

Legislative Bulletin.....July 9, 2009

Contents:

H.R. 2701— The Intelligence Authorization Act for Fiscal Year 2010

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(Reyes, D-TX)

Key Conservative Concerns

Key Take Away Points

- ***Does Not Address Guantanamo Bay Issue:*** The bill does not address the issue of releasing sensitive legal memoranda on the actions of the CIA regarding the President’s policy to close Guantanamo Bay and relocate terrorists on American soil.
- ***Intelligence Committee Notification:*** H.R. 2701 abandons a bipartisan agreement on congressional notification procedures and replaces it with a process that effectively makes it unclear whether all Members of the Committee will be briefed on sensitive matters. The provision is so problematic, the Obama Administration stated “If the final bill presented to the President contains this provision, the President’s senior advisors would **recommend a VETO.**”
- ***Lack of Transparency:*** The bill does not make unclassified materials on congressional briefings on enhanced interrogation available to the public, undermining the ability for the American public to know whether the CIA informed the Speaker of the House of certain activities.
- ***GAO Oversight:*** Even the Obama administration opposes this provision as well because it would “fundamentally shift the long-standing relationship and information flow between the Intelligence Community (IC) and intelligence committee members and staff.
- ***Earmark:*** The bill does not close the National Drug Intelligence Center, a facility in Pennsylvania many view as a congressional earmark because of its questionable results to improve intelligence gathering techniques.
- ***Video Taping Detainees:*** The bill requires the CIA to videotape interrogations, leaving sensitive techniques potentially available to public scrutiny and the enemy.

Order of Business: The bill is scheduled to be considered on Thursday, July 9, 2009, under an expected structured rule providing for one hour of general debate and making in order several amendments. The RSC will summarize each amendment made in order in a separate document.

Summary: H.R. 2701 would authorize \$675 million over 5 years, a \$26 million increase over the House-passed Intelligence Authorization for FY 2009. The specific schedule of authorizations for intelligence activities of the federal government (including the Office of the Director of National Intelligence (DNI), the Central Intelligence Agency (CIA), the Defense Department, the National Security Agency (NSA), the FBI, etc.) is classified. The intelligence community has not operated with an official authorization bill since 2005; including one that was vetoed by President Bush. Some of the more notable unclassified provisions detailed below.

Note: This Legislative Bulletin addresses only the *unclassified* portion of the bill. The language of H.R.2701 provides for the passage of the classified annex, which contains the *vast majority* of the authorizations in this legislation. The classified annex is available to the Committees on Appropriations of the House and Senate, and to the President. The President has to provide for the “suitable” distribution of appropriate portions of the annex within the executive branch.

Title I—Budget and Personnel Authorizations

- ***Authorization of Appropriations:*** H.R. 2701 authorizes classified appropriations for FY 2010 for intelligence-related activities of the following 18 U.S. entities:
 - The Office of the Director of National Intelligence
 - The Central Intelligence Agency
 - The Department of Defense
 - The Defense Intelligence Agency
 - The National Security Agency
 - The Department of the Army, the Department of the Navy, and the Department of the Air Force
 - Coast Guard
 - The Department of State
 - The Department of the Treasury
 - The Department of Energy
 - The Department of Justice
 - The Federal Bureau of Investigation
 - The Drug Enforcement Agency
 - The National Reconnaissance Office
 - The National Geospatial-Intelligence Agency
 - The Department of Homeland Security

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FBI, etc.) is classified. The schedule of authorizations will be made available to the House and Senate Appropriations committees and the President.

- ***Personnel Ceiling Adjustments:*** The bill authorizes the DNI, with the approval of the Director of the Office of Management and Budget, to exceed their current (classified) personnel ceilings when necessary to perform “important intelligence functions,” when reported to Congress, and when the increase is no greater than 3 percent of the current level.
- ***Intelligence Community Management Account:*** The legislation authorizes FY 2010 appropriations of \$672.8 million to the Intelligence Community Management Account (ICMA) to fund 853 (unclassified) full-time personnel for management and administrative requirements.
- ***Earmarks:*** H.R. 2701 states that nothing in the classified schedule or conference report shall be construed to authorize expenditures for Member-requested earmarks. However, the committee rejected an amendment to close the National Drug Intelligence Center (NDIC), long considered an earmark by many conservatives.

Title II—Central Intelligence Agency Retirement and Disability System (CIARDS)

- ***Authorization of Appropriations:*** H.R. 2701 authorizes \$290.9 million in FY 2010 to fund CIARDS. The appropriation for CIARDS is considered mandatory and the authorization in H.R. 2701 is the same amount as the assumed baseline. As such, CBO does not ascribe any additional mandatory spending for CIARDS to the cost of the bill.

Title III—General Intelligence Community Matters

- ***Flexibility in Non-reimbursable Details to the Intelligence Community:*** The legislation increases the amount of time that an agency employee may be detailed to the Office of the Director of National Intelligence (ODNI), on a reimbursable or non-reimbursable basis, from one year to two years. Employees detailed on a non-reimbursable basis are paid by their home agencies.
- ***Pat Roberts Intelligence Scholars Program:*** Provides permanent authorization for the Pat Roberts Intelligence Scholars Program (PRISP), which provides financial assistance to students who pursue studies in critical language specialties, area studies, and technical and scientific specialties.
- ***Pilot Project:*** Directs the DNI to establish a pilot program to provide scholarships for training in certain African languages not currently covered by existing scholarship programs.

- ***Covert Action Reporting Requirements:*** The provision directs the full committee to unilaterally develop procedures for the handling of reporting on sensitive matters. The language *fails to create a statutory presumption that all Members of the Committee should be briefed on sensitive matters* and fails to require a bipartisan solution to reconcile any dispute between the Legislative and Executive branch with respect to reporting requirements.

Some conservatives may be concerned that during the mark-up, the committee rejected an amendment offered by Rep. Thornberry (R-TX) to replace the reporting requirements with bipartisan language accepted in last year's Intelligence Authorization Act that would require notification to the full committee unless *both* the Chairman and Ranking Member objected.

- ***Financial Report on Terrorists:*** Changes from semi-annual to annual and eliminates "certain data requirements" from the requirement to report to Congress on financial intelligence concerning terrorist assets.
- ***Annual Personnel Level Assessment:*** The bill requires the DNI, in consultation with the head of each applicable agency, to prepare an annual personnel assessment for each element of the intelligence community for the subsequent fiscal year. The assessment would have to include, at a minimum, the budget for personnel costs, the increase over the previous year's costs, the number of positions requested, the best estimate of the cost of contractors, the increase in the number and cost of contractors over the previous year, a written justification for the levels of personnel and contractors, the number of intelligence analysts employed by each intelligence community element, and a list of all contractors that have been investigated by the Inspector General of an element. Each agency would have to obtain a statement from the DNI saying that they will have sufficient internal infrastructure, training, and funding to support the requested level of personnel.
- ***Reports on Iran, Syria, and North Korea:*** The bill requires the DNI to report at least twice each year on the nuclear intentions and capabilities of Iran, Syria, and North Korea.
- ***Government Accountability Office Audits:*** The bill directs the DNI to ensure that Government Accountability Office (GAO) personnel are provided with access to all information when the Comptroller General conducts such analysis, evaluation, or investigation at the request of a congressional intelligence committee. *Some conservatives may be concerned this provision would threaten the ability to keep the missions of certain intelligence agencies covert.* Additionally, all intelligence agencies already have sufficient inspector generals. Even the *Obama Administration is concerned with this provision* stating the provision "would fundamentally shift the long-standing relationship and information flow between the IC and intelligence committee members and staff."

- ***Comprehensive Report on Intelligence Community Contractors:*** Requires the DNI to submit a report, describing the intelligence community’s use of personal service contractors, and present the findings to the House and Senate Committees on Intelligence. The report would have to include information about the regulations, oversight, and guidance used to hire, train, monitor, and provide security clearances to contractors. The report would also have to include information regarding the costs and savings involved with awarding contracts for jobs that are similar to work done by government employees and a comparison of the compensation of contract employees and government employees. Finally, the report would have to include a section identifying the best practices for oversight and accountability that may be applied to contract employees.
- ***Iraq and Afghanistan:*** Requires the DNI and the Secretary of Defense to submit to the congressional intelligence and defense committees a report on the intelligence resources dedicated to Iraq and Afghanistan during the preceding two fiscal years and on the plan for fiscal year 2010.
- ***Recidivism Rates of Detainees:*** The bill requires the DNI to supply an unclassified summary of intelligence relating to recidivism rates of detainees held at Guantanamo Bay and assess the likelihood that they will engage in terrorism or communicate with persons in terrorist organizations. The bill also provides for another report on the same issues specifically for Uighur detainees.
- ***Interrogation Report:*** H.R. 2701 mandates a report on the state of research, analysis, and training in interrogation and debriefing process. The report must include: “an assessment of the quality and value of scientific and technical research in interrogation and debriefing practices; the state of interrogation and debriefing training in the Intelligence Community; the adequacy of efforts to enhance career paths for employees who conduct interrogations and debriefings; and the effectiveness of processes for studying and implementing best practices for interrogation and debriefing.” Some conservatives have expressed concern that reporting on interrogation techniques may *hamper intelligence gathering capabilities*.
- ***Plan on Increased Diversity:*** The bill requires the DNI to submit a report describing the specific plan of each intelligence community entity to increase diversity within that element.
- ***Guantanamo Bay:*** The bill limits the use of funds to release or transfer an individual held at Guantanamo Bay, Cuba, to the United States, its territories, or possessions until 120 days *after the President has submitted a plan to Congress*. Some conservatives have expressed the only adequate provision is to expressly prohibit transferring prisoners to U.S. territory.

Title IV—Matters Relating to Elements of the Intelligence Community

- ***Data Center for Energy Efficiency:*** Requires the DNI to submit a compliance plan with the Environmental Protection Agency's report on data center energy efficiency.
- ***Inspector General:*** The bill expands the statutory authority of the Intelligence Community Inspector General (IC/IG) in areas of investigation, subpoena power, reporting requirements, and jurisdiction.
- ***Private Contractors for Interrogations:*** The bill prohibits funds to any contractor to conduct the interrogation of a detainee in the custody of the CIA. However, a waiver is allowed for interrogations when no capable employee of the federal is available and the interrogation is in the “national interest of the United States.”
- ***Video Recording of Interrogations:*** The bill establishes guidelines to require that interrogations of detainees in CIA custody are recorded in video form and the recording is maintained for not less than 10 years. Some conservatives have expressed concerns that this provision will unnecessarily expose intelligence personnel to risk.

Title V—General Intelligence Matters and Technical Amendments

- ***Program Reauthorization:*** The bill reauthorizes the National Commission for the Review of Research and Development Programs of the United States Intelligence Community after they expired in 2004. The reauthorization will provide subpoena power, requiring entities to provide testimony, documents, or other evidence.

Additional Conservative Concerns: Some conservatives have voiced concern over the bill because it fails to address many of the recent Obama policy initiatives that have caused much controversy; including his decision to release sensitive information concerning the legal activities of the Central Intelligence Agency, the decision to close the detention facility at Guantanamo, and decisions to relocate detainees on U.S. soil.

The legislation also makes significant changes to how the House Intelligence Committee receives and disseminates intelligence reports from the Administration. Some conservatives may believe the notification requirements prescribed in the bill do not fulfill the statutory duty to keep each member of the Committee fully and currently informed with respect to certain intelligence matters. Even the Obama Administration opposes this measure stating “Administrations of both political parties have long recognized the importance of protecting the confidentiality of the Executive Branch's legal advice and deliberations. If the final bill presented to the President contains this provision, the President's senior advisors would recommend a veto.”

The legislation also contains a number of provisions that will ultimately increase bureaucracy and decrease efficiency in the intelligence community. One provision will force additional Senate confirmations for a number of intelligence positions previously

filled internally by career intelligence professionals. Some conservatives worry this might politicize the process and do not see how it will enhance our ability to respond to catastrophic terrorist attacks.

Additionally, some conservatives and *the Obama Administration have expressed concerns* over the high number of *reporting requirements* mandated in the bill because they would remove the flexibility that Congress and the Executive Branch would have to modify and adapt to policy changes. Some conservatives believe Congress should be much more judicious in the reports it requires and that it should demand high quality responses to those requests.

Some conservatives have additionally expressed concerns over the fact the legislation requires the DNI to provide the GAO full access to information to conduct an investigation requested by the intelligence committees. This requirement would allow GAO employees full access sensitive national security information without restrictions on how they may use or disseminate that information. The potential for sensitive information to be disclosed greatly increases with this provision included in the bill.

Finally, some conservatives have also expressed reservations that the bill makes *several education and scholarship programs permanent* that have not been fully vetted or have not demonstrated their effectiveness or value to the intelligence community.

Committee Action: On June 4, 2009, the bill was introduced and referred to the House Committee on Intelligence. On June 28, 2009, the committee held a mark-up and ordered the bill to be reported.

Administration Position: In a Statement of Administration Policy ([SAP](#)), the President generally supports most measures in the bill. However, they list concerns with at least nine provisions of the bill that “would impede the smooth and efficient functioning of the IC and that would raise a number of policy, management, legal, and constitutional concerns.” Additionally, if the final bill presented to the President with one specific provision, as discussed above, *“the President’s senior advisors would recommend a veto.”*

Cost to Taxpayers: According to CBO, the unclassified portions of the bill would authorize \$675 million over the 2010-2014 period; subject to appropriation. Enacting H.R. 2701 would not affect direct spending or revenues. In addition, H.R. 2701 would authorize the appropriation of \$291 million to the Central Intelligence Agency Retirement and Disability System to cover retirement costs attributable to military service and various unfunded liabilities. The appropriation to CIARDS is considered mandatory, and the authorization under this bill would be the same as the amount in the CBO baseline (thus scoring as zero under current budget rules).

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill would create a diversity workforce program.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes, according to CBO Section 501 of the bill includes “new subpoena authority that would impose an intergovernmental and private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO expects the cost of complying with the mandate would be small and well below the thresholds established in UMRA (\$69 million for intergovernmental mandates and \$139 million for private-sector mandates in 2009, adjusted annually for inflation).”

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: According to the House Permanent Select Committee on Intelligence in House Report 111- 186 nothing in this Act “shall be construed to authorize or require the expenditure of funds for a congressional earmark.”

Constitutional Authority: The House Permanent Select Committee on Intelligence, in House Report 111-186, cites constitutional authority in Article 1, Section 8, but fails to cite a specific clause. House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific powers* granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[Emphasis added]*

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