



SENATE REPUBLICAN

POLICY COMMITTEE

Legislative Notice

No. 10

April 13, 2007

S. 372 – FY07 Intelligence Authorization Bill

Calendar No. 20

Reported by the Senate Select Committee on Intelligence on January 24, 2007, as an original bill by a vote of 12-3; S. Rpt. 110-2, with additional views filed, and a classified supplement. The Senate Armed Services Committee, on sequential referral, also approved the bill by voice vote; S. Rpt. 110-5, with a classified annex.

Noteworthy

- On Monday, April 16 at 3PM, the Senate will resume consideration of S. 372, the Intelligence Authorization Bill for Fiscal Year 2007. Except for some minor changes, S. 372 is identical to the bill on the same matter that was reported out of Committee by a vote of 15-0 in the last Congress. The changes relate primarily to date references, as well as other grammatical and technical corrections.
- At that time, Senator Rockefeller will be recognized to offer a Managers' Amendment on behalf of himself and Senator Bond. It is unclear if that amendment will be accepted on both sides.
- At 5:30PM that day, there will be a cloture vote on the bill.
- The Statement of Administration Policy is that "if S. 372 were presented to the President, his senior advisers would recommend that he veto the bill."
- No similar House bill has been introduced in this Congress.

Background/Overview

On January 24, 2007, the Senate Select Committee on Intelligence reported out S. 372, the Intelligence Authorization Bill for Fiscal Year 2007, by a vote of 12-3. In accordance with the resolution establishing the Senate Select Committee on Intelligence, the Senate Armed Services Committee reviewed the bill on sequential referral,¹ and it reported out the bill unamended by voice vote on February 8, 2007. Except for some minor changes, relating primarily to date references, as well as other grammatical and technical corrections, S. 372 is identical to the bill on the same matter that was reported out of Committee by a vote of 15-0 in the last Congress.

On Tuesday evening, April 10, 2007, Majority Leader Reid filed cloture on the motion to proceed to S. 372. The Senate invoked cloture on that motion on Thursday morning, April 12, 2007, by a vote of 94-3. Later that day, the motion to proceed was agreed to by unanimous consent, and Majority Leader Reid filed a cloture motion on the bill itself.

Thus, on Monday, April 16 at 3PM, the Senate will resume consideration of S. 372. At that time, Senator Rockefeller will be recognized to offer a Managers' Amendment on behalf of himself and Senator Bond. It is unclear if that amendment will be accepted on both sides. At 5:30PM that day, there will be a cloture vote on the bill.

This Legislative Notice covers the bill as reported.

House Action

In the 109th Congress, the House passed H.R. 5020, its proposed Intelligence Authorization Act for Fiscal Year 2007. There is no companion bill to S. 372 pending in the House this Congress.

Bill Provisions

Section 1 – Short Title

Section 1 provides that the short title of this bill may be cited as the Intelligence Authorization Act for Fiscal Year 2007.

¹ S. Res. 400, § 3(b), 94th Cong. (1976).

Title I – Intelligence Activities

Section 101 – Authorization of Appropriations

Section 101 lists the government entities for which the Act authorizes appropriations for intelligence and intelligence-related activities for fiscal year 2007.

Section 102 – Classified Schedule of Authorizations

Section 102 provides that the amounts authorized to be appropriated for the conduct of intelligence and intelligence-related activities, as well as the applicable personnel ceilings, are contained in a classified Schedule of Authorizations.

Section 103 – Incorporation of Classified Annex

Section 103 intends to incorporate into the bill the classified Annex to the Committee report.

Section 104 – Personnel Ceiling Adjustments

Section 104 authorizes the Director of National Intelligence (DNI) to authorize employment in fiscal year 2007 of civilian personnel in excess of the personnel ceilings provided in section 102 of the bill by an amount not to exceed 2 percent of the total of the ceilings provided. The DNI may exercise this authority only if necessary to the performance of important intelligence functions, and must report the execution of such authority to the intelligence committees of Congress.

Section 105 – Intelligence Community Management Account

Section 105 authorizes appropriations of \$648,952,000 for fiscal year 2007 for the activities of the Intelligence Community Management Account and sets the personnel end-strength for the elements within the Community Management Account for fiscal year 2007. This account is the principal source of funding and resources for the Office of the Director of National Intelligence (ODNI) to coordinate programs, budget oversight, and management of the intelligence agencies.

Section 106 – Incorporation of Reporting Requirements

Section 106 intends to incorporate by reference into the bill each requirement to submit a report contained in the Joint Explanatory Statement to accompany the conference report or in the Classified Annex accompanying the conference report.

Section 107 – Declassify Top Line of the Intelligence Community Budget

Section 107, for each fiscal year after fiscal year 2007, directs:

1. the President to disclose to the public the aggregate amount of appropriations requested for the National Intelligence Program, and
2. Congress to disclose to the public the aggregate amount of funds it appropriates to the National Intelligence Program.

Section 108 – Timeline of Response to Congressional Requests

Section 108 attempts to structure the time and manner in which the intelligence community responds to requests from Congress. As an initial matter, it puts into law that the intelligence community must respond within 15 days to a document or information request.² The Committee report claims that this requirement “applies only to existing intelligence documents and information and would not apply to requests to generate new intelligence assessments, reports, estimates, legal opinions, or other information.”

The section then requires that the intelligence community deliver the documents or information requested “unless the President certifies that such document or information is not being provided because the President is asserting a privilege pursuant to the Constitution.”

Title II – CIA Retirement & Disability System

Section 201 of the bill authorizes appropriations of \$256,400,000 for fiscal year 2007 for the Central Intelligence Agency Retirement and Disability Fund.

Title III – Intelligence & General Intelligence Community Matters

Section 301 – Employee Compensation and Benefits Increases

Section 301 provides that funds authorized to be appropriated for salary, pay, retirement, and other benefits for federal employees may be increased by such additional or supplemental amounts as may be necessary for authorized increases in such compensation or benefits.

Section 302 – Intelligence Activities Consistent with Law

Section 302 provides that the authorization of appropriations by the bill shall not be deemed to constitute authority for the conduct of any intelligence activity not otherwise authorized by the Constitution or laws of the United States.

² As a policy matter, it would seem that the details of inter-branch information and document requests should be a matter of comity rather than fiat outlined in public laws.

Section 303 – Intelligence Community Definition

Section 3(4) of the National Security Act of 1947, 50 U.S.C. § 401a(4), defines the elements of the intelligence community. Section 303 makes a technical correction to that definition.

Section 304 – Expanding Access to Sensitive National Security Information

Subsection (a) – defining the intelligence committees

This section amends the definition of “congressional intelligence committees” provided in Section 3(7) of the National Security Act, 50 U.S.C. § 401a(7), to provide that the committee means “each member” of the House and Senate Committees.

Subsection (b) – mitigating the protections provided by the Gang of Eight

Section 502 of the National Security Act, 50 U.S.C. § 413a, provides that the DNI shall keep the congressional intelligence committees “fully and currently informed of all intelligence activities” “to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” Section 503 of the National Security Act, 50 U.S.C. § 413b, provides that the Committees are to be similarly informed of covert actions. Thus, there are two separate legislative provisions that individually address how the Executive is to keep the Congress informed of 1) intelligence activities other than covert actions, and 2) covert actions.

With respect to covert actions, the National Security Act provides that if the President determines that it is essential to limit access to information about the covert action, disclosure may be limited to the so-called “Gang of Eight,” which is the Speaker of the House, House Minority Leader, the Senate Majority and Minority Leaders, and the Chairman and Ranking Member of both the House and Senate Intelligence Committees.³ In such cases, the National Security Act requires the President to provide “a statement of the reasons for limiting such access.”⁴

The legislative text related to informing Congress about intelligence matters other than covert actions, as confirmed by historical practice, envisions that there are certain intelligence matters that are not covert actions, which are still so sensitive that it is appropriate to inform only the Gang of Eight about them.

This section of the bill alters this practice and understanding. It provides that in such instances where each individual member of the Congressional committees is not informed of a

³ 50 U.S.C. § 413b(c)(2). The Minority side of the Congressional Committee investigating the Iran-Contra matter recommended that there might be matters so extraordinary that only a “Gang of Four,” the Majority and Minority Leaders of each of the Houses, be informed of such matters. Report of the Congressional Committees Investigating the Iran-Contra Affair, S. Rep. No. 100-216/H. Rep. No. 100-433, p. 585 (1987).

⁴ 50 U.S.C. § 413b(c)(4).

covert action or an intelligence matter other than a covert action, the DNI is to provide to each Committee member 1) a notification of this fact, including a justification for such action, and 2) certain information regarding the intelligence matter or covert action at issue. That information includes a summary of the intelligence activity or covert action “that provides sufficient information to permit such members to assess the legality, benefits, costs, and advisability of such activities.”

There are two other salient aspects of this subsection of the bill. First, it provides that this provision is not to be construed as authorizing less than full and current disclosure to all Committee members. Next, it requires that any change to a covert action finding must be reported to the committees, rather than the existing requirement to report any “significant” change to a covert action finding.⁵

Section 305 – Travel on Common Carriers

Section 305 amends Section 116 of the National Security Act of 1947, 50 U.S.C. § 404k, addressing the authorization of intelligence community personnel to travel on any common carrier.

Sections 306 & 307 – Limitation on Availability of Funds for Intelligence Matters

Section 504 of the National Security Act of 1947, 50 U.S.C. § 414, provides the circumstances and requirements under which appropriated funds to an intelligence agency may be obligated or expended. Section 306 of the bill makes a conforming amendment on this point. Section 307 creates an additional requirement that appropriated funds may be obligated or expended for an intelligence activity only if “the congressional intelligence committees have been fully and currently informed of such activity.” This section provides that the committees shall be treated as fully and currently informed of an intelligence activity or covert action if all Members have been provided a summary of the activity consistent with the requirements created in Section 304 of this bill.

Section 308 – Increased Penalties Related to Undercover Officers

Section 308 amends Section 601 of the National Security Act of 1947, 50 U.S.C. § 421, to increase criminal penalties for the unauthorized disclosure of information identifying a covert agent. It increases the maximum sentence for disclosure by someone who has had “authorized access to classified information that identifies a covert agent” from 10 years to 15 years; and increases the penalty for disclosure by someone who “as a result of having authorized access to classified information, learns of the identity of a covert agent,” from 5 years to 10 years.

⁵ As per Section 503 of the National Security Act, 50 U.S.C. § 413b, the President may not authorize the conduct of covert actions unless the President makes a “finding” meeting all of the outlined requirements of the section.

Section 309 – Use of Funds Paid as Debts to the Intelligence Community

Section 309 adds a new Section 1103 to the National Security Act of 1947 to authorize elements of the intelligence community to use certain funds received from private parties in certain ways, namely, as envisioned by Committee Report language, to expeditiously repair or replace lost or damaged property or equipment.

Section 310 – Privacy Act Pilot Project

The Privacy Act, 5 U.S.C. § 552a, generally precludes, with certain exceptions, the dissemination of information regarding U.S. persons that is stored within a system of records maintained by the U.S. government, without the consent of that individual. One exception does permit the sharing of information to support a civil or criminal law enforcement activity under certain prescribed circumstances; but there is no exception permitting intelligence community elements and other U.S. government agencies to share foreign intelligence or counterintelligence information between or with elements of the intelligence community. Section 310 addresses this shortcoming by creating a three-year pilot program to study a narrow intelligence exception to the Privacy Act to allow the transfer of such information under certain defined circumstances, such as when information pertains to an identifiable individual and is relevant to a lawful and authorized foreign intelligence or counterintelligence activity, or when the information is relevant to a lawful and authorized activity to protect against international terrorism or the proliferation of weapons of mass destruction. Senators Wyden and Feingold have published an Additional View to express a concern about this provision.

Section 311 – Authority to Delete Information about Foreign Gifts

Current law provides extensive requirements related to the receipt of gifts by federal employees from foreign governments. Section 311 expands the exemptions provided to intelligence community personnel related to the reporting and disclosure of such gifts.

Section 312 – Funds for Community Personnel Travel and Transportation

Section 312 provides the CIA and ODNI the same administrative authority as the Department of State with respect to travel and transportation authorized by valid travel orders beginning in one fiscal year but not completed during that same fiscal year.

Section 313 – Report Regarding Compliance with Detainee Treatment Act

Section 313 directs the DNI to submit a report on compliance with the Detainee Treatment Act,⁶ including a description of detention and interrogation methods. This specifically includes:

- a description of the detention or interrogation methods determined to comply with the Detainee Treatment Act, including

⁶ Codified at FY06 National Defense Authorization Act, Tit. XIV, Pub. L. No. 109-163, 119 Stat. 3136, 3474.

- the name of the official making such determination, and
- a statement of the basis for such determination
- a description of the detention or interrogation methods whose use has been discontinued pursuant to the Detainee Treatment Act, including
 - the name of the official making such determination, and
 - a statement of the basis for such determination
- an appendix containing all
 - guidelines for the application of the Detainee Treatment Act, and
 - legal opinions concerning the meaning or application of Detainee Treatment Act with respect to detention or interrogation activities.

Section 314 – Report Regarding CIA Detention Program

On September 6, 2006, the President made public that a small number of suspected terrorist leaders and operatives had been detained outside of the Guantanamo detention facility and outside of the United States. These individuals included the key architects of the attacks of September 11, against the USS Cole, as well as the embassy bombings in Kenya and Tanzania. As the President further explained, “This program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they’ve determined it complied with our laws. This program has received strict oversight by the CIA’s Inspector General. A small number of key leaders from both political parties on Capitol Hill were briefed about this program.” Moreover, when the President further announced that all these individuals had been transferred to the Guantanamo facility, it was the case at that time that there was no longer any detainee in CIA custody.

Section 314 requires the DNI to submit a detailed, classified report to Congress on this matter, including the location where the CIA detained individuals, and a description of the interrogation methods employed on such individuals. Other elements of the report include the size of the detention facility, the disposition of such facility if no longer operational, and the number of detainees held there.

Title IV – Matters Relating to Elements of the Intelligence Community

Subtitle A – Office of the Director of National Intelligence

Section 401 – Information Sharing Authorities

Section 401 provides additional statutory authority to the DNI to use National Intelligence Program funds to address deficiencies or needs that arise in intelligence information access or sharing capabilities.

Section 402 – Protection of Intelligence Sources and Methods

Section 102A(i) of the National Security Act of 1947, 50 U.S.C. § 403-1(i), gives the DNI the responsibility to protect intelligence sources and methods and provides that he may only

delegate such a duty or authority to his principal deputy. Section 402 of this bill amends this provision to permit the DNI to delegate this authority to any of his deputy directors or the Intelligence Community Chief Information Officer.

Section 403 – Human Intelligence Information Authorities

Section 403 amends the DNI’s authorities to ensure that he has the statutory authority to receive intelligence information collected through human sources, including the underlying operational data necessary to understand that reporting, and disseminate that information to appropriately cleared and authorized analysts or other intelligence officers throughout the intelligence community. The report language makes clear that access to human intelligence reporting, and underlying operational reporting, must be balanced against real threats to sources and methods.

Section 404 – Additional Administrative Authority

Section 404 provides an additional administrative authority to the DNI to approve, notwithstanding certain specified provisions of general appropriations law, interagency financing of national intelligence centers or other groups or entities established by the DNI, most notably the Mission Manager.

Section 405 – Location of ODNI Headquarters

The Intelligence Reform Act of 2004 provides that the ODNI “may not be co-located with any other element of the intelligence community.” Section 405 amends this to provide that this ban applies to the headquarters of the ODNI and the headquarters of any other element of the intelligence community.

Section 406 – ODNI DS&T

Section 406 clarifies and expands the role of the Director of Science and Technology within the Office of the DNI, and directs the DNI to submit a report on the development and use of technology throughout the intelligence community through 2021.

Section 407 – Appointment of Chief Information Officer

Section 407 converts the position of Chief Information Officer of the Intelligence Community from an appointment by the President, by and with the advice and consent of the Senate, to an appointment by the DNI.

Section 408 – Intelligence Community Inspector General

Section 1078 of the Intelligence Reform Act of 2004 authorized the DNI to establish an Office of the Inspector General if the DNI determined that an Inspector General “would be beneficial to improving the operations and effectiveness of the Office of the DNI.” The DNI has appointed an Inspector General. Section 408 statutorily creates an Office of the Inspector

General of the Intelligence Community, and essentially provides a charter for the Office. Of particular note, section 408 provides that the Inspector General may be removed only by the President, who must then communicate the reasons for the Inspector General's removal to the intelligence committees.

Section 409 – ODNI Elements & NCPC

Section 1021 of the Intelligence Reform Act of 2004 directed the President to create the National Counter Proliferation Center (NCPC), which he did. Section 409 clarifies that the DNI shall appoint the Director of the NCPC, and that NCPC shall reside in the ODNI. Section 409 also expressly adds three other officials to the statutorily-defined Office of the DNI.

Section 410 – National Space Intelligence Center

Section 410 establishes a National Space Intelligence Center within the ODNI and provides its charter.

Section 411 – FOIA Exemptions for ODNI Operational Files

Section 411 adds a new Section 700 to the National Security Act of 1947 to ensure that operational files provided by elements of the intelligence community to the ODNI retain their exemption from Freedom of Information Act (FOIA) requirements for search, review, publication, or disclosure.

Section 412 – Personnel Incentive Awards

Section 412 makes various technical and conforming amendments to reflect organizational changes and practice regarding the provision of monetary incentives to personnel detailed to the ODNI.

Section 413 – Repeal of NCIX Authorities

Now that the National Counterintelligence Center is within the ODNI, Section 413 makes the necessary technical and conforming amendments to reflect that circumstance.

Section 414 – Inapplicability of FACA to ODNI Advisory Committees

Section 414 extends the exemption of the Federal Advisory Committee Act to those advisory committees established or used by the ODNI.

Section 415 – DNI Membership on Transportation Security Oversight Board

Section 415 substitutes the DNI or his designee for the membership of the Director of the CIA (or his designee) on the Transportation Security Oversight Board.

Section 416 – Privacy Act Applicability to ODNI

Section 416 extends to the DNI the authority to promulgate rules under which certain records systems of the ODNI may be exempted from certain Privacy Act disclosure requirements.

Subtitle B – Central Intelligence Agency

Section 421 – CIA Director & Deputy Director

Section 421 requires that the President appoint, by and with the advice and consent of the Senate, the Director and Deputy Director of the CIA from “civilian life,” which is to be applicable to the next appointees.

Section 422 – Protecting CIA Intelligence Sources and Methods

The Intelligence Reform Act of 2004 provided the DNI with the responsibility to protect intelligence sources and methods from unauthorized disclosure. Section 422 supplements this authority with a comparable grant of authority to the Director of the CIA to protect CIA intelligence sources and methods from unauthorized disclosure.

Section 423 – Exceptions to Foreign Language Proficiency Requirements

Section 104A(g) of the National Security Act of 1947, 50 U.S.C. § 403-4a(g), provides that an individual cannot be appointed to a position in the Senior Intelligence Service in the CIA Directorate of Intelligence (DI) or Directorate of Operations (DO) (now the National Clandestine Service) unless the individual demonstrates at least a specified level of professional speaking and reading proficiency in a foreign language. The Director of the CIA may waive that requirement in his discretion if he determines that foreign language proficiency is not necessary for the successful performance of the duties and responsibilities of such position. Section 423 expands this waiver authority so that the Director can make the waiver for individual officers, rather than by job position.

Section 424 – CIA Protective Detail Personnel

Section 424 provides additional authorities to designated security personnel on CIA protective details.

Section 425 – Report on Air America Employee Retirement Benefits

Section 425 requires the DNI to submit a report on the advisability of providing retirement benefits to U.S. citizens who were employees of Air America before 1977.

Subtitle C – Defense Intelligence Components

Section 431 – NSA Training Program

Section 431 addresses the National Security Agency undergraduate training program.

Section 432 – NSA Protective Personnel

Section 432 clarifies and enhances the authority of NSA protective details.

Section 433 – Inspector General Matters

Some Inspectors General are appointed by the President with the advice and consent of the Senate, while others are administratively appointed by the heads of their respective federal entities. Section 433 provides that the Inspectors General of the NRO, DIA, NSA, and NGA, all of whom are administratively appointed, shall be considered “designated federal entities” under the Inspector General Act, with all the attending authorities thereof, such as access to information and subpoena power.

Section 434 – Confirmation of the Directors of Certain Community Elements

The directors of the NSA, NGA, and NRO are not confirmed by the Senate in their capacity as director of the agency.⁷ Section 434 provides that these appointees must now be nominated by the President and confirmed by the Senate.

Section 435 – NGA Information

Section 435 provides an additional mission to the National Geospatial-Intelligence Agency to include full-motion video and ground-based photography in its analytical efforts.

Section 436 – NGA Security Clearances

Section 436 provides that the Secretary of Defense shall, during the period beginning on the date of the enactment and ending on December 31, 2007, delegate to the NGA Director personnel security authority with respect to NGA that is identical to the personnel security authority of the NSA Director with respect to NSA. This would provide NGA authority to contract out background investigations and perform adjudications on individuals doing work for NGA, as NGA must currently rely on the Defense Security Service or the Office of Personnel Management for background investigations and on the DIA for adjudication.

⁷ If the appointee is a military officer being promoted or transferred into the position, the appointee may be confirmed by the Senate in that capacity, with the nomination passing through the Armed Services Committee.

Subtitle D – Other Elements

Section 441 – Foreign Language Incentives for Certain FBI Employees

Section 441 authorizes the FBI Director to pay a cash award, up to 5 percent of basic pay, to any FBI employee who uses or maintains foreign language skills in support of FBI analyses, investigations, or operations to protect against international terrorism or clandestine intelligence activities.

Section 442 – INR Contracting

Section 442 authorizes the Secretary of State, in certain circumstances, to enter into personal services contracts to support the mission of the Department’s Bureau of Intelligence and Research (INR).

Section 443 – Coast Guard and DEA as Intelligence Community Components

Section 443 clarifies that all of the Coast Guard’s intelligence elements are included within the statutory definition of intelligence community, and codifies the February 17, 2006 announcement that the Drug Enforcement Agency has been designated as an element of the intelligence community.

Title V – Other Matters

The individual sections of Title V make various conforming and technical amendments.

Administration Position

The Statement of Administration Policy is that “if S. 372 were presented to the President, his senior advisers would recommend that he veto the bill.” It expresses concerns in detail about sections 107 (declassify top line), 108 (15-day response to requests), 304 (detailed notification to every Committee member), 307 (authorization predicated on full disclosure), 313 (Detainee Treatment Act compliance report), 314 (CIA detention program report, including location), and 408 (Inspector General). It further states that it “strongly opposes” sections 102, 103, 106, 406, 410, 421, and 434. Finally, it expresses “additional concerns” with sections 104, 407, 411, 425, and 435.

Cost

CBO estimates that implementing certain provisions of the bill would cost \$10 million in 2007 and \$64 million over the 2007-2012 period, assuming appropriation of the necessary funds. Enacting S. 372 would also affect direct spending, but CBO cannot estimate those effects because the data required to prepare such an estimate are classified.

S. 372 contains an intergovernmental and private-sector mandate, namely \$66 million for intergovernmental mandates and \$131 million for private-sector mandates in 2007.

Other Views

Vice Chairman Bond and other Republican Senators published an Additional View to express concerns about Section 304 concerning the disclosure of intelligence information to Congress, and Section 314 demanding a reporting on CIA detention facilities.

Senators Wyden and Feingold published an Additional View to express their concern that the pilot program created in Section 310 to study a narrow intelligence exception to the Privacy Act merits further examination and debate before being passed into law. They expressed similar concerns about the additional authorities provided to NSA and CIA security personnel.

Senator Warner published an Additional View to express concerns about Section 304.

Senator Hatch published an Additional View to state that the reason he voted against the authorization bill is explained in the classified annex accompanying the report.

Possible Amendments

As of the publication of this notice, there is no unanimous consent agreement limiting the submission of amendments. On Monday, April 16 at 3PM, Senator Rockefeller will be recognized to offer a Managers' Amendment on behalf of himself and Senator Bond. It is unclear if that amendment will be accepted on both sides.

On Monday, April 16 at 5:30PM, there will be a cloture vote on the bill. If cloture is invoked, all non-germane amendments will be out of order.