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WASHINGTON, D.C. 20503

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(Senate)

## STATEMENT OF ADMINISTRATION POLICY

### S. 372 – Intelligence Authorization Act of FY 2007

(Sen. Rockefeller (D) WV)

The Administration strongly opposes S. 372, as reported by the Senate Select Committee on Intelligence and modified by the Rockefeller/Bond Managers Amendment. The bill fails to authorize appropriations of sufficient funds with sufficient flexibility for the effective conduct of U.S. intelligence activities. The bill should authorize the funding requested by the Administration for the conduct of intelligence activities, and without enacting, as section 103 purports to do, statutes that would be kept secret from the American public to regulate intelligence activities.

S. 372 does not authorize approximately four percent of the funding already appropriated for the National Intelligence Program (NIP) in the FY 2007 Defense Appropriations Act. In addition, the classified annex fences 50 to 100 percent of the funding for several projects pending the receipt of reports, earmarks significant resources for unrequested activities, and places onerous restrictions on hiring Intelligence Community (IC) personnel and contractors. Because we are already significantly into the fiscal year, these lower authorizations and restrictions would curtail many critical intelligence activities and could result in costly contract penalties.

S. 372 is inconsistent with the need for the effective conduct of intelligence activities, the protection of intelligence sources, methods, and activities from unauthorized disclosure, and legislative-executive comity and cooperation with respect to U.S. intelligence activities. If S. 372 were presented to the President, his senior advisers would recommend that he veto the bill.

The Administration has particular concerns with the following provisions:

- Mandatory Provision of Requested Documents in 15 Days Unless the President Claims Constitutional Privilege.

Section 108 provides that the Director of National Intelligence (DNI) and the head of any intelligence agency shall furnish “any intelligence assessment, report, estimate, legal opinion, or other intelligence information” within 15 days upon a request by: (1) a congressional intelligence committee, (2) any other congressional committee of jurisdiction, (3) the Chairman of a congressional intelligence committee, or (4) the Vice Chairman or Ranking Minority Member of a congressional intelligence committee. This section also provides that the DNI or the agency head cannot withhold the requested item “unless the President certifies that such document or information is not being provided because the President is asserting a privilege pursuant to the Constitution of the United States.” Such provisions are highly objectionable, because rather than facilitating

effective and cooperative interaction between the legislative and executive branches, they would foster political gamesmanship and elevate routine disagreements to the level of constitutional crises. Section 108 also is impractical and would require IC agencies to direct resources from critical missions to comply with broad information requests within an artificial deadline.

- Mandatory Notification to All Members, and Not Just Chairman, Vice Chairman, and Ranking Minority Member, on Extraordinarily Sensitive Matters.

Section 304 amends the existing congressional intelligence oversight provisions of the National Security Act so that notification to the intelligence committees means notification to “each member” of the committees. This section further requires that, in any case in which the DNI or the head of an intelligence agency fails to give the full notification to each member of an intelligence activity, the DNI or agency head must notify each member that a determination has been made not to provide information in full to all members of the committees; provide a classified statement of the reasons for such a determination; and provide a description of the “main features” of the intelligence activity. Section 304 also amends the reporting requirements for covert actions, and in cases where a determination has been made that it is essential to limit access to required reports, requires the DNI to: (1) notify each member that a determination has been made not to provide information in full to all members of the committees; (2) provide a classified statement of the reasons for such a determination; and (3) provide a description of the “main features” of the covert action. These reporting requirements themselves may require broader dissemination of the very facts that require limited access.

Section 307 makes such notification to each member a condition on use of funds for intelligence activities. These provisions establish an all-or-nothing approach to executive branch notification to the intelligence committees that could delay actions needed to meet urgent national security requirements and would discourage, rather than encourage, the sharing of extraordinarily sensitive information needed for effective legislative-executive relations with respect to the most sensitive intelligence matters. This provision, in practice, would seek to compel the disclosure to multiple additional persons of sensitive national security information as to which the President has determined that special protection must be provided.

- Detailed Reports to Congress on Any Detention and Interrogation Activities and on Any Clandestine Detention Facilities.

Section 313 requires the DNI to submit a report (by May 1, 2007) to the congressional Intelligence Committees on the Detainee Treatment Act of 2005. The reports are required to include, among other things, “all legal opinions” provided by the Department of Justice regarding the “meaning or application of the Detainee Treatment Act of 2005 with respect to the detention and interrogation activities” undertaken by any element of the intelligence community. Section 313 includes no exception for applicable legal privileges. Section 314 imposes similarly far-reaching disclosure requirements, obligating the DNI to submit within 60 days a detailed report on any current or former clandestine detention facility. In addition to raising grave constitutional issues, such matters are appropriately left to sensitive handling in the normal course between the

intelligence committees and the executive branch and should not be the subject of detailed statutory reporting requirements.

- New Inspector General (IG) for the IC, Cutting Across Departments and Agencies that Already Have an IG.

Sections 408 and 409(b) creates an IG of the IC in the Office of the DNI (ODNI), with a duty to keep the DNI and the congressional intelligence committees fully and currently informed of problems and deficiencies in U.S. intelligence activities and needed corrective action. The new IC IG would be authorized to conduct, supervise, and give policy direction for investigations in any element of the IC, each of which is, or is part of, a department or agency that already has a statutory IG. The existing IGs of all the IC elements are best suited to performing the investigation, inspection, and audit functions, without the organizationally dysfunctional interference of an outside entity like the proposed new IG. This provision also is inconsistent with the preservation of the authority of heads of departments and agencies over their respective departments and agencies so carefully preserved by the chain of command provision in the IRTPA.

- Public Disclosure of Amounts Annually Requested, Authorized, and Appropriated for the NIP.

Section 107 would require the President annually to disclose publicly the total amount requested for the NIP and would require Congress annually to disclose publicly the total amounts authorized to be appropriated, and appropriated, for the NIP. The Congress thoroughly examined this issue during its consideration of the Intelligence Reform and Terrorism Prevention Act (IRTPA), when Congress rejected publication of the NIP funding total. The funding information should continue to be kept classified, because disclosure of changes in funding totals over time could compromise intelligence sources, methods, and activities.

The Administration also strongly opposes:

- Sections 102, 103, and 106, which would incorporate a classified annex into the bill to make secret law, and thereby remove the flexibility of the Congress and the Executive Branch to modify and adapt provisions in the classified annex to meet changing conditions and requirements without seeking a statutory change;
- Section 406, which would inappropriately inject the ODNI Director of Science and Technology into the statutory research programs as well as acquisition functions and activities carried out by IC elements;
- Section 410, which would give the DNI sole authority to provide policy direction for the management of space-related intelligence assets and the development of space intelligence professionals. This provision would unduly constrain the President's flexibility to determine how best to provide accountability and responsibility for national space intelligence issues and fails to recognize the Secretary of Defense's significant role in this area; and

- Sections 421 and 434, which would require that: (1) the President appoint and the Senate confirm the heads of NSA, NGA, NRO, and the Deputy Director of CIA, which would unnecessarily create more PAS-level positions; and (2) future CIA Directors and Deputy Directors be appointed from civilian life, which would interfere with the President's prerogatives to appoint qualified individuals for and supervise the Nation's intelligence organizations.

The Administration has additional concerns with:

- Section 104, which would limit the authority of the DNI to exceed the authorized number of civilian personnel authorized for each element of the IC, which the Administration believes should be determined by justified need and limited by the availability of funds, rather than artificial caps;
- Section 407, which would transfer from the President to the DNI the authority to appoint the existing IC Chief Information Officer, which should be an appointment by the President alone;
- Section 411, which would provide an exception to certain provisions of the Freedom of Information Act for operational files of the ODNI, which goes beyond the current requirements of the ODNI;
- Section 425, which would purport to require submission of legislative recommendations to Congress in conflict with the Recommendations Clause of the Constitution; and
- Section 435, which would inappropriately expand the mission of the National Geospatial-Intelligence Agency, which should be determined based on the needs of the IC and not statutorily mandated.

The Administration is prepared to work with Congress towards the passage of an annual intelligence authorization bill that would strengthen the Nation's intelligence capabilities, so that the President can sign such a bill into law.

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