup> *Ibid.*, p. 9.

<sup>23</sup> The future status of the Operationally Responsive Program remains uncertain; see U.S. Government Accountability Office, *Defense Space Activities: DOD Needs to Further Clarify the Operationally Responsive Space Concept and Plan to Integrate and Support Future Satellites*, GAO Report GAO-08-831, July 2008. In addition one independent commission has recommended combining the NRO and the Air Force Space and Missile Systems Center into a new organization that would report both to the Secretary of Defense and the DNI; see Institute for Defense Analyses, *Leadership, Management, and Organization for National Security Space: Report to Congress of the Independent* (continued...)

concerns that some systems may be viewed in isolation from others without adequate concern for the implications of a specific decision for the entire interlinked effort. Arguably, it is the intelligence committees that have the mandate to ensure the coherence of the intelligence acquisition effort throughout the Federal Government and that the primary vehicles for ensuring coherence are annual authorization bills. Skeptics might see proposals for operationally responsive space systems as potentially duplicative of Intelligence Community programs.

HPSCI also noted that within DOD there may be differences in approaches between the Under Secretary of Defense for Intelligence (USD(I)), who is the principal DOD point of contact with the DNI, and the Under Secretary of Defense for Acquisition, Technology and Logistics who may be more responsive to service needs.<sup>24</sup> Taking a different approach, the Senate-passed version of S. 3001, the FY2009 Defense Authorization bill provided<sup>25</sup> that the USD(I) may not establish or maintain “a capability to execute programs of technology or systems development or acquisition.” The Administration objected to this provision, arguing that such provisions would prevent the USD(I) for carrying out the activities for which it was created,<sup>26</sup> and it was deleted from the final version of the bill. The FY2009 Act, P.L. 110-417, requires instead that DOD produce a consolidated position: “the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, shall establish a policy and an acquisition strategy for intelligence, surveillance, and reconnaissance payloads and ground stations for manned and unmanned aerial vehicle systems. The policy and acquisition strategy shall be applicable throughout the Department of Defense and shall achieve integrated research, development, test, and evaluation, and procurement commonality.” The DOD report is to be provided both to the armed services and intelligence committees.

In addition, P.L. 110-417 also included a requirement for the DNI and Secretary of Defense to conduct a comprehensive review of the nation’s space policy including a description of current and planned space acquisition programs. This report was to be submitted to the armed services and intelligence committees by December 2009, but preparation has been reportedly delayed for several months. If the Executive Branch prepares a comprehensive space architecture the two intelligence committees would have major responsibilities to review it and to weigh its recommendations in an effort to authorize necessary programs and personnel with whatever modifications Congress finds appropriate. Other committees—especially the armed services and appropriations committees—would also have responsibilities to review such architectures.

Congress returned to the issue in FY2011 Defense Authorization legislation. Section 911 of P.L. 111-383 provides that the Secretary of Defense and the DNI shall develop an integrated process for national security space architecture planning, development, coordination, and analysis.

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(...continued)

*Assessment Panel on the Organization and Management of National Security Space*, July 2008.

<sup>24</sup> Concern over the relationships between these two offices was reflected in language that was included in the Senate version of the Defense Authorization Act for FY2009, but removed after strong White House complaints.

<sup>25</sup> In section 922.

<sup>26</sup> U.S., Office of Management and Budget, Statement of Administration Policy, S. 3001–National Defense Authorization Act for FY2009, September 9, 2008, p. 2.

## Related Concerns about Intelligence Oversight

Concerns about the effectiveness of congressional intelligence oversight have been expressed both by members and by outside observers for some time. As noted above, the need for closer integration of the nation's intelligence effort was a principal finding of the various assessments of the Intelligence Community's performance prior to the 9/11 attacks and Operation Iraqi Freedom. These assessments had concluded that intelligence agencies had not effectively coordinated the acquisition and dissemination of information on terrorism.

The 9/11 Commission was especially critical of congressional oversight:

So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want or need. The United States needs a strong, stable and capable congressional committee structure to give America's national intelligence agencies oversight, support, and leadership.

...

Tinkering with the existing structure is not sufficient. Either Congress should create a joint committee for intelligence, using the Joint Atomic Energy Committee as its model, or it should create House and Senate committees with combined authorizing and appropriations powers.<sup>27</sup>

In response to the 9/11 Commission's recommendations, the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) established the position of DNI (and the Office of the DNI (ODNI)) with wide-ranging authorities over all intelligence agencies.<sup>28</sup> Many recommendations of the 9/11 Commission were eventually adopted by Congress and the Bush Administration including several that pertained to intelligence oversight,<sup>29</sup> but Congress neither established a joint intelligence committee nor has it moved to create a committee having both authorizing and appropriating authorities.<sup>30</sup>

A joint intelligence committee, patterned after the Joint Atomic Energy Committee (JCAE), was suggested for consideration by the 9/11 Commission. The JCAE was an exceptional entity that was created in 1946 with broad oversight responsibilities for the newly established Atomic Energy Commission (AEC). As one CRS report has noted, "The [JCAE] combined both legislative and oversight functions which, for most of the life of the committee, essentially

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<sup>27</sup> National Commission on Terrorist Attacks Upon the United States, Final Report, *The 9/11 Commission Report*, Washington: Government Printing Office, [2004], pp. 419, 420.

<sup>28</sup> The ODNI, which includes the National Counterterrorism Center (NCTC), is understood to have a staff of over 1500 positions. Some members have expressed concern that the ODNI was growing too large and generating unnecessary reports from agencies. They argued that the congressional consensus is that the ODNI is to be "a coordinator, not a doer of functions." U.S. Congress, 110<sup>th</sup> Congress, 2d session, House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2009*, H.Rept. 110-665, May 21, 2008, Minority Views, p. 118.

<sup>29</sup> Total levels of funding for the NIP was made public on October 30, 2007 and again on October 28, 2008 in accordance with P.L. 110-53, the Implementing Recommendations of the 9/11 Commission Act of 2007. NIP funding is appropriated to the DNI, the House Intelligence Committee has an oversight subcommittee; the Senate has removed term limits for members of SSCI. The amount appropriated for FY2007 was \$43.5 billion; the amount for FY2008 was \$47.5 billion.

<sup>30</sup> For background on intelligence oversight structures, see CRS Report RL32525, *Congressional Oversight of Intelligence: Current Structure and Alternatives*, by Frederick M. Kaiser.

preempted all other congressional committees except the Committee on Appropriations, from having any say whatever over the items in the JCAE's jurisdiction.<sup>31</sup> Although the AEC had a permanent authorization, beginning in 1954, the JCAE reported authorization legislation for new construction projects and real estate acquisition. In 1963 the annual AEC authorization covered all activities of the commission and this practice continued until both the AEC and the JCAE were disbanded in the mid-1970s. In 1946, atomic energy was largely related to atomic bombs and a small secretive congressional committee seemed appropriate when the JCAE was established; two decades later, when the AEC's focus had shifted to the civilian uses of nuclear energy, Congress chose to revert to regular forms of congressional oversight.

In general, there was a close working relationship between the JCAE and the appropriators and appropriations and authorization levels were consistent.<sup>32</sup>

The other major suggestion of the 9/11 Commission was to consider "a single committee in each house of Congress, combining authorizing and appropriating authorities."<sup>33</sup> The relationship between authorizing and appropriations committees has a long history in the U.S. Congress that lies beyond the scope of this Report.<sup>34</sup> Since the 1920s, however, appropriations and authorization legislation have been separate. Annual appropriations acts govern most government activities; some government activities are authorized by standing authorization legislation but other, especially those related to DOD, are authorized on an annual basis. Annual authorization bills for DOD have been enacted since FY1960 and have become broad in scope, authorizing funding for almost every appropriations account in the DOD budget.

Given the practice followed by Congress for over eight decades, proposals to make authorizations and appropriations the responsibility of one committee in each chamber would be viewed with caution, especially by existing Committees on Appropriations.<sup>35</sup> Thus far, Congress has not been inclined to adopt this measure, but, partially in response to encouragement to be responsive to the 9/11 Commission, two steps have been taken. First, in 2004 the Senate adopted S.Res. 445 (of the 108<sup>th</sup> Congress) which (along with removing term limits for members of SSCI and other changes in SSCI rules) established within the Committee on Appropriations a Subcommittee on Intelligence with "jurisdiction over funding for intelligence matters, as determined by the Senate Committee on Appropriations." This subcommittee, however, has never been established.

By House Resolution 35 in the 110<sup>th</sup> Congress a Select Intelligence Oversight Panel" was established within the House Appropriations Committee. This initiative creating a 13-member panel preserved the budgetary responsibilities of the Appropriations Committee, but created a panel composed of members from both the appropriations and intelligence committees to recommend funding for intelligence activities to be included in the defense appropriations act. These recommendations were used by the defense subcommittee in developing the classified

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<sup>31</sup> See CRS Report RL32538, *9/11 Commission Recommendations: Joint Committee on Atomic Energy -- A Model for Congressional Oversight?*, by Christopher M. Davis, p. 14.

<sup>32</sup> For further discussion of the implications of using the JCAE model for an intelligence committee, see CRS Report RL32538, *9/11 Commission Recommendations: Joint Committee on Atomic Energy -- A Model for Congressional Oversight?*, by Christopher M. Davis, p. 14.

<sup>33</sup> *9/11 Commission Report*, p. 420.

<sup>34</sup> See, however, CRS Report 97-684, *The Congressional Appropriations Process: An Introduction*, by Sandy Streeter; and the Government Accountability Office, *Principles of Federal Appropriations Law (Red Book)*.

<sup>35</sup> See CRS Report RL32659, *Consolidating Intelligence Appropriation and Authorization in a Single Committee: 9/11 Commission Recommendation and Alternatives*, by Sandy Streeter.

annexes accompanying the defense appropriations bill,<sup>36</sup> but there has been, however, little public information about the functioning of the panel.

In November 2007, the Senate Intelligence Committee held a hearing to examine congressional oversight of U.S. intelligence activities which indicated strong disquiet about prevailing procedures for addressing intelligence budgets. Chairman Rockefeller noted steps taken by the committee in the aftermath of 9/11 and described a Memorandum of Agreement (MOA) with the Senate Appropriations Committee and the Subcommittee on Defense Appropriations designed to improve the flow of information between the two committees by allowing staff from each committee to attend hearings and markups of the other committee. Senator Bond, the Vice Chairman, criticized the MOA as not having led to significant changes. He argued that the intelligence committee, with a staff of some 40 professionals, was better positioned to assess the merits of intelligence programs. His testimony indicated that the problem of inadequate coordination existed even when intelligence authorization bills had been enacted:

In 2000, the previous administration proposed a new collection program. Our Intelligence Committee analysis indicate[d] the program would cost substantially more than estimated and the utility of data collected did not justify the cost. Chairman Shelby and Vice Chairman Graham opposed the program. Chairman Rockefeller and I have supported program termination as well....

It took until recent time to end a program that at least should have been terminated a number of years ago, and unfortunately, all told, the loss to the taxpayers is astronomical, in the billions of dollars.<sup>37</sup>

At the hearing former members of Congress Lee Hamilton and Timothy Roemer, who had both served on the 9/11 Commission, reiterated their concerns with the current process. Former Representative Hamilton noted that the 9/11 Commission had judged congressional oversight of intelligence as being “dysfunctional” and noted that intelligence community officials tend to focus on committees that directly control funds; they

work hard to get the answer they want from the people who control their dollars. They take advantage of the fact that defense appropriators are mightily distracted from intelligence oversight because of their other responsibilities....<sup>38</sup>

When asked about his experience as chairman of HPSCI, Mr. Hamilton recalled:

And when I was chairman of the Intelligence Committee, we were frequently, continually bypassed. How did I deal with that? Well, I dealt with it by very, very close contact consultation with the chairman of the Appropriations Committee and the chairman of the Defense Subcommittee. And I tried to persuade them of the value of committee recommendations.<sup>39</sup>

Later in the hearing, Mr. Roemer added that intelligence agencies can “game” the system:

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<sup>36</sup> See U.S. Congress, House of Representatives, 110<sup>th</sup> Congress, 1<sup>st</sup> session, Committee on Appropriations, *Department of Defense Appropriations Bill, 2008*, H.Rept. 110-279, July 30, 2007, p. 3.

<sup>37</sup> Congressional Quarterly, Congressional Transcripts, “Senate Select Committee on Intelligence Holds Hearing on Intelligence Oversight,” November 13, 2007.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

they can circumvent that authorizing committee that has spent months doing budget oversight, that has spent years doing language capabilities and requirements and how that is for the rebuilding of our human resources and our human capabilities, and they go to two or three people on the Appropriations Committee and get around months and years of work on the authorizing committee.

Mr. Hamilton concluded that:

the Senate of the United States and the House of the United States is not doing its job. And because you're not doing the job, the country is not as safe as it ought to be, because one of my premises is that robust oversight is necessary for a stronger intelligence committee.<sup>40</sup>

## **The Intelligence Authorization Act of FY2010**

During the 111<sup>th</sup> Congress it was evident that there was determined interest in the enactment of intelligence authorization legislation, but it was also evident that there existed significant issues on which agreement would be difficult. A House bill (H.R. 2701) was reported by the House Intelligence Committee in June 2009. A Senate version (S. 1494) was reported in July 2009 and passed by the Senate in September 2009. It was sent to the House, but was held at the Speaker's desk. H.R. 2701 was given floor consideration in February 2010 and was passed by the House. Neither House nor Senate version was supported by the Administration and after extensive discussions, another Senate intelligence authorization bill (S. 3611) was reported in July 2010 and passed by the Senate in August 2010. This version was then incorporated into H.R. 2701 and passed the Senate in September 2010. It was subsequently accepted by the House just before the end of FY2010. It was ultimately signed by the President on October 7, 2010 and became P.L. 111-259.

According to media accounts, the issues that prevented earlier consideration of the legislation were the appropriate notification of members of Congress of covert actions and other sensitive activities—whether the practice of notifying just the chairmen and ranking members of the intelligence committees along with other congressional leaders was adequate.<sup>41</sup> Some provisions provoked veto threats from the Administration and views of members and senior executive branch officials were reconciled only after extensive discussions in the spring of 2010. Also difficult were provisions that affected parallel authorities of the DNI and the Secretary of Defense and the intelligence oversight role of the Government Accountability Office (GAO). Congressional efforts to oversee detention and interrogation practices after the 9/11 attacks and to establish specific penalties for intelligence personnel using certain interrogation techniques were major subjects of disagreement (although some of these were addressed in the Supplemental Appropriations Act of 2010, P.L. 111-212).

Inasmuch as the new fiscal year would begin prior to the enactment of P.L. 111-259, the act did not contain a classified annex for FY2010 similar to those that previous intelligence authorization acts incorporated to set spending levels for specific programs. The act addressed the issue of notification of covert actions in a way that avoided a veto and established the position of Inspector General for the Intelligence Community. It provided for the possibility of a greater

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<sup>40</sup> Ibid.

<sup>41</sup> See CRS Report R40691, *Sensitive Covert Action Notifications: Oversight Options for Congress*, by Alfred Cumming; also, CRS Report R40698, *"Gang of Four" Congressional Intelligence Notifications*, by Alfred Cumming.

oversight role for the GAO, and gave the DNI new acquisition and management authorities. For some observers the major accomplishment was simply the reestablishment of the practice of enacting an annual intelligence bill. Intelligence committee leaders have indicated their intent to secure passage of legislation for coming years.

## Conclusion

In recent years the U.S. Intelligence Community has begun a transformation from the agency-centric practices to “a true Intelligence enterprise established on a collaborative foundation of shared services, mission-centric operations, and integrated mission management.”<sup>42</sup> In addition to well known threats from terrorist groups and hostile regional powers, the Intelligence Community also confronts “a growing array of emerging missions that expands the list of national security (and hence, intelligence) concerns to include infectious diseases, science and technology surprises, financial contagions, economic compensation, environmental issues, energy interdependence and security, cyber attacks, threats to global commerce and transnational crime.”<sup>43</sup> Such a configuration of the Intelligence Community, if achieved, will involve systems and capabilities that extend well beyond DOD.

A major challenge for Congress, not just in oversight of the Intelligence Community but of many other agencies, is the synergism (or lack thereof) that results from the collaborative efforts of various agencies. Congressional oversight and funding responsibilities are divided agency-by-agency and committee-by-committee. Oversight and appropriations committees are challenged to assess the interagency efforts; making tradeoffs and adjustments to Administration plans and proposals can be very difficult. The intelligence committees, however, have been long established with well defined jurisdictions and sizable professional staffs. Intelligence authorization legislation does not, of course, guarantee effective interagency intelligence efforts, but proponents maintain that authorization acts are the best lever that Congress has in addressing the interagency effort.

If Congress has an important role in the oversight of this altered intelligence environment, the annual authorization process appears to represent one of the most important opportunities to exercise this role. The two intelligence committees are positioned to have the most comprehensive information on intelligence activities broadly defined including those conducted by agencies wholly independent of DOD. In the absence of intelligence authorization legislation, critics maintain that Congress does not exercise its option to adjust funding in accordance with a comprehensive assessment of the interrelationships of intelligence agencies. Some observers argue that this practice results in imbalances and weakens the overall intelligence effort; others maintain that the Executive Branch can efficiently adjust appropriated funds without unnecessary congressional micromanagement.

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<sup>42</sup> Office of the Director of National Intelligence, *Vision 2015: A Globally Networked and Integrated Intelligence Enterprise*, [2008], p. 5.

<sup>43</sup> *Ibid.*, p. 4.



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