

INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR  
2013

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

**R E P O R T**

together with

**ADDITIONAL VIEWS**

[To accompany S. 3454]

The Select Committee on Intelligence, having considered an original bill (S. 3454) to authorize appropriations for Fiscal Year 2013 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon and recommends that the bill do pass.

**CLASSIFIED ANNEX TO THE COMMITTEE REPORT**

On February 13, 2012, acting pursuant to Section 364 of the Intelligence Authorization Act for Fiscal Year 2010 (Public Law 111-259), the Director of National Intelligence (DNI) publicly disclosed that the President's aggregate request for the National Intelligence Program (NIP) for Fiscal Year 2013 is \$52.6 billion. Other than for limited unclassified appropriations, primarily the Intelligence Community Management Account, the classified nature of United States intelligence activities precludes any further disclosure, including by the Committee, of the details of its budgetary recommendations. Accordingly, the Committee has prepared a classified annex to this report that contains a classified Schedule of Authorizations. The classified Schedule of Authorizations is incorporated by reference in the Act and has the legal status of public law. The classified annex is made available to the Committees of Appropriations of the Senate and the House of Representatives and to the President. It is also available for review by any Member of the Senate subject to the provisions of Senate Resolution 400 of the 94<sup>th</sup> Congress (1976).

## **SECTION-BY-SECTION ANALYSIS AND EXPLANATION**

The following is a section-by-section analysis and explanation of the Intelligence Authorization Act for Fiscal Year 2013 that is being reported by the Committee.

### **TITLE I—BUDGET AND PERSONNEL AUTHORIZATIONS**

#### *Section 101. Authorization of appropriations*

Section 101 lists the United States Government departments, agencies, and other elements for which the Act authorizes appropriations for intelligence and intelligence-related activities for Fiscal Year 2013.

#### *Section 102. Classified Schedule of Authorizations*

Section 102 provides that the details of the amounts authorized to be appropriated for intelligence and intelligence-related activities and the applicable personnel levels by program (expressed as full-time equivalent positions) for Fiscal Year 2013 are contained in the classified Schedule of Authorizations and that the classified Schedule of Authorizations shall be made available to the Committees on Appropriations of the Senate and House of Representatives and to the President.

#### *Section 103. Personnel ceiling adjustments*

Section 103 is intended to provide additional flexibility to the DNI in managing the civilian personnel of the Intelligence Community. Section 103(a) provides that the DNI may authorize employment of civilian personnel (expressed as full-time equivalent positions) in Fiscal Year 2013 in excess of the number of authorized full-time equivalent positions by an amount not exceeding 3 percent of the total limit applicable to each IC element under Section 102. The DNI may do so only if necessary to the performance of important intelligence functions.

Section 103(b) requires the DNI to establish guidelines that would ensure a uniform and accurate method of counting certain personnel under a system of personnel levels expressed as full-time equivalents. The DNI has issued such a policy. Subsection (b) confirms in statute the obligation of the DNI to establish these guidelines.

The DNI must report the decision to allow an IC element to exceed the personnel ceiling in advance to the congressional intelligence committees.

#### *Section 104. Intelligence Community Management Account*

Section 104 authorizes appropriations for the Intelligence Community Management Account (ICMA) of the DNI and sets the authorized full-time equivalent personnel levels for the elements within the ICMA for Fiscal Year 2013.

Subsection (a) authorizes appropriations of \$542,346,000 for Fiscal Year 2013 for the activities of the ICMA. Subsection (b) authorizes 827 full-time equivalent personnel for elements within the ICMA for Fiscal Year 2013 and provides that such personnel may be permanent employees of the Office of the Director of National Intelligence (ODNI) or detailed from other elements of the United States Government.

Subsection (c) authorizes additional appropriations and full-time equivalent personnel for the classified Community Management Account as specified in the classified Schedule of Authorizations and permits the funding for advanced research and development to remain available through September 30, 2014.

## **TITLE II—CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM**

### *Section 201. Authorization of appropriations*

Section 201 authorizes appropriations in the amount of \$514,000,000 for Fiscal Year 2013 for the Central Intelligence Agency (CIA) Retirement and Disability Fund.

## **TITLE III—GENERAL INTELLIGENCE COMMUNITY MATTERS**

### *Section 301. Restriction on conduct of intelligence activities*

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

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

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

### *Section 303. Non-reimbursable details*

Section 303 amends Section 113A of the National Security Act of 1947 (50 U.S.C. 404h-1) to increase the length of time an officer or employee of the federal government can be detailed to the staff of an element of the Intelligence Community funded through the NIP from two years to three. In addition, Section 303 clarifies that a non-reimbursable detail made under Section

113A shall not be considered an augmentation of the appropriations of the receiving element of the Intelligence Community.

The DNI requested that an extension of the length of service from two years to three years be made for members of the Armed Forces detailed to an element of Intelligence Community. This request was intended to align Section 113A with requirements for joint duty assignments among the military. Section 664(a) of Title 10 provides that joint duty assignments for military officers, other than general and flag officers, shall be no less than three years. The Committee determined that the flexibility of a three-year length of service should be available for civilian employees as well as military officers.

*Section 304. Software licensing*

Section 304 requires the chief information officer for an element of the Intelligence Community to conduct an inventory of software licenses held by such element, including those utilized and unutilized, by the element. This inventory is to be conducted in consultation with the Chief Information Officer of the Intelligence Community (CIO) and completed within 120 days of enactment. Not later than 180 days after enactment, the CIO shall provide the congressional intelligence committees with a copy of the reports along with any comments the CIO wishes to provide. The CIO shall transmit any portion of a report involving a component of a department of the U.S. government to the congressional committees with jurisdiction over such department simultaneously with submission of such report to the congressional intelligence committees.

*Section 305. Improper Payments Elimination and Recovery Act of 2010 compliance*

Section 305 requires the DNI and the directors of the CIA, the Defense Intelligence Agency (DIA), the National Geospatial-Intelligence Agency (NGA), and the National Security Agency (NSA) each to develop a corrective action plan, with major milestones, that delineates how such agencies will achieve compliance with the Improper Payments Elimination and Recovery Act of 2010, not later than September 30, 2013. Section 305(b) requires the relevant inspectors general to review the corrective action plan and assess whether it is likely to lead to compliance. Each assessment is to be provided to the congressional intelligence committees. The corrective action plans and inspector general assessments involving the DIA, NGA, and NSA shall also be submitted to the armed services committees of the Senate and House of Representatives.

*Section 306. Authorities of the Inspector General of the Intelligence Community*

Section 306 authorizes the Inspector General of the Intelligence Community (IC IG) to designate certain officers or employees in investigative positions within the Office of the Inspector General as law enforcement officers solely for the purpose of certain federal law enforcement retirement and pension benefit laws. The DNI requested this authority for the benefit of the CIA Inspector General (CIA IG) based upon the difficulties the CIA IG faces in recruiting and retaining experienced professional investigators from among the law enforcement

and inspectors general community. The bill includes this authority for the CIA IG in Section 401. Section 306 clarifies that this same authority also is available to the IC IG.

*Section 307. Modification of reporting schedule*

Section 307 changes the dates by which the IC IG and the CIA IG are required to prepare and submit semiannual reports on the activities of their offices from a calendar year basis to a fiscal year basis. This change will align these reporting requirements with the reporting requirements of other inspectors general in the Intelligence Community and facilitate joint audits, inspections and investigations.

*Section 308. Repeal or modification of certain reporting requirements*

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

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

In response to a request from the DNI, the Committee examined a set of recurring reporting requirements nominated by the Intelligence Community including those which arise from legislation reported or managed by committees other than the congressional intelligence committees. In addition, the Committee consulted directly with these other Senate committees that receive reports identified by the DNI. Section 308 eliminates eight reports that were burdensome to the Intelligence Community when the information in the reports could be obtained through other means or was no longer considered relevant to current concerns. Section 308 also modifies the period for two reporting requirements.

**TITLE IV—MATTERS RELATING TO THE CENTRAL INTELLIGENCE AGENCY**

*Section 401. Authorities of the Inspector General for the Central Intelligence Agency*

Section 401 authorizes the CIA IG to designate certain officers or employees in investigative positions within the Office of the Inspector General as law enforcement officers solely for the purpose of certain federal law enforcement retirement and pension benefit laws. The DNI requested this authority for the benefit of the CIA IG based upon the difficulties of the

CIA IG in recruiting and retaining experienced professional investigators from the law enforcement and inspectors general community.

The Committee considered this request of the DNI during the development of the Fiscal Year 2012 bill. Section 415 of the Intelligence Authorization Act for Fiscal Year 2012 (Public Law 112-87) directed the Inspector General of the Office of Personnel Management (OPM IG) to do a study of the personnel authorities and available personnel benefits of the CIA IG to include: (1) identification of any barriers or disincentives to the recruitment or retention of experienced investigators within the CIA IG's office; and (2) a comparison of the personnel authorities of the CIA IG with those of inspectors general of other agencies.

The report of the OPM IG was completed in June 2012 and confirmed that the CIA IG's inability to designate certain positions as law enforcement officers for retirement purposes "is a disincentive to the recruitment of experienced criminal investigators." With respect to the CIA IG's mission-related critical needs, the report noted that the CIA IG, like most inspectors general, investigates "a mixture of criminal, civil, and administrative cases" to include assault, contract fraud, illegal gratuities/bribery, possession of child pornography, sexual assault, theft, and weapons violations. The OPM IG concluded that "in order for the CIA Inspector General to fully achieve his mission of conducting independent and *effective* oversight of CIA operations and programs, he needs to select and retain professionally trained criminal investigators. To do so, his office must have the authority to offer potential candidates the same retirement benefits that they would receive in essentially identical positions at other [inspectors general offices]."

The Committee held a hearing with the IC IG, the CIA IG, and inspectors general from three other intelligence agencies on June 5, 2012, concerning issues facing inspectors general within the Intelligence Community, including questions concerning the inability of the IC IG and the CIA IG to offer law enforcement retirement and pension benefits to their officers and employees. The Committee expects be kept informed of the plans of the IC IG and the CIA IG to exercise this authority upon enactment.

#### *Section 402. Working capital fund amendments*

Section 402 amends Section 21 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403u) to provide authority for the service providers under the CIA Central Services Program to use resources to make their services known to their authorized customer base through government communication channels, but clarifies this authority shall not be used to distribute gifts or promotional items. In addition, Section 402 authorizes service providers to deposit receipts from the sale of their recyclable materials into the CIA working capital fund.

### **TITLE V—PREVENTING UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION**

#### *Section 501. Notification regarding the authorized public disclosure of national intelligence*

Section 501 requires government officials responsible for making certain authorized disclosures of national intelligence or intelligence related to national security to notify the congressional intelligence committees concurrent with such disclosures.

This provision is intended to ensure that the intelligence committees are made aware of authorized disclosures of national intelligence or intelligence related to national security that are made to media personnel or likely to appear in the press, so that, among other things, these authorized disclosures may be distinguished from unauthorized "leaks."

Section 501(c) provides that the notification requirement does not apply to a disclosure made pursuant to statutory requirements, in connection with civil, criminal or administrative proceedings, as a result of a declassification review process under Executive Order 13526, or to cleared government representatives with a need to know.

*Section 502. Requirement to record authorized disclosures of classified information*

Section 502 requires that the head of each element of the Intelligence Community maintain a record of certain authorized disclosures of classified information and to make such records available for review by the congressional intelligence committees.

This provision is intended to ensure that Intelligence Community elements maintain a record of authorized disclosures of classified information that are made to media personnel or likely to appear in the press, which may facilitate the investigation of unauthorized disclosures of classified information.

*Section 503. Procedures for conducting administrative investigations of unauthorized disclosures*

Section 503 directs the DNI to establish procedures, within 90 days, to be implemented by each element of the Intelligence Community, for the conduct of investigations of unauthorized disclosures of classified information.

On May 7, 2011, the DNI established procedures and guidance for conducting investigations of unauthorized disclosures. These implemented a series of reforms relating to the conduct of administrative investigations of unauthorized disclosures and the prioritization of crimes reports.

Section 503 codifies a statutory mandate for these procedures and requires that they incorporate certain additional elements not present in the existing procedures and guidance.

*Section 504. Assessment of procedures for detecting and preventing unauthorized disclosures*

Section 504(a) directs the DNI to prepare an assessment to be provided to the congressional intelligence committees, within 120 days, regarding the feasibility of extending the use of the polygraph, the benefits of extending automated insider threat detection capabilities, and actions that could be taken to address improper classification.

Section 504(b) directs the IC IG to perform an assessment, within 120 days, of the effectiveness of the process used by each element of the Intelligence Community for preventing, detecting, and investigating unauthorized disclosures of classified information and describe any best practices that could be replicated throughout the Intelligence Community.

*Section 505. Prohibition on certain individuals serving as consultants*

Section 505 prohibits certain persons possessing an active security clearance from entering into contracts or other binding agreements with the media in order to provide analysis or commentary on matters concerning classified intelligence activities or intelligence related to national security. Section 505 also prohibits certain persons who formerly possessed an active security clearance for access to top secret, sensitive compartmented information from entering into such contracts or agreements for a period of one year after they leave government service.

This provision is intended to restrict the practice of current and former cleared government personnel appearing in media broadcasts in order to discuss matters concerning classified intelligence activities.

*Section 506. Limitation on persons authorized to communicate with the media*

Section 506 provides that for each element of the Intelligence Community, only the Director and Deputy Director of such element and individuals in the offices of public affairs who are specifically designated by the Director may provide background or off-the-record information regarding intelligence activities to the media.

Section 506(b) clarifies that this section does not prohibit an officer or employee of an element of the Intelligence Community from providing authorized, unclassified, on-the-record briefings to the media, or to any person affiliated with the media. Thus, this provision would not prohibit an Intelligence Community official from providing necessary threat or other unclassified information to the public, provided the official was acting in his or her official capacity and was authorized to speak to the media on-the-record.

*Section 507. Responsibilities of Intelligence Community personnel with access to classified information*

Section 507 provides that, within 120 days, the DNI shall prescribe regulations and requirements specifying the responsibilities of Intelligence Community personnel with access to classified information, including regulations and other requirements relating to contact with the media, non-disclosure agreements, prepublication review, and disciplinary actions.

*Section 508. Report on improvements to the criminal process for investigating and prosecuting unauthorized disclosures of classified information*

Section 508 requires the Attorney General to prepare a report for the congressional intelligence and judiciary committees, within 180 days, on the effectiveness of and potential



improvements to the process for investigating and prosecuting unauthorized disclosures of classified information and to report on potential improvements to this process. In the report, the Attorney General is required to address potential modifications to the process used by elements of the intelligence community to submit crimes reports of unauthorized disclosures of classified information to the Attorney General, potential modifications to the policies of the Department of Justice on issuing subpoenas directed at members of the news media, and potential modifications to the Classified Information Procedures Act.

*Section 509. Improving insider threat initiatives*

Section 509 requires that the head of each element of the Intelligence Community designate an insider threat program manager with responsibility for developing a comprehensive insider threat program management plan.

The Committee has determined that existing intelligence community efforts to counter insider threats are not centrally managed so as to effectively allocate resources between and among the disciplines of counterintelligence, physical security, information security, and human resources.

Section 509(a) specifies that an insider threat program manager designated by an element head shall have access to all relevant information regarding the allocation of resources to efforts by such element to counter insider threats, but that such access does not necessarily need to include information concerning specific counterintelligence or security investigations, which may need to remain compartmented. Nonetheless, the head of an element, at his or her discretion, may conclude that the insider threat program manager for the element should have access to information concerning specific counterintelligence or security investigations and authorize such access.

Sections 509(b) and 509(c) set forth milestones for the development and implementation of a comprehensive insider threat program management plan for each element, including a requirement that the plan be approved by the head of the element and the DNI, notified to the congressional intelligence committees, and implemented within two years of the date of enactment of the Act.

*Section 510. Automated insider threat detection program*

Section 510 extends by one year the milestones for establishment of an automated insider threat detection program under Section 402 of the Intelligence Authorization Act for Fiscal Year 2011 (Public Law 112-18). The administration had requested a two-year extension of the milestone for "initial operating capability" and a three-year extension of the milestone for "full operating capability." The Committee, however, believes that the Intelligence Community must move more rapidly toward establishment of this program.

*Section 511. Surrender of certain benefits*

Section 511 authorizes the surrender of government contributions made to an individual's current or future federal pension benefits if it is determined that the individual violated the prepublication review requirements of his signed non-disclosure agreement in a manner that disclosed classified information to an unauthorized person or entity. Section 511(a) requires the DNI to publish regulations, in coordination with the head of each element of the Intelligence Community, which set forth the administrative procedures applicable to an employee who violates the written terms of his signed non-disclosure agreement. In order to ensure that the government's procedures governing classified information are administered in an integrated manner, regulations published under Section 511 shall be consistent with any procedures established by Executive order or regulation under Section 801 of the National Security Act.

Section 511(b) requires that such non-disclosure agreements will: (1) prohibit an employee from disclosing classified information without authorization; (2) require the employee to comply with all prepublication review requirements; (3) specify appropriate disciplinary action, including the surrender of any current or future federal government pension benefits, to be taken against the employee if the DNI or the head of the employee's element of the Intelligence Community determines that the employee knowingly violated the prepublication review requirements contained in the non-disclosure agreement in a manner that disclosed classified information to an unauthorized person or entity; and (4) describe procedures for making and reviewing disciplinary determinations in a manner consistent with the due process and appeal rights otherwise available to an employee who is subject to the same or similar disciplinary action under existing law. These non-disclosure agreement requirements are consistent with and do not supersede, conflict with, or otherwise alter Intelligence Community employee obligations, rights, or liabilities established by federal law, statute, or regulation. In particular, the Committee notes that this provision has no impact on any laws relating to whistleblowers. Unauthorized disclosure of classified information to the media or the public is not permissible under any existing whistleblower protection laws, and would therefore not be covered under this provision.

Section 511 provides a mechanism for the DNI to enforce the contractual obligations contained in a non-disclosure agreement with respect to prepublication review requirements, for both current and former Intelligence Community employees. Such agreement may be enforced either during or subsequent to employment. The use of the term "surrender" is crucial to this contractual concept. Section 511 is not intended to give the DNI the authority to revoke or take pension benefits on his own and without reference to the agreement between the employee and the Intelligence Community element. Rather, each individual employee may now be held to the promise to surrender federal government pension benefits if it is determined, in accordance with the applicable administrative procedures, that the individual knowingly violated the prepublication review requirements in a manner that disclosed classified information to an unauthorized person or entity. It is important to note that there is no requirement that the disclosure of classified information also be done knowingly. The Committee believes that imposing such a requirement would allow those who purposely bypass the prepublication review procedures to claim that they did not reasonably know that their published information was classified—a fact about which they would have been informed had they complied with their prepublication requirements in the first place.

For the purposes of Section 511, the term “federal government pension benefit” includes the specific government contributions to an employee's Federal Government pension plan, in its fair market value. The term does not include any Social Security benefits, Thrift Savings Plan benefits or contributions, or any contribution by a person to a federal government pension plan, in their fair market value. These limitations ensure that the only part of the individual’s pension that is subject to surrender under the authorities of this provision is that portion funded by U.S. taxpayers.

The Committee notes that the DNI expressed objections to a similar provision that appeared in Section 403 of S. 719, the Intelligence Authorization Act for Fiscal Year 2011, as reported by the Committee on April 4, 2011. The DNI's letter of April 12, 2011, specifying those objections, may be found in the Appendix.

*Section 512. Prohibition on security clearances for individuals who disclose to the public evidence or information on United States covert actions*

Section 512 provides that, consistent with administrative procedures and due process afforded under otherwise applicable laws and regulations, individuals employed by, or under contract to, the Federal Government, or possessing an active security clearance, may not receive, retain, or otherwise possess a security clearance if they are determined to have knowingly made an unauthorized public disclosure of classified information concerning a classified covert action. This provision would not apply to such authorized disclosures of classified information concerning a classified covert action that are made between and among individuals possessing the requisite security clearances and need to know. Further, the Committee does not intend that approval by an original classification authority must be required for each individual disclosure in order to be considered "authorized."

## **TITLE VI—OTHER MATTERS**

*Section 601. Authorization of the Homeland Security Intelligence Program*

Section 601 authorizes the Homeland Security Intelligence Program (HSIP) within the Department of Homeland Security for activities of the Office of Intelligence and Analysis (OIA) that serve predominantly a departmental mission. The OIA is currently funded through the NIP. The Committee supports the request of the Secretary and DNI to fund OIA through the NIP and a new HSIP but is continuing to study the question of whether other intelligence activities of the Department should be included in the HSIP. The Committee intends to continue oversight of and authorize the HSIP.

*Section 602. Extension of National Commission for the Review of the Research and Development Programs of the United States Intelligence Community*

Section 602 extends the date by which the National Commission for the Review of the Research and Development Programs of the United States Intelligence Community is required to

submit a report on its findings from “not later than one year after the date on which all members of the Commission are appointed pursuant to Section 701(a)(3) of the Intelligence Authorization Act for Fiscal Year 2010” to not later than March 31, 2013, which is effectively one year after the Commission was able to begin its review. The extension was requested by the co-chairs of the Commission in a letter to the Committee.

*Section 603. Public Interest Declassification Board*

The Public Interest Declassification Board (PIDB) was created in the Intelligence Authorization Act for Fiscal Year 2000 to promote public access to a thorough, accurate, and reliable documentary record of significant United States national security decisions and activities. Section 603 extends the authorization for the PIDB to 2018 and eliminates certain limitations on the length of service of members of the Board.

*Section 604. Provision of classified opinions of the Office of Legal Counsel to Congress*

Section 604 requires the Attorney General to provide certain information concerning opinions of the Office of Legal Counsel (OLC) at the Department of Justice to the congressional intelligence committees.

Section 604(a) requires the Attorney General, in coordination with the DNI, to provide the congressional intelligence committees with a copy of every classified OLC opinion that was provided to an element of the Intelligence Community on or after September 11, 2001.

Section 604(b) requires the Attorney General, in coordination with the DNI, to provide the congressional intelligence committees with an annual listing of every OLC opinion provided to an element of the Intelligence Community, whether classified or unclassified.

Section 604(c) provides an exception to the disclosure requirements in sections 604(a) and (b) where the President determines that it is essential to limit access to a covert action finding under section 503(c)(2) of the National Security Act. In such cases, the President may limit access to information concerning such a finding that is subject to disclosure under subsection (a) or (b) to those members of Congress who have been granted access to the relevant finding.

Section 604(d) provides a second exception to the disclosure requirements in sections 604(a) and (b) where the President determines that information subject to disclosure under subsection (a) or (b) is subject to Executive privilege. In such cases, the Attorney General must notify the congressional intelligence committees, in writing, of the legal justification for the assertion of the privilege prior to the date by which the opinion or listing is required to be disclosed.

The Committee regularly conducts oversight of intelligence activities that are the subject of one or more OLC legal opinions. The Committee regards access to these legal opinions as

necessary to the performance of its oversight functions and often requests access to such opinions when the committee is made aware of their existence.

While the Committee in general is kept apprised of the legal basis for U.S. intelligence activities, neither the Department nor the Intelligence Community routinely accommodates the Committee's requests for full OLC opinions. Furthermore, oral or written summaries of the legal basis for U.S. intelligence activities often do not provide the level of detail necessary for the Committee to fully carry out its oversight functions, as such summaries often omit relevant information, including the application of law to the specific facts present in a particular intelligence activity.

Finally, neither the Department nor the Intelligence Community regularly advises the Committee of the existence of OLC opinions that are relevant to the Committee's oversight functions. This presents a particular impediment to the Committee's oversight function, as the Committee cannot request access to legal analysis when it is not made aware that such analysis exists.

The Committee recognizes that some OLC opinions are entitled to Executive privilege. The Committee further recognizes that access to information concerning certain compartmented covert action programs must be restricted. Therefore, subsections 604 (c) and (d) provide exceptions for such cases.

*Section 605. Technical amendments related to the Office of the Director of National Intelligence*

Sections 2302 and 3132 of Title 5 of the United States Code exclude from the definition of "agency" under those chapters certain specifically listed agencies such as the CIA. In addition, Sections 2302 and 3132 exclude from the definition of "agency" those executive agencies that the President determines have as their principal function "the conduct of foreign intelligence or counterintelligence activities." Section 605 amends the definition of agency in Sections 2302 and 3132 to expressly identify the ODNI as an agency excluded from the definition of "agency" under those chapters.

*Section 606. Technical amendment for definition of intelligence agency*

Title VI of the National Security Act of 1947 imposes criminal penalties for the disclosure of the identity of covert agents of an intelligence agency. The current definition of an "intelligence agency" does not include the counterintelligence elements of the Department of Defense or the intelligence and counterintelligence components of other elements of the Intelligence Community despite the fact that these components may be conducting counterintelligence operations jointly with the Federal Bureau of Investigation or under their own independent authority. Section 606 thus amends Section 606(5) of the National Security Act of 1947 (50 U.S.C. 426) to revise the definition of "intelligence agency" to include all elements of the Intelligence Community, as found in Section 3(4) of the National Security Act.

*Section 607. Budgetary effects*

Section 606 provides that the budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go-Act of 2010, shall be determined by reference to the latest statement titled “Budgetary Effects of PAYGO Legislation” for this Act, submitted for printing in the Congressional Record by the Chairman of the Senate Budget Committee, provided that such statement has been submitted prior to the vote on passage.

## COMMITTEE COMMENTS

### *Unauthorized Disclosures of Classified Information*

The Committee is gravely concerned by both the quantity and substance of unauthorized disclosures of classified information (“leaks”) that continue to appear in media. The damage caused by such unauthorized disclosures cannot be overstated. Too many intelligence sources and methods have been compromised, ranging from counterintelligence capabilities to intelligence assets to foreign government relationships. As a result, terrorists and foreign adversaries have learned to improve their tactics, and American lives and the American national interest have been placed at greater risk.

The Committee also recognizes that such leaks are not limited to any particular agency, department, or branch of government. Moreover, the Committee is aware that the publication of classified information is not always a direct result of leaks by government insiders. Journalists may obtain such information from foreign sources or eyewitness (or a combination of sources). Or, as is sometimes the case, journalists may report inaccurate information that only appears to be classified.

The Committee-reported bill includes several legislative provisions that will help to prevent and detect unauthorized disclosures of classified information, identify those responsible, and ensure that they are appropriately disciplined. The Committee will continue to pay close attention to the issue of “leaks” and give careful consideration to other legislative measures that may be effective.

The problem of leaks, however, does not readily lend itself to any single set of solutions. Measures taken must be balanced as efforts to prevent leaks by limiting access to classified information may also work to limit the availability of vital intelligence to analysts and policy makers who have a need to know. Aggressive efforts to identify and prosecute leakers must be tempered by the need to protect rights to freedom of speech, freedom of the press, and due process that are enshrined in the Bill of Rights. Therefore, the Committee calls upon the Executive branch to be vigilant in the protection of classified information, to aggressively but responsibly investigate all unauthorized disclosures of classified information within the bounds of the law, and to prosecute or otherwise punish those found to be responsible for such disclosures. As is its mandate, the Committee will oversee these measures to ensure that efforts to stem the tide of leaks remain a priority.

Finally, the Committee calls upon those in all branches of government who have been entrusted with classified information to be mindful that they have taken an oath to protect that information, that they are duty bound to honor that oath, and that the security of the nation rests on their doing so.

#### *Offices of Inspectors General Funded in the National Intelligence Program*

The Committee is concerned about the stability of funding, personnel, and resources for the Offices of Inspectors General (OIGs) within the Intelligence Community and the policies and practices that may impede the mission or independence of these offices.

To ensure that agencies do not realign or cut resources from the vital oversight activities of the OIGs once Congress has determined an OIG's funding and personnel levels, the Committee considers these levels to be congressional interest items. In addition, the Committee expects that the DNI and other heads of intelligence agencies will identify the budgets of the OIGs within the agencies as distinct projects in future budget requests.

#### *Auditability*

While the Committee recognizes the Intelligence Community's notable efforts towards audibility in recent years, much remains to be achieved. Auditability is not just the responsibility of Intelligence Community financial management personnel—there must be a sustained commitment across the leadership of Intelligence Community agencies to align the resources and personnel efforts necessary to achieve success. Additionally, contracting officers, approving officers and budget officers must fully adopt the pursuit of auditability as a personal responsibility.

The National Reconnaissance Office (NRO) has received an unqualified audit opinion from its independent auditors for three years. In order for the other major agencies of the Intelligence Community to achieve unqualified audit opinions by 2016, critical work must be accomplished in Fiscal Year 2013. This requires the leadership of the ODNI, CIA, DIA, NSA and NGA to inculcate a sense of urgency, not just among financial managers, but also across the entire organization, to assure continued efforts are made to reach the ultimate goal of achieving "clean" audit statements.

#### *Department of Defense Intelligence Analysis*

As part of its oversight activities, the Committee reviews analysis produced by intelligence elements across the United States Government. The Committee is pleased to have daily access to the Joint Staff J2 Daily Intelligence Briefing but is concerned that daily and periodic intelligence produced by the Joint Intelligence Operations Centers (JIOCs) of the combatant commands (COCOMs) is not being provided to the Committee on regular basis.

The COCOM JIOCs make a significant contribution to the government's overall intelligence analysis. Each of the regional and functional COCOMs are members of the Defense

Intelligence Analysis Program managed by the DIA with clearly defined all-source analytic responsibilities. The intelligence products of the COCOM JIOCs should be made available to the congressional intelligence committees. The Committee thus directs the Director of DIA and the Under Secretary of Defense for Intelligence to ensure that the congressional intelligence committees are regularly provided with daily and periodic intelligence products from the JIOCs.

### *Space Launch*

The Committee remains concerned over space launch costs, particularly of the Air Force's Evolved Expendable Launch Vehicle (EELV) program. Costs have increased dramatically over several years. Fortunately, actions by both the United Launch Alliance (ULA) and the U.S. Air Force seem to have curtailed this cost growth in the near term. The Committee encourages both these groups to continue to seek efficiencies in the EELV program.

The Air Force and the NRO remain committed to the EELV program and are entering into agreements to buy Atlas-V and Delta-IV rockets in multi-booster blocks in an attempt to stabilize the EELV industrial base and garner further savings. However, at least one new entrant is demonstrating enough potential to enable competition.

The Committee believes it is in the nation's economic and national security interests to promote competition among U.S. space launch providers, and to do so as soon as potential competitors are viable.

The Committee understands that costs advertised by new space launch entrants may increase as those companies integrate rigorous Air Force processes, which, while suited for ensuring high levels of mission assurance, add substantial costs compared to those used in the commercial space launch sector.

One private space launch provider, SpaceX, has spent a total of \$1.2 billion since its inception in 2002. This amount includes developing the Falcon 1 rocket, Falcon 9 rocket, and Dragon capsule; building out the manufacturing facility in Hawthorne, California, the Rocket Development Facility in McGregor, Texas, and the launch complex in Kwajalein; construction to date of Space Launch Complex 40 at Cape Canaveral; and total costs of multiple Falcon-1 flights and three Falcon 9 flights. The U.S. government has much to gain with the success of SpaceX and the commercial orbital transportation services and cargo resupply services programs are infusing critical investments in the company.

The current EELV launch capability contract totals approximately \$1.2 billion per year just to maintain the infrastructure to launch an EELV. Launch costs for each satellite are additive to that amount.

The Committee believes the government should continue to position itself for the use of alternative launch providers pending demonstrations of reliability and performance in the EELV program. It is the hope that the government can reduce costs through competition while



maintaining a strong and healthy industrial base to ensure access to space for national security missions.

As the NRO works with alternative providers, the Committee directs the Office to place each of its planned launches into one of the three categories in the risk-based certification framework.

### COMMITTEE ACTION

On July 24, 2012, a quorum being present, the Committee met to consider the bill and amendments. The Committee took the following actions:

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

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

By a voice vote, the Committee agreed to the following en bloc amendments to: (1) expand congressional reporting of comprehensive insider threat program management plans, by Chairman Feinstein and Vice Chairman Chambliss; (2) amend the classified Schedule of Authorizations and annex, by Senator Coats, Senator Mikulski, and Senator Warner; (3) prohibit security clearances for those who knowingly disclose to the public classified information on U.S. covert actions, by Senator Burr; (4) amend the classified annex, by Senator Nelson; (5) amend the classified annex, by Senator Risch, as amended by Chairman Feinstein; (6) amend the classified Schedule of Authorizations and annex, by Senator Warner and Senator Udall as amended by Chairman Feinstein; (7) amend the classified annex, by Senator Warner; (8) amend the classified Schedule of Authorizations and annex, by Senator Rubio; (9) amend the classified annex, by Senator Rubio; (10) amend the classified annex, by Senator Rubio; (11) amend the classified Schedule of Authorizations and annex, by Senator Udall as amended by Vice Chairman Chambliss; (12) amend the classified Schedule of Authorizations and annex, by Senator Nelson as amended by Chairman Feinstein; and (13) amend the classified Schedule of Authorizations and annex, by Senator Blunt.

By a vote of 8 ayes to 7 noes, the Committee adopted an amendment by Vice Chairman Chambliss to the managers' amendment to provide for the surrender of government pension benefits by Intelligence Community employees or former employees who knowingly violate pre-publication requirements in non-disclosure agreements in a manner that disclosed classified information. The votes in person or by proxy were as follows: Chairman Feinstein—no; Senator Rockefeller—no; Senator Wyden—no; Senator Mikulski—no; Senator Nelson—aye; Senator Conrad—no; Senator Udall—no; Senator Warner—no; Vice Chairman Chambliss—aye; Senator Snowe—aye; Senator Burr—aye; Senator Risch—aye; Senator Coats—aye; Senator Blunt—aye; Senator Rubio—aye.

By a vote of 15 ayes to zero noes, the Committee adopted the managers' amendment as amended. The votes in person or by proxy were as follows: Chairman Feinstein—aye; Senator Rockefeller—aye; Senator Wyden—aye; Senator Mikulski—aye; Senator Nelson—aye; Senator Conrad—aye; Senator Udall—aye; Senator Warner—aye; Vice Chairman Chambliss—aye; Senator Snowe—aye; Senator Burr—aye; Senator Risch—aye; Senator Coats—aye; Senator Blunt—aye; Senator Rubio—aye.

By a vote of 10 ayes to 5 noes, the Committee adopted an amendment by Chairman Feinstein to authorize the CIA Inspector General and the Inspector General of the Intelligence Community to make individuals who hold investigative positions within their offices eligible for federal law enforcement retirement benefits. The votes in person or by proxy were as follows: Chairman Feinstein—aye; Senator Rockefeller—aye; Senator Wyden—aye; Senator Mikulski—aye; Senator Nelson—aye; Senator Conrad—aye; Senator Udall—aye; Senator Warner—aye; Vice Chairman Chambliss—no; Senator Snowe—aye; Senator Burr—no; Senator Risch—no; Senator Coats—no; Senator Blunt—aye; Senator Rubio—no.

By a vote of 15 ayes to zero noes, the Committee adopted an amendment to the classified annex by Senator Nelson. The votes in person or by proxy were as follows: Chairman Feinstein—aye; Senator Rockefeller—aye; Senator Wyden—aye; Senator Mikulski—aye; Senator Nelson—aye; Senator Conrad—aye; Senator Udall—aye; Senator Warner—aye; Vice Chairman Chambliss—aye; Senator Snowe—aye; Senator Burr—aye; Senator Risch—aye; Senator Coats—aye; Senator Blunt—aye; Senator Rubio—aye.

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

#### *Vote to report the committee bill*

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

### **COMPLIANCE WITH RULE XLIV**

Rule XLIV of the Standing Rules of the Senate requires publication of a list of any “congressionally directed spending item, limited tax benefit, and limited tariff benefit” that is included in the bill or the committee report accompanying the bill. Consistent with the determination of the Committee not to create any congressionally directed spending items or earmarks, none have been included in the bill, the report to accompany it, or the classified

schedule of authorizations. The bill, report, and classified schedule also contain no limited tax benefits or limited tariff benefits.

#### **ESTIMATE OF COSTS**

Pursuant to paragraph 11(a)(3) of rule XXVI of the Standing Rules of the Senate, the Committee deems it impractical to include an estimate of the costs incurred in carrying out the provisions of this report due to the classified nature of the operations conducted pursuant to this legislation. On xxx xx, 2012, the Committee transmitted this bill to the Congressional Budget Office and requested it to conduct an estimate of the costs incurred in carrying out unclassified provisions.

#### **EVALUATION OF REGULATORY IMPACT**

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

#### **CHANGES IN EXISTING LAWS**

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

## ADDITIONAL VIEWS OF SENATOR NELSON

My amendment, which was adopted by a roll call vote of 15-0, relates to critical decisions regarding replenishment of our nation's imagery architecture. Those decisions should not be rushed, and must be informed by a complete and comprehensive understanding of all available options.

BILL NELSON

ADDITIONAL VIEWS OF SENATORS WARNER, MIKULSKI, BLUNT, UDALL  
AND NELSON

Commercial Satellite Imagery

In our constrained budget environment, we are committed to reducing the billions of dollars in costs of acquiring electro-optical satellite imagery needed to satisfy the requirements of our nation's leaders, intelligence agencies, and military forces, while at the same time pursuing innovative solutions and technologies that may be obtained at substantial cost savings to the taxpayer over government-owned and operated systems.

Leveraging the commercial satellite industry – and sharing costs with private sector investment – helps meet the government's satellite imagery needs in an affordable manner. Moreover, meeting growing requirements for unclassified commercial imagery that can be easily used in the field by our military forces, shared readily with allies, and provided quickly to first-responders during natural disasters such as floods or forest fires, should be a high priority.

We are concerned about the process by which major decisions that will have negative, irreversible impacts on the U.S. commercial satellite industry were made. Cuts were made to commercial imagery even before the completion of the Office of Management and Budget-ordered review to determine future needs.

Of even greater concern is that these decisions were in direct contravention of the President's "Way Ahead" strategy for electro-optical imaging; the National Space Policy (PPD-4), which directs the Executive Branch to "purchase and use commercial space capabilities and services to the maximum practical extent when such capabilities and services are available in the marketplace and meet the U.S. Government's requirements [and] modify commercial space capabilities and services to meet government requirements when... the potential modification represents a more cost-effective and timely acquisition approach for the government"; and the Commercial Remote Sensing Policy, which states that the "United States Government will rely to the maximum practical extent on U.S. commercial remote sensing space capabilities for filling imagery and geospatial needs for military, intelligence, foreign policy, homeland security and civil users."

This decision process put the proverbial cart before the horse: a major program established by the Director of National Intelligence and the Secretary of Defense should be thoroughly examined before a decision to reduce it, not afterwards.

Cutbacks to the commercial satellite industry may result in the reduction of an American industrial base that creates high-tech jobs at home and has produced a nascent, yet innovative industry that has outpaced foreign competition. We have just seen the two major U.S. commercial imagery providers propose to merge into a single source of commercial imagery for the government – a development that could lead to a loss of competition and innovation, as well as higher costs.

The Intelligence Community's decisions led directly to this proposed merger. The commercial imagery providers took on greater risks and operating costs on an accelerated schedule and involving additional capital investments. They did so on the basis of the Government's request that commercial providers increase their collection capacity. The Intelligence Community's precipitous budgetary decision to reduce commercial imagery purchases has left both providers in a precarious position.

We are deeply concerned that this decision by the Government presented Congress with a fait accompli and left the legislative branch no chance to decide on the appropriate funding levels for commercial imagery.

While we are disappointed that the Committee did not address this issue through funding in the current version of this bill, we hope that it still will be addressed in the conferencing of this legislation. Furthermore, we support the actions of the Senate Armed Services Committee, which in its Fiscal Year 2013 National Defense Authorization Act, reported to the Senate on June 4, 2012, recommended an increase of \$125 million to restore some of the funding that was cut, as well as a provision that would require the Director of National Intelligence and the Secretary of Defense to sustain commercial imagery collection capacity today and into the future.

MARK R. WARNER  
BARBARA A. MIKULSKI  
ROY BLUNT  
MARK UDALL  
BILL NELSON

## ADDITIONAL VIEWS OF SENATOR WARNER

I support the passage of this bill, which contains robust provisions to stop leaks of classified information that damage our national security. As a relatively new member of this Committee I have been shocked at how much information I see on the front pages of our newspapers that ought to be kept behind closed doors. The culture in Washington, which has led to this proliferation of leaks, must be changed, so that we will no longer read almost every week about a new disclosure that can do grave harm to the nation.

Nevertheless, I also strongly believe that the Congress must be extremely careful about protecting the rights of intelligence community employees: they should not face a penalty such as the loss of pensions, without the due process protections afforded to every American. Furthermore, I believe it would be unfair to single out our intelligence officers for such penalties without also covering the literally thousands of other individuals who have access to sensitive information.

MARK R. WARNER

## MINORITY VIEWS OF SENATOR WYDEN

This intelligence authorization bill is the result of significant work by Chairman Feinstein, Vice Chairman Chambliss and their staff, and I commend them for the bipartisan manner in which they have worked to put it together. I believe that this bill contains several worthwhile provisions, including one that would renew the mandate for the Public Interest Declassification Board, and another that seeks to improve Congress' access to secret legal opinions written by the Department of Justice. Understanding how the executive branch secretly interprets public laws is an essential part of deciding whether laws need to be updated or reformed, so I am grateful for the leadership that Senators Feinstein and Chambliss have shown in trying to improve Congress' access to this secret legal analysis.

This bill also contains a number of provisions that are intended to address the problem of unauthorized disclosures of classified information. I share my colleagues' frustration with the problem of unauthorized disclosures. As the son of a newspaperman, I have great respect for the press and the absolutely vital role that they play in a democratic society, and I believe that it is particularly important to have transparent public debate about issues of foreign policy and national security. And I can certainly recall specific instances in which, despite my seat on the Senate Intelligence Committee, I found out about serious government wrongdoing – such as the NSA's warrantless wiretapping program or the CIA's coercive interrogation program – only as a result of disclosures by the press. It is also true, however, that unauthorized disclosures can jeopardize legitimately sensitive government activities and operations, and even put lives at risk.

One of the best analyses I have seen of the problem of unauthorized disclosures was a report published in July 2011 by the National Intelligence University. The report observed that this problem has been around for several decades, noting specifically that “The relative consistency in the number of unauthorized disclosures over the past 30 years demonstrates their persistent nature, independent of which political party controls the White House or Congress.” It also suggested that because it is typically very difficult to identify government employees responsible for disclosing classified information to the media, unauthorized disclosures are not a problem that can be solved with legislation. (The report also cited a number of other studies that have reached this same conclusion.) That being said, I see no reason why Congress should not try to help the executive branch safeguard information that it wishes to protect, as long as Congress is careful not to do more harm than good. I myself spent four years working on legislation to increase the criminal penalty for people who are convicted of deliberately exposing covert agents, out of concern for both national security and the well-being of the covert agents themselves. And I am proud to say that with help from a number of my Republican and Democratic colleagues, this legislation was finally signed into law in 2010.



Title V of this bill contains a number of provisions that are intended to address the problem of unauthorized disclosures. I am looking forward to further debate on these provisions, but I have serious concerns about one of them in particular, and that is the reason that I voted against this bill.

Section 511 of this bill would require the Director of National Intelligence (DNI) to establish an administrative process under which the DNI and the heads of the various intelligence agencies would have the authority to take away pension benefits from an intelligence agency employee (or a former employee) if the DNI or the agency head “determines” that the employee has knowingly violated his or her nondisclosure agreement and disclosed (or “leaked”) classified information.

I am concerned that the Director of National Intelligence himself has said that this provision would not be a significant deterrent to leaks, and that it would neither help protect sensitive national security information nor make it easier to identify and punish actual leakers. Beyond these concerns about the provision’s effectiveness, I am also concerned that giving intelligence agency heads the authority to take away the pensions of individuals who haven’t been formally convicted of any wrongdoing could pose serious problems for the due process rights of intelligence professionals, and particularly the rights of whistleblowers who report waste, fraud and abuse to Congress or Inspectors General. I raised this same concern when the provision was included in the Senate Intelligence Committee’s version of the intelligence authorization bill for fiscal year 2011, so I will repeat my reasoning here.

Section 511 - as approved by the Select Committee on Intelligence - gives the intelligence agency heads the power to take pension benefits away from any employee that an agency head “determines” has knowingly violated their nondisclosure agreement. However, it is entirely unclear to me which standard agency heads would use to “determine” that a particular employee was guilty of disclosing information. It seems clear that section 511 gives agency heads the power to make this determination themselves, without going to a court of law, but the language of the provision provides virtually no guidance about what standard should be used, or even whether this standard could vary from one agency to the next. No agency heads have yet told Congress what standard they believe they would be inclined or required to use. This means that if an agency head “determines” that a particular individual is responsible for a particular anonymous publication, he or she could conceivably take action to revoke that individual’s pension benefits even if the agency does not have enough proof to convict the employee in court.

Section 511 states that agency heads must act “in a manner consistent with the due process and appeal rights otherwise available to an individual who is subject to the same or similar disciplinary action under other law.” But federal agencies do not normally take away the pension benefits of former employees unless they are convicted of a crime or begin openly working for a foreign government. I do not believe that this “otherwise available” language is intended to require the government to get a criminal conviction, but beyond that I am not at all sure what impact this language is supposed to have and I am not sure that the various intelligence agency heads will know what it means either. This only increases my concern that this provision could be used to undermine or violate the due process rights of intelligence agency employees.

I am also especially troubled that section 511 is silent regarding disclosures to Congress and Inspectors General. Everyone hopes that intelligence agency managers and supervisors will act honorably and protect whistleblowers who come forward and go through proper channels to report waste, fraud and abuse in national security agencies, but this is unfortunately not always the reality. There are existing laws in place that are intended to protect whistleblowers who provide information to Congress and Inspectors General – and I believe that these laws should be strengthened – but section 511 does not specify whether it would supersede these existing statutes or not. I know that none of my colleagues would deliberately do anything to undermine protections for legitimate whistleblowers, but I am concerned that this provision could nonetheless have a negative impact on existing whistleblower protections.

It is unfortunately entirely plausible to me that a given intelligence agency could conclude that a written submission to the congressional intelligence committees or an agency Inspector General is an “unauthorized publication,” and that the whistleblower who submitted it is thereby subject to punishment under section 511, especially since there is no explicit language in the bill that contradicts this conclusion. Withholding pension benefits from a legitimate whistleblower would be highly inappropriate, but overzealous and even unscrupulous individuals have served in senior government positions in the past, and will undoubtedly do so again in the future. This is why it is essential to have strong protections for whistleblowers enshrined in law, and this is particularly true for intelligence whistleblowers, since, given the covert nature of intelligence operations and activities, there are limited opportunities for public oversight. But reporting fraud and abuse by one’s own colleagues takes courage, and no whistleblowers will come forward if they do not believe that they will be protected from retaliation.

Finally, I remain somewhat perplexed by the fact that section 511 creates a special avenue of punishment that only applies to accused leakers who have worked directly for an intelligence agency at some point in their careers. There are literally thousands of employees at the Departments of Defense, State and Justice, as well as the White House, who have access to sensitive information. Some of the most serious leaks of the past few decades have undoubtedly been made by individuals working for these organizations. I do not see an obvious justification for singling out intelligence community employees, particularly in the absence of evidence that these employees are responsible for a disproportionate number of leaks. And I am concerned that it will be harder to attract qualified individuals to work for intelligence agencies if Congress creates the perception that intelligence officers have fewer due process rights than other government employees.

Withholding pension benefits from individuals who are convicted of disclosing classified information may well be an appropriate punishment. This punishment is already established in existing laws, and I would be inclined to support efforts to clarify or strengthen these laws. But I am not inclined to give agency heads broad authority to take away the pensions of individuals who have not been convicted of wrongdoing, particularly when the agency heads themselves have not even told Congress how they would interpret and implement this authority. This is why I voted against this authorization bill. I look forward to working with my colleagues to amend this bill, and I hope that we will be able to reach an agreement that both achieves their goals and

addresses my concerns. All of my colleagues and I agree that illegal leaks can be a serious problem, but this does not mean that anything at all that is done in the name of stopping leaks is necessarily wise policy.

RON WYDEN

A P P E N D I X

DIRECTOR OF NATIONAL INTELLIGENCE  
WASHINGTON, DC 20511

APR 12 2011

✓ The Honorable Dianne Feinstein  
Chairman  
The Honorable Saxby Chambliss  
Vice Chairman  
Select Committee on Intelligence  
United States Senate  
Washington, DC 20510

The Honorable Mike Rogers  
Chairman  
The Honorable C.A. "Dutch" Ruppertsberger  
Ranking Member  
Permanent Select Committee on Intelligence  
United States House of Representatives  
Washington, DC 20515

Dear Madam Chairman Feinstein, Chairman Rogers, Vice Chairman Chambliss, and Ranking Member Ruppertsberger:

The Administration thanks the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence for their continued support of the Intelligence Community (IC) and its mission. We greatly appreciate the Committees' willingness to work with the Administration, and we are pleased that both the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence have included several provisions in S. 719/H.R. 754 that the Administration supports, namely, a technical fix for non-reimbursable details, specific expenditure authority for human intelligence and counterintelligence, modification to the schedule and requirements of the National Counterintelligence Strategy, and transfer authority for appropriations and other amounts for the intelligence elements of the Department of Defense. These provisions, if they become law, will facilitate more efficient operations and improve the IC's ability to accomplish its mission.

While the Administration appreciates the above provisions, the Administration has significant concerns with other provisions of the bills and the accompanying Classified Annexes, which are outlined below:

Section 403, Unauthorized disclosure of classified information (S. 719):

This provision requires the DNI to publish regulations relating to violations of prepublication review requirements contained in IC employee nondisclosure agreements. The Administration shares the Senate Select Committee on Intelligence's concern and frustration with the unacceptable number and severity of leaks of classified information. Leaks of classified information constitute a breach of public confidence and risk serious harm to the national security interests of the United States, including the lives of United States civilians and military service members, and citizens of our foreign partners.

Despite these shared concerns, the Administration does not support Section 403. This is so for three principal reasons:

First, the Administration does not believe that the potential loss of retirement benefits through an administrative forfeiture would constitute a deterrent sufficient to justify the creation

The Honorable Dianne Feinstein  
The Honorable Saxby Chambliss  
The Honorable Mike Rogers  
The Honorable C.A. "Dutch" Ruppertsberger

of such process. Obviously, a predicate to any administrative process would be the identification of the leaker. Of course, leakers take steps to protect their identity and avoid any sanction — administrative or criminal — for their conduct. It seems unlikely that a leaker would take different steps to avoid apprehension based upon whether the leaker believed he or she could be sanctioned criminally or administratively. Any person who would risk identification as a leaker necessarily risks a felony criminal conviction, incarceration, and forfeiture of any Government pension. If the threat of a felony conviction and incarceration did not deter a potential leaker, it is unlikely that the threat of the loss of retirement benefits due to administrative action would add a significant, additional disincentive. And although in our view it will not deter potential whistleblowers who follow established procedures, the provision fails to deter the targeted group — individuals that do not follow such procedures.

Second, any process to revoke a leaker's retirement benefits must include robust legal protections for the accused — e.g., to ensure due process. As such, Section 403 will only result in the substitution of one substantial and meaningful fact finding and adjudicative procedure for another. Consequently, the Administration believes that section 403 would not provide the Executive branch with a meaningful new tool in prosecuting leakers.

Third, both the initial administrative process and judicial appeals would carry the potential for disclosure of additional classified information. For example, while the Classified Information Procedures Act establishes procedures for the handling of classified information in criminal proceedings, there are no analogous statutory procedures for the protection of classified information in a civil appeal challenging an underlying administrative action.

The Administration is committed to taking positive and meaningful steps to address the problem of leaks. This includes new measures to protect classified information, control access to classified information, and identify and prosecute leakers. We do not believe that section 403 will advance this effort. Section 403 should be removed from the bill.

Section 413, Confirmation of appointment of the Director of the National Security Agency (S. 719):

This provision requires that the Director of the National Security Agency be appointed by the President, by and with the advice and consent of the Senate. Consistent with the recommendations of the National Commission on Terrorist Attacks upon the United States, the Administration believes that if this provision were to become law, a critical national security position could remain unfilled for a significant period of time, adversely impacting the management and function of the National Security Agency. The Administration therefore objects to the inclusion of this provision in the FY11 Intelligence Authorization Act.

Section 402, Insider threat detection program (S. 719/H.R. 754):

This provision requires the Director of National Intelligence (DNI) to create an automated insider threat detection program for the information resources of each element of the IC to detect unauthorized access to classified information. We wholeheartedly agree that we

The Honorable Dianne Feinstein  
The Honorable Saxby Chambliss  
The Honorable Mike Rogers  
The Honorable C.A. "Dutch" Ruppertsberger

must be vigilant and proactive in trying to detect, mitigate, and deter insider threats. The Administration supports a comprehensive insider threat detection capability and we are currently working toward its implementation.

The Administration, however, is concerned with the tight timelines required by this provision for the automated program's operational readiness (initial operating capability by October 1, 2012; full operating capability by October 1, 2013). The Administration believes that fixing firm timelines in statute for the program's operational readiness will not permit sufficient flexibility in managing the program. There are differing capability levels across the Government, and, as a result, improvements to insider threat detection require phased implementation. Throughout implementation, moreover, the Administration must ensure that privacy protections are in place, and that access to insider threat detection information and activities is limited to authorized personnel for authorized purposes. Accordingly, the Administration strongly requests that the provision instead grant the DNI flexibility in implementation timelines of the program.

Section 412, Accounts and transfer authority for appropriations and other amounts for the intelligence elements of the Department of Defense (S. 719/H.R. 754):

This provision provides the Secretary of Defense with transfer authority for appropriations available for intelligence, intelligence-related activities, and [intelligence-related] communications (S.719 does not contain the bracketed language). The Administration welcomes this provision, but recommends three minor revisions: One would permit, rather than require, the Secretary of the Treasury to establish accounts for the receipt of such transferred appropriations; a second would not limit transfers to "intelligence-related communications" appropriations, but permit transfers of other "communications" appropriations; and the third would authorize the Secretary of Defense to exercise this transfer authority "notwithstanding any other provision of law," so it is clearly in addition to other transfer authorities.

Section 102, Classified schedule of authorizations (S. 719/H.R. 754):

This provision sets a personnel limit as specified in the Classified Schedule of Authorizations with no provision to exceed the limit to meet operational needs or unforeseen requirements. The Administration requests that Section 102 be amended to authorize the employment of additional personnel up to five percent in excess of that established in the Classified Schedule of Authorizations to meet unforeseen IC operational needs or requirements.

Classified Annexes:

The Administration has recently been granted access to the Classified Annexes (containing the Schedule of Authorizations) to accompany the FY 2011 Intelligence Authorization Act. Based on this review, we have identified two significant concerns that we can reference in this unclassified letter. First, the funding reductions and direction in the Schedule of Authorizations will jeopardize manpower required for essential IC national security operations. Second, the funding reductions and redirection proposed in the Classified Annexes

The Honorable Dianne Feinstein  
The Honorable Saxby Chambliss  
The Honorable Mike Rogers  
The Honorable C.A. "Dutch" Ruppertsberger

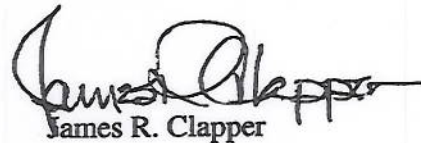
would negatively impact a much-needed technical collection program that is meeting acquisition milestones. The IC is conducting an assessment of an alternative to the Administration's technical collection program; until that assessment is completed, any reduction or redirection of funds is unwarranted and could jeopardize the scheduled operational capability of this critical national security collection system.

A separate classified letter will be transmitted which will more fully explain these and other Administration concerns.

The Administration requests that the Committees address the concerns highlighted in this letter. We need to resolve these issues before the Administration can reach a determination regarding support for this bill. We welcome the opportunity to work with the Committees to address the Administration's concerns.

The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,



James R. Clapper