

Testimony Of Jeffrey H. Smith¹
Senate Committee on Homeland Security and Governmental Affairs
March 17, 2010

Mr. Chairman, thank you for inviting me to appear this morning to discuss a very important topic, namely the implementation of the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”) that established the Director of National Intelligence (“DNI”) some five years ago. In particular, you have asked me to reflect on the role of the DNI and the organization of the Intelligence Community in light of the failure to prevent Abdul Farouk Abdulmutallab, the “Christmas bomber,” from getting on an airplane bound for the United States with a concealed bomb.

I am very pleased that the Committee is taking a hard look at how the statute has worked. And I must be candid: It is not working as well as it should.

To prepare for these hearings, I spoke to many senior Intelligence Community officers, including in the Office of the Director of National Intelligence (“ODNI”). My testimony this morning draws on those conversations and my own experiences over the years. What I found was very disturbing. It leads me to conclude that there is an urgent need for a serious in-depth look at the organization and functioning of the American Intelligence Community.

The Intelligence Community is very large and complex. It is a unique beast in the American government - sixteen agencies spread throughout seven separate government

¹ It has been my privilege to work in and with the U.S. Intelligence Community for 35 years, since I was hired in 1975 by the Office of the Legal Adviser of the Department of State to be the junior lawyer helping the department with the Church and Pike Committee investigations of the Intelligence Community. After my State Department service, I moved to the staff of the Senate Armed Services Committee where I was the General Counsel under Senator Sam Nunn and his designee to the Senate Intelligence Committee. Later I served as General Counsel of the CIA and have worked closely with the Intelligence Community in my private practice. And, I currently serve on the External Advisory Board of the Director of the Central Intelligence Agency.

departments and agencies, but with a singular mission: the provision of intelligence to the President and the execution of intelligence operations. Over the years, many efforts have been made to stitch the “community” into something more. But we’ve never agreed on what that “more” is.

The attacks of 9/11 starkly demonstrated that the previous system, in which the Director of Central Intelligence was “dual-hatted” as the Director of the CIA and the head of the U.S. Intelligence Community, had serious shortfalls. To address these problems, the 9/11 Commission recommended, among other things, the establishment of a National Intelligence Director who would head the U.S. Intelligence Community. I was a supporter of that legislation and still believe it was the right thing to do.

As this Committee knows, IRTPA gave the DNI broad responsibility, but not clear authority to carry out many of those responsibilities. The result is much confusion and inconsistency between the authorities of the DNI and those already held by others in the Community, including the Secretary of Defense and the Director of CIA.

This confusion over authorities lies at the heart of the problem. Senior officials tell me they spend an inordinate amount of time arguing over these authorities. This creates friction - and occasionally anger - that distracts from the accomplishment of their important missions. More disturbingly, some officers even speak about mistrust among agencies. This must be addressed.

This friction can erupt into unseemly bureaucratic warfare. One widely reported dispute had to be resolved by the White House. In my conversations, several officers said that experience left “scars” that will take a long time to heal.

The men and women of the United States Intelligence Community are dedicated, hard working, enormously talented individuals. Many risk their lives to keep us safe. By all accounts, they work together extremely well in the field, for example in Iraq and Afghanistan, but for some reason they are not able to find that same ability to work together here in Washington.

The individual elements of the Community regard themselves - correctly - as elite organizations. They have great morale. They take pride in their organizations. Competition to join the Community is fierce. For example, the CIA gets about 180,000 applicants a year, providing a rich pool of talented Americans committed to service. I have been greatly impressed by the young officers with whom I have recently met in the CIA and other agencies. All Americans should be proud of these men and women.

But maintaining an elite organization with high morale requires careful attention. Strong and clear leadership is needed. The support of the President, the Congress, and the American people is critical. The seemingly endless arguments over authorities undermines the unit pride that all agencies in the Intelligence Community require. We owe it to them to fix this.

I would like to use my time this morning to discuss: (1) my specific observations about the current structure under IRTPA, (2) four areas where the DNI's authority should be strengthened or clarified, and (3) a suggestion that a comprehensive review of these issues is needed.

I. Observations about the Current Structure under IRTPA

Overall, the current structure is not working as Congress intended. The 9/11 Commission recognized that the DCI had three jobs: (1) run the CIA, (2) manage the "loose confederation" of the Intelligence Community, (3) and be the "analyst in chief for the government." National

Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* 409 (W.W. Norton & Co. 2004). That was, the Commission said, “too many jobs” and no DCI had ever been able to do all three effectively. *Id.* They recommended, and Congress agreed, that a new national director of intelligence should be established with two jobs: (1) “oversee national intelligence centers on specific subjects of interest,” *e.g.*, the National Counterterrorism Center (“NCTC”), and (2) “manage the national intelligence program and oversee the agencies that contribute to it.” *Id.* at 411.

Those are still valid objectives. However, there was also the concern that ODNI would, as government agencies do, grow and become a layer of bureaucracy between the operating elements of the Intelligence Community and the President. Unfortunately, many are convinced that has occurred.

One of the most prescient observations I heard was that we are slowly replicating the problems of the old DCI. Many believe the dual responsibilities of providing intelligence to the President on the one hand and managing the Intelligence Community on the other are sufficiently distinct that they should be separated. In a sense, it’s the reason the Goldwater Nichols Act streamlined the chain of command and clarified that the military service chiefs were not to exert operational control of their services in the field. Operational control is to be exercised by the combatant commanders.

But all is not gloom. Each of the gifted Americans who have served as DNI has accomplished a great deal and put many excellent policies and procedures in place. The current DNI, Admiral Blair, has brought extraordinarily talented people into his office and has established very good relationships with the defense agencies, including in the important area of procurement. Support to the warfighters is excellent. Nearly everyone agrees there is much

better information sharing within the Community. “A-Space,” the research tool for analysts, gets very high marks. NCTC is widely praised as very effective, and there is acceptance that joint duty in more than one agency or discipline should be a requirement for promotion to senior ranks.

But there are also assertions that ODNI often overreaches in its demand for information and micromanages the agencies. There are frequent complaints that the staff of the ODNI is too large and that it relies far too heavily on contractors.

I know, for a fact, that Director Blair does not seek to micromanage or make excessive demands for information. However, he also confronts a mismatch between his statutory responsibilities and his authority to carry them out.

II. Four Areas where the DNI’s Authority Should be Strengthened or Clarified

These basic observations lead me to believe that the Director’s authority should be strengthened in those areas that are essential to the effective management of the Community and clarified in operational areas where there is overlap and inconsistency.

I would like to discuss four specific areas that I hope will illustrate my observations. In two of them, I believe the Director needs additional authority and in two I believe his authority needs to be clarified.

A. The Role of the Director of National Intelligence

What do we want the DNI to do?

By law, the DNI is to serve “as the head of the intelligence community” and “as the principal advisor to the President . . . for intelligence matters related to the National Security.” 50 U.S.C. § 403(b)(1)-(2). There is a considerable amount of discussion among the intelligence

agencies as to exactly what that means. Because the relationship between the DNI and the President is so important, I would like to discuss it in some depth.

Section 403-1 says that the Director of National Intelligence shall be “responsible for insuring that National Intelligence is provided . . . to the President.” 50 U.S.C. § 403-1. But does this mean that he or she should be the President’s daily briefer? Does it mean that the DNI is personally responsible for the production of all intelligence products?

Obviously, this is a matter that must be worked out between the President and his DNI, but it illustrates the challenges of the current statutory scheme. Those who think that the DNI should not be the daily briefer believe the briefer should be a senior intelligence analyst whose only duty is to brief the President and that he or she should bring with them “subject matter experts” when particular subjects are to be discussed. The briefer would then be able to follow up on issues that arise in the briefing and respond to the President in a timely fashion. The DNI should participate in the daily briefing as needed. The demands of being the daily briefer, however, almost surely make it impossible to devote the time needed to carry out effectively his management responsibilities for the broader Intelligence Community.

If the DNI is the daily briefer or is in the Oval Office excessively, it also raises the specter that has occasionally bedeviled the Intelligence Community – namely, that the senior intelligence official of the government should not be drawn into the policy process so deeply that he or she is not able to step back and render fully independent advice to the President. This is a very tricky balance, and does not lend itself to resolution by statute. Clearly, the President must have great confidence in the DNI and the DNI must have unfettered access to the President. However, maintaining a respectable distance seems wise.

Along these same lines, the DNI has a responsibility that I believe is sometimes overlooked. Just as the Secretary of Defense and the service secretaries have the obligation to insulate the uniformed armed services from the political winds of Washington, so too does the DNI have the responsibility to prevent politics - regardless of its source - from influencing the management of the Intelligence Community, its products, or its operations.

Finally, on the issue of production of intelligence, the career professional analysts who are responsible for the production of intelligence believe, very strongly, that they must be integrally involved in the discussions that lead to the formation and execution of our national security policy. They understand, very clearly, that they are not decision makers, but believe that if they are not “at the table” their ability to provide relevant and useful intelligence is severely degraded. And some have expressed concern that the ODNI structure has placed a layer between them and the decision makers that they believe risks the quality and usefulness of their products.

I wish to emphasize that I do not speak from first-hand knowledge on these matters as I am not an intelligence analyst and have never even been in the Oval Office. However, I do believe these are legitimate concerns and worthy of close examination.

Another concern that arises out of the DNI’s basic responsibility is: How much staff is needed to do the job?

There is much talk that the DNI’s staff is too large. That is a bit unfair because the staff also includes NCTC, the National Intelligence Council, the National Counter Intelligence Executive, and other organizations that perform vital functions and do so very well. However, in my conversations with elements in the Intelligence Community, I frequently heard that the ODNI staff often micromanages the agencies and engages in duplicative and unnecessary efforts.

Much of this frustration is with the proliferation of contract employees, not government officials, who “task” the agencies for information. For example, one senior agency official told me that contractors at ODNI had recently requested detailed information about an operation. The agency responded that they were not able to comply with the request because the individuals involved in that operation simply didn’t have the time to set aside the mission and respond to the request. The response from the contractors at ODNI was to offer to send another contractor to the agency in order to answer the questions put by the contractors in the first place. This senior agency officer expressed frustration that, to the best of the officer’s knowledge, there was not a single government employee “in the loop” with respect to that particular request for data.

Others complain that the requests for information are not coordinated within the ODNI staff and they get conflicting and overlapping requests from different elements of the ODNI staff. Many of these comments were made with considerable passion. Some even said that the Office of the DNI was so intrusive that it was causing harm and getting in the way of good intelligence.

In response, ODNI correctly points out that the Congress has given the Director very clear missions and responsibilities. In many cases, the DNI does not have the direct authority to ensure that these responsibilities are carried out. Therefore, it is necessary to collect a great deal of information so the Director can understand what is happening across the Community and develop and implement policies to carry out the responsibilities he has under the law.

B. Acquisition Authority

The second area where confusion has arisen is the responsibility for acquisition. Here I believe that the DNI needs additional authority, particularly over the large technical collection platforms, most of which are in the Department of Defense (“DOD”).

There is, as this Committee knows, considerable overlap between the responsibilities of the DNI and the Secretary of Defense. One of the biggest challenges in the massive DOD intelligence procurement programs is to ensure that the requirements are adequately understood, are not overstated, and that the appropriate budgetary and procurement discipline is applied to the programs throughout their life cycle.

With respect to the large programs in the DOD, I note that DNI is responsible for providing “guidance for developing the National Intelligence Program budget” to each agency, 50 U.S.C. § 403-1(c)(1)(A), and “ensur[ing] the effective execution” of that budget. 50 U.S.C. § 403-1(c)(4). Although the Director is given a considerable amount of authority over the “allotment or allocation” of the National Intelligence Program, he still lacks authority to do many of the things that Congress intended him to be able to do. 50 U.S.C. § 403-1(c)(5)(A).

For example, it is not clear to me that he has adequate authority over programs in the National Reconnaissance Office (“NRO”), the National Security Agency (“NSA”), or the National Geospatial Agency (“NGA”). These agencies are part of the DOD, and the Secretary of Defense is required by law only to “ensure appropriate implementation of the policies and resource decisions of the DNI by elements of the Department of Defense within the National Intelligence Program.” 50 U.S.C. § 403-5(a)(2). Obviously, the word “appropriate” gives the Secretary of Defense enormous flexibility to decide what to do - or not do. This provision, when coupled with Section 1018 that provides that nothing in the DNI’s authority shall “abrogate” the existing statutory authority of any other department head illustrates this problem. 50 U.S.C. § 403 note.

On a positive note, Director Blair has established a system that is designed to give him oversight without oppressive interference in the execution of these DOD intelligence procurement programs. Both sides, I understand, are very pleased with these new arrangements.

However, there is still confusion over authorities. For example, the law is not clear as to whether the agencies or ODNI are responsible for Independent Cost Estimates and at what threshold. I know the two pending intelligence authorization bills address this and I hope Congress will quickly pass that legislation. Similar confusion persists over re-programming authority that makes it difficult to execute the DNI's priorities during the execution of programs.

The fact that there continues to be confusion in the very important area of procurement suggests to me that a careful review is needed. Over time, DNIs have been able to work out arrangements that sometimes work - but not always. However, the successful arrangements are largely personality-dependent and suggest that the underlying statutory authority should be reviewed to see if adjustments are needed.

C. Information Sharing

A third area where the authorities of the DNI could usefully be strengthened is information sharing. Information sharing has been a focus of this Committee and I commend you for the hard work you have put into this critical issue. The Christmas bomber demonstrated how difficult it is to get this issue right and I'm pleased that the government is working very hard to see what went wrong and to fix the problems.

As you know, I am privileged to serve on the Markle Task Force on National Security in the Information Age, co-chaired by Zoë Baird and Jim Barksdale. Since 2002, the Markle Task Force has pursued a "virtual reorganization of government" that uses the best technology to

connect the dots and the best management know-how that gets people working across agency lines to understand the meaning of fragments of information.²

Although much has been accomplished, much remains to be done. For example, I understand that the ODNI has “dozens” of bilateral agreements with other agencies that are needed to obtain information within the possession of those other agencies. We still need uniform guidance that enables the Intelligence Community to obtain appropriate access to U.S. person information in a number of diverse data bases.

Technology exists to make the information in all the systems that exist today “discoverable” without creating a large centralized database. When “data can find data” through discoverability, the process of piecing information together can be automated so that an electronic notification is sent to relevant analysts when new information reveals a connection that may warrant action. When discoverability is combined with an authorized use standard that allows users to see what has been discovered based on their specific role or mission, persistent obstacles in the present system of classification and stovepipes can be overcome. Using such a decentralized system of discoverability simultaneously improves security and minimizes privacy risks by avoiding bulk transfers of data.

Shortly before leaving office, Director McConnell issued a directive, Intelligence Community Directive 501, that is being implemented by Director Blair. ICD 501 moved the Community very much in the right direction. We need to press for complete implementation of that directive. The Director must also work very hard to encourage collaboration across all agencies and departments to empower the establishment of ad hoc communities of interest that

² The Markle Task Force has released four reports that are available at http://www.markle.org/markle_programs/policy_for_a_networked_society/national_security/projects/taskforce_national_security.php.

focus on a given intelligence challenge. The stove pipes are still there and we still have much work to break through them.

My concern is that the DNI may need additional authority to press for these changes. I understand that ODNI and NCTC are currently reviewing whether additional authority is needed. When that review is completed, I hope the President and Congress will give them any additional authority they believe they need.

D. Human Resources

The fourth area where I believe clarification is needed is in the human resource area. As I noted earlier, there is broad agreement that joint duty should be a requirement for promotion to senior rank in the Intelligence Community. This requirement, which is a hallmark success of the Goldwater Nichols Act, assures that officers will understand other elements of the Intelligence Community. It greatly enhances cooperation across the Community and improves both operations and production.

Joint duty is a very noble objective, as are a number of other human resource objectives contained in IRTPA. However, the agencies frequently complain that there seems to be an obsession with uniformity on personnel issues across the Community that is unnecessary and threatens the effectiveness, initiative and unit pride of the various agencies. For example, I understand that ODNI recently has required that a database be created on every employee in the Intelligence Community with eighty fields that must be completed for each individual. As I understand it, the argument is that this data is needed so that ODNI can assure compliance with the law and report accordingly to Congress. Agencies have complained that this creates a great burden and questioned whether it is truly needed. In some cases, particularly those with officers

under cover, it creates counterintelligence risks. One must also ask whether the objectives of the law could be achieved without requiring this level of detailed oversight.

III. A Way Forward

Let me now outline some suggestions that I hope will address these issues. Some of these thoughts are tentative and all require more deliberation. But I believe they are worthy of consideration.

A. Goldwater Nichols for the Intelligence Community

I believe a strong Director of National Intelligence with clear authority over policy, procurement, and management of the Intelligence Community is needed. Unfortunately, we now have conflicting authorities and overlapping responsibilities that cause frustration and waste great amounts of time in arguing over those authorities. In the course of my conversations, I heard frequent suggestions that a “Goldwater Nichols” act is needed for the Intelligence Community. I believe there is much merit in that suggestion.

Analogies are never perfect. However, there are approaches in Goldwater Nichols that could be adapted to help with the challenges in managing the Intelligence Community. Keep in mind that the Goldwater Nichols legislation made relatively minor changes - things like streamlining the chain of command, establishing a Vice Chairman of the Joint Chiefs, requiring joint duty for promotion to flag rank, and giving the Chairman the power to choose officers for assignment to the Joint Staff. Accordingly, I would like to make a few suggestions that draw on the success that emerged from our experience with Goldwater Nichols.

Let me begin by discussing the relationship between the CIA and the ODNI, probably the most challenging relationship. That is true for a number of reasons, including the legacy of the CIA and the fact that it is the only agency over which the DNI has clear authority. The other

agencies are all part of another cabinet department and Section 1018 gives those departments a handy tool anytime they wish to ignore the DNI's directions.

Section 1018 speaks only in terms of "department" heads and some have suggested that CIA should be put on the same footing by adding the word "agencies." I believe that Section 1018 should be carefully reviewed. A strong case can be made that it should be repealed, but if it is to stay in the law, I believe consideration should be given to including the word "agencies" so that CIA is treated like other agencies in the Intelligence Community. A further complication is the language in IRTPA that says the Director of CIA "shall report to the DNI regarding the activities of the CIA." This language should not be studied in the war colleges as a model for establishing clear lines of command and control.

The CIA was established to be "central" and to be independent. In my view, those functions are still critical. CIA is the only member of the Intelligence Community that is not part of another department. No other agency has broad responsibility for all-source production of intelligence. The analysts at CIA have developed, over the years, a close working relationship with the National Clandestine Service that is critical for assuring that human intelligence ("HUMINT"), which is often the most valuable intelligence, is adequately factored into the final product.

It is occasionally frustrating to DNIs that the President and the National Security Council ("NSC") continue to deal directly with CIA rather than going through them. That frustration is understandable, but it is also easy to understand why the President and the NSC reach out directly to CIA.

CIA is, after all, the chief operational arm of the Intelligence Community. Therefore, the wise approach may be to tailor the authorities to maximize the value of the CIA and, where necessary, clarify and strengthen the management responsibilities of the DNI.

In Goldwater Nichols terms, perhaps we should think of the CIA as a “combatant command” responsible for production of all source intelligence to the President, covert operations, and HUMINT. The “chain of command” for intelligence activities would run from the President through the Director of National Intelligence to the Director of CIA. Certain other intelligence agencies, for example NSA, NGA, and NRO could be thought of as “combat support agencies” supporting the CIA in its national mission, much as they support the regional combatant commands in the DOD. To continue the analogy, the DNI would function a bit like the Chairman of the Joint Chiefs of Staff in that the chain of command would pass through him to the Director of CIA, but the execution of the mission would rest with the Director of CIA. The DNI should be able to choose his own staff, much as the Chairman of the Joint Chiefs does. The DNI would also function a bit like the Secretary of Defense in that he has responsibility for management and overall policy of the Community. The DNI should have clear authority to appoint - and remove - heads of the agencies that comprise the Intelligence Community.

But much as the President deals directly with his field combatant commanders, it is reasonable, and one can argue desirable, for the President to deal directly with the Director of CIA.

A more difficult organizational challenge is represented with respect to the issue of domestic intelligence. Much progress has been made in integrating the foreign intelligence agencies and the FBI. And the FBI has made great strides in developing a genuine domestic intelligence function. However, I remain concerned that we still don't have the organizational

structure right. In preparing for this hearing, I concentrated on the foreign side of the house, but I believe many of the observations I've made may well apply to the domestic side. Should, for example, we begin to think of the National Security Branch ("NSB") of the FBI as the "combatant commander" for counterintelligence and domestic intelligence? Do we need to establish the NSB as a free-standing domestic intelligence service, perhaps in the Department of Justice or Homeland Security? These are very difficult questions and raise some fundamental issues about how domestic intelligence should be conducted in our democracy, but I believe we must keep asking them.

B. Review of IRTPA

Mr. Chairman, many of the organizational challenges that arose after the creation of the DNI have been worked out; for example in the revision of Executive Order 12333 issued in 2008 and in numerous DNI directives. Nevertheless, much tension remains. Some of the remaining issues can be solved by strong presidential leadership. However, I also believe the statute should be reviewed to address some of the ambiguity and confusion that I've discussed today. I believe it should be possible to develop a clearer division of responsibility between the DNI and the elements of the Community that will improve the management of the Community while preserving the special nature and effectiveness that each agency in the Community rightfully takes pride in. The result should be, if we get it right, a great improvement in the quality of the intelligence provided to the President and, at the same time, a great improvement in the management and effectiveness of the Community.

Many senior officers in the community put it this way: "The DNI should establish clear policies, provide direction and priorities for collection, develop integration strategies and assure that requirements for the major acquisition programs are sound. But the execution must be left

to the agencies who are the operating arms. The DNI must have authority to hold me accountable, but he should not micromanage. Just give me a mission and let me do it. If I fail, fire me.” That seems right to me.

C. Establishment of a Separate National Intelligence Program

As part of this review, consideration should be given to the establishment of a separate National Intelligence Program (“NIP”). This would be a very dramatic change from the current practice and would require much thought - and political compromise in the executive and congressional branches. But its time may have come, especially given the procurement concerns discussed above. As a separate budget program the NIP would be authorized by the two intelligence committees, with appropriate sequential referrals to the other relevant committees for authorization of their portions. It would then be appropriated as a separate appropriation. The top line would necessarily be unclassified and a new congressional rule may have to be adopted to assure that it could be debated and considered in a manner that protects classified information and prohibits politicizing the budget. By that I mean it would not be advisable for the intelligence budget to become like the defense budget where individual members of Congress seek to amend the authorization of appropriation bills to favor constituent contractors.

I understand that the administration is exploring ways to have the intelligence budget separately treated within the existing structure. I encourage that but it may be necessary to go even further. I fully recognize that a wholly separate NIP would be a sea change in the manner in which intelligence agencies are funded and managed. And I recognize how hard it would be to achieve this. However, I believe it should be closely examined. Even if we conclude such a change is not advisable, the process of thinking it through will, in all likelihood, shed light on

some of the more difficult management problems, and creative solutions may emerge that would not otherwise have occurred to us.

D. Next Steps

There are, in my view, three basic approaches to a review of IRTPA and the Intelligence Community organization. Congress could take the lead, perhaps by setting up a special task force of members from the relevant committees. The President could order the study on his own, perhaps using the President's Intelligence Advisory Board. A third approach would be for the President and Congress to encourage an outside group, such as the Bipartisan Policy Center to conduct the study. As the Committee knows, Governor Keane and Mr. Hamilton have a strong interest in this subject and have scheduled a conference on the matter on April 6.

Regardless, I believe a review should be done and done now. I thank the Committee again for its leadership and the opportunity to appear before you this morning.