

**SENATE V. HOUSE PROPOSALS
ON KEY PROVISIONS OF INTELLIGENCE REFORM
Senate Governmental Affairs Committee Minority**

October 2004

Strong Budget Scope and Authority for the NID:

House offer -

The House gives the National Intelligence Director (NID) the authority to “develop and determine” an annual National Intelligence Program (NIP) budget, but he must put together a budget based on proposals provided by intelligence agencies and the heads of their respective departments. The NID then would present to the President a “consolidated” budget with comments from agency or department heads. Unless the NID also has authority, which he has in the Senate bill, to “review, modif[y], and approv[e]” the budgets of individual agencies – then his “develop and determine” role will be severely constrained by the overall budgets he receives.

The House proposal gives the NID responsibility for “managing appropriations” for the NIP, however, the NID is to allot or allocate such appropriations *through the heads of departments*. Although the Office of Management and Budget (OMB) is to apportion funds “at the exclusive direction of the NID,” OMB is to do so *through the host executive departments* that manage programs and activities that are part of the National Intelligence Program.

Senate offer -

The most critical authority for the NID is controlling the funding for agencies and programs that produce “national” intelligence. The NID will “develop, determine, and present” to the President the annual budget request for the National Intelligence Program; provide guidance on the development of annual budgets to each agency or element in the intelligence community, and have the authority to “review, modif[y], and approv[e] the budgets.

Under the Senate’s approach, the NID is not just responsible for “managing appropriations.” Rather, funds for the NIP are appropriated to the National Intelligence Authority (NIA) and are “*under the direct jurisdiction of the NID.*” In the Senate bill, the NID “shall allot and allocate funds ... directly to the agencies or elements of the intelligence community...”

9/11 Commission –

Commission Chairman Tom Kean and Vice-Chair Hamilton said in a 10/20/04 letter to conferees: “If the National Intelligence Director does not have strong authorities, then we do not believe such a position should be created. Half-hearted reform would leave us

worse off than we are today.”nal Intelligence Director does not have strong authorities, then we do not believe such a position should be created. Half-hearted reform would leave us worse off than we are today.”

Transfer/Reprogramming Authorities for the NID

House offer –

The authority of the NID to transfer/reprogram funds and personnel in the House offer are virtually the same as those from the original House bill, which placed significant constraints (some even beyond those in current law) on the NID.

Under the House offer (and the original House bill), the NID can only transfer personnel for one year and in accordance with procedures to be developed with department heads (effectively giving them – including the Secretary of Defense, the same right to object as they have under current law).

Without concurrence from the affected department head, the NID could only transfer funds less than \$100 million and less than 5% of an agency’s budget under the NIP (cumulatively in a fiscal year), and only if the transfer does not terminate a program – these caps do not exist under current law. While the original House bill kept the current requirement that any transfer of funds or personnel be “based on unforeseen requirements,” the House offer modestly improves that constraint by requiring that any transfer either “supports an emerging need, improves program effectiveness, or increases efficiency.”

Senate offer –

The Senate bill provides the NID with more effective transfer/reprogramming authority – as was recommended by the 9/11 Commission – and does not have such limiting and potentially time-consuming constraints as the House offer and the original House bill.

The Senate rejected a proposed amendment by Senator Byrd on the floor (by a bipartisan vote of 62-29) that would have imposed similar constraints as those in the House offer/bill.

The Senate bill requires that the NID consult with affected department heads and that transfers be made only for “a higher priority intelligence activity” (as under current law and in the House offer and original bill). The Senate bill (like the House offer and original bill) also requires approval from OMB for all NID transfers and provides that any transfer may not exceed applicable ceilings established in law for such transfers.

In a compromise worked out with Senator Levin, the Senate bill provides that the NID’s transfer authorities do not apply to uniformed services personnel, except that the NID may transfer military positions or “billets” for up to three years.

9/11 Commission –

The Commission report wrote that the NID “would submit a unified budget for national intelligence...He or she would receive an appropriation for national intelligence and apportion the funds to the appropriate agencies, in line with that budget, and with authority to reprogram funds among the national intelligence agencies to meet any new priority.”

National Counterterrorism Center

House offer -

The NCTC Director would be appointed by the President (not the NID in the original House bill), but would not be confirmed by the Senate. The Director is principal adviser to and reports only to the NID on counterterrorism intelligence operations. The NID also carries out the missions of the NCTC “*through* the Deputy National Intelligence Director for Operations.”

The NCTC’s primary mission is to “conduct strategic operational planning” for counterterrorism operations. The NCTC would “assign roles and missions responsibilities as part of its strategic operational planning duties to lead Department or agencies, as appropriate, for counterterrorism *strategic plans*, but shall not direct the execution of any resulting operations.”

The Director of the NCTC has no role in the appointment of key counterterrorism officials.

Senate offer –

The NCTC Director is appointed by the President, confirmed by the Senate, and is principal advisor to the NID and the President on interagency plans and activities relating to counterterrorism. The Director reports to both the NID and the President on the planning and progress of joint counterterrorism operations

The NCTC’s planning role will be to develop interagency counterterrorism plans that “(A) involve more than one department, agency, or element of the executive branch (unless otherwise directed by the President); and (B) include the mission, objectives to be achieved, courses of action, parameters for such courses of action, coordination of agency operational activities, recommendations for operational plans, and assignment of departmental or agency responsibilities.” The NCTC would not direct the execution of operations.

The NCTC Director will play an active role in selecting key counterterrorism officials in the Executive Branch; the head of the relevant department or agency must seek the Director’s concurrence in the selection or recommendation to the President for the

Director of the CIA Counterterrorist Center, the Assistant FBI Director in charge of the Counterterrorism Division, the State Department's Ambassador-at-Large for Counterterrorism, and any other official designated by the President.

9/11 Commission –

In support of an empowered NCTC, Chairman Kean and Vice Chair Hamilton said, “We can and should learn from successful reforms in the military that were done two decades ago. We want all the government agencies that play a role in counterterrorism to work together, to have one unified command. We want them to work together as one team in one fight against transnational terrorism.”

In its final report, the Commission stated that in order “[t]o avoid the fate of other entities with great nominal authority and little real power, the head of the NCTC must have the right to concur in the choices of personnel to lead the operating entities of the departments and agencies focused on counterterrorism.”

National Intelligence Centers

House offer –

As in the original House bill, there are no substantive provisions or authorities for the establishment or the operation of national intelligence centers. The House only provides that the NID “shall oversee the NCTC and may establish such other national intelligence centers as the Director determines necessary.”

Senate offer –

The Senate bill expressly provides for the establishment and the operation of such centers which, as recommended by the 9/11 Commission, would focus on specific areas of responsibility.

While the Senate bill provides the NID with flexibility as to when and how many centers there should be established, it clearly states the mission of these centers and provides that the centers should have sufficient access to funds, information, and staff in order to be effective. The Senate bill provides for the appointment of Directors these centers.

9/11 Commission –

The Commission report said, “The National intelligence Director should oversee national intelligence centers to provide all-source analysis and plan intelligence operations for the whole government on major problems.”

Declassification:

House offer –

No provision for the declassification of the top-line or individual intelligence agency budgets, or even a study to determine whether such declassification is feasible. Same as original House bill.

Senate offer –

Requires declassification of the aggregate top-line national intelligence budget and requires the NID to conduct a study to assess whether public disclosure of such information for individual elements of the intelligence community would harm national security.

9/11 Commission –

Recommended declassification of the top-line national intelligence budget figure, as well as the top-line budget of component agencies.

Privacy and Civil Liberties Oversight Board

House offer –

The new proposal includes a Privacy and Civil Liberties Oversight Board. The Board, however, is located “in the intelligence community” and can only review and oversee policies within the intelligence community. Board members are to be appointed by the President upon the NID’s recommendation with no Senate confirmation. The Board has no authority to obtain documents from, or interview, anyone outside the federal government (such as contractors or ex-government employees), by subpoena or otherwise. Even within the federal government, the Board must go through the NID to obtain any documents or other materials it believes necessary to carry out its responsibilities. And although the Board is permitted, subject to the direction of the NID, to hold public forums and publish public reports “and otherwise inform the public of its activities,” it is also exempted from the Federal Advisory Committee Act, meaning it is effectively exempted from FOIA and similar public disclosure laws.

Senate offer –

The Senate bill creates a government-wide Board to provide advice on and review policies across agencies that are related to efforts to protect the nation against terrorism. The Board would be located in the Executive Office of the President, and its members would be appointed by the President with Senate confirmation. Members would serve six-year terms, and no more than three members of the five-member Board could be of the same political party. The Board would have access to relevant materials in the federal government, without going through the NID or another official, and the right to subpoena materials from private parties. The Board would first have to seek to obtain

material from private parties voluntarily before issuing a subpoena. The Board would be required to make its reports public to the greatest extent possible, consistent with the protection of classified information and applicable law and would be treated as an agency for purposes of FOIA and other open-government laws.

9/11 Commission –

Chairman Kean and Vice Chair Hamilton said in a 10/20/04 letter to Conference Chairman Hoekstra: “[T]he Privacy and Civil Liberties Oversight Board must be independent and statutory. While we agree that the board should be in the executive branch, we cannot view a board as independent if it is composed of the very people whom it is meant to oversee. Its membership must be Senate-confirmed, have strong investigative powers, and the ability and requirement to report to Congress and the public.”

Information Sharing

House offer –

The House bill broadly directs the President to establish an information sharing environment. The new House proposal incorporates some additional description from the Senate bill on what the environment is supposed to do (including sharing the information beyond just the intelligence community), and it requires that the President submit to Congress an implementation plan for the information sharing environment within one year. The information sharing environment in the House proposal encompasses only intelligence and “related information,” which is left undefined.

Senate offer –

The Senate bill provides more detail on what the information sharing environment is supposed to accomplish and provides for a staged approach to implementation, with reporting requirements at prescribed intervals. Among other things, the Senate bill requires that there be a baseline survey to understand what current capabilities exist throughout the government; that the President issue guidelines for information sharing and for civil liberties and privacy before the environment gets implemented; that specific information, such as timelines, projected budget, delineations of responsibilities, performance measures, etc., be included in the implementation plan; and requires regular progress. The Senate bill also establishes an Executive Council of agency officials from across relevant agencies to help coordinate the Environment and to resolve interagency disputes. Under the Senate bill, the information sharing environment would encompass not only intelligence but also other “terrorism information,” a defined term that includes information not traditionally thought of as intelligence, such as relevant customs or immigration information, that could potentially be significant in “connecting the dots.”

9/11 Commission –

In a 10/20/04 letter to Conference Chairman Hoekstra, Commission Chairman Kean and Vice Chair Hamilton said: “[T]he information sharing effort needs the more detailed guidance provided by the language in the Senate bill. The White House prefers less direction on this topic. We think the experience before 9/11, and even the record three years hence, has shown the necessity for strong legislative guidance.”

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