

**STATEMENT FOR THE RECORD BY
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BEFORE THE SENATE SELECT COMMITTEE ON INTELLIGENCE**

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Chairman Feinstein, Vice Chairman Bond, Members of the Committee, thank you for the opportunity to offer my views on the Administration's intelligence authorization proposals for Fiscal Year (FY) 2011.

It has been more than five years since the passage of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). Since that time the relationship between the Director of National Intelligence and the Intelligence Community has been evolving to meet the challenges presented by a dangerous and unpredictable world and to fill some of the gaps left by the IRTPA. The FY2011 Intelligence Authorization bill offered by the Administration advances that process.

Before we discuss the FY11 proposals, I wanted to thank you for including many of the Administration's proposals in the House-Senate agreement embodied in the June 2, 2010 draft bill. We believe that these proposals will provide long-term benefits to the Intelligence Community. The FOIA exemption (Section 410) you supported will enable the DNI to take full advantage of the collective experience and wisdom of subject-matter experts outside the government as he grapples with intelligence policy decisions. Section 402 ensures that operational files will retain their FOIA exemptions provided by the National Security Act when they are forwarded to the ODNI. The expansion of Intelligence Community educational programs provided for in Sections 311 through 313 will help to provide Intelligence Community elements with a pipeline of dedicated, diverse, high-quality college graduates in academic disciplines critical to our national security mission. Section 326, allowing Intelligence

Community elements to take advantage of the DNI's Section 8(a) authorities, will help to ensure flexibility in responding to acquisition needs, effective acquisition support, and improved mission accomplishment.

In putting together the FY2010 Intelligence Authorization bill, the committee has expressed its concerns with the size of the ODNI, and I want you to know that we recognize and share those concerns. While it is our long-term goal to manage to budget, we remain committed to working within the personnel caps called for in the bill. We appreciate the fact that the committees have recognized the need for some flexibility with regard to these caps, as evidenced by those provisions that allow for limited overages and for certain personnel, such as students or reserve corps members, not to count against the ceilings.

Turning now to the Administration's FY2011 proposals, we have included proposals that will promote a variety of different DNI objectives, including enhancing information sharing, improving strategic workforce management and planning, and improving fiscal accountability. These proposals include the following:

1. Protection of Terrorist Identity Information:

Section 336 of the Administration's FY2011 bill would provide a Freedom of Information Act exemption for terrorist identity information disseminated by the National Counterterrorism Center. That information may be disseminated for terrorist screening purposes, including to appropriate law enforcement officials, or for other authorized counterterrorism purposes, such as to private sector partners charged with protecting critical infrastructure (i.e. nuclear power plants) or to select foreign partners. Though often derived from intelligence sources and methods, this information is not classified and is categorized as Law Enforcement Sensitive or For Official Use Only.

We have included this provision in prior Intelligence Authorization submissions, and for good reason: there is a strong public policy interest in protecting terrorist identity information from disclosure under the FOIA, even if it is not classified. For individual terrorists and terrorist organizations, knowing that a particular individual's identifiers are contained—or are not contained—within the Terrorist Screening Database is valuable information. Having that information in hand could lead to altered behavior or to more aggressive attempts at countersurveillance. It could also potentially compromise intelligence sources and methods.

2. Personnel flexibilities:

These provisions would create more uniformity in personnel management among the Intelligence Community elements. Section 305 relates to the excepted service. The vast majority of Intelligence Community employees are in the excepted service. However, Intelligence Community elements in several departments (the Departments of Energy, Homeland Security, Justice [Drug Enforcement Administration], State, and Treasury) include employees who are covered by the Title 5 competitive service rules. The excepted service allows more flexibility in hiring, training, assigning, and promoting workers. It has different time-in-grade restrictions, different rules on temporary appointments, and different classification authorities. Under the Administration's bill, the DNI could convert these positions or establish new positions in the excepted service at the request of a department or agency that includes Intelligence Community elements. This proposal will help to rectify the disparities that can occur as a result of the Community's operating under two different personnel systems, subject to agreement by affected employees and department or agency heads.

Section 305 would also allow any Intelligence Community element, upon request, to take advantage of any competition, scholarship, or performance management authority that is enjoyed

by any other element. Those Intelligence Community elements with employees covered by Title 5 do not have the statutory flexibility to manage and compensate their employees in the same manner as the rest of the Intelligence Community. The numerous education and scholarship authorities that have been established for the CIA and Department of Defense intelligence elements do not apply to the elements with employees covered by Title 5. This proposal would help to ensure that Intelligence Community personnel in all Intelligence Community elements have the same opportunities.

3. Reserve for Contingencies Fund:

Section 339 would establish a reserve fund of appropriations that would allow the DNI to use NIP funds to address emergency requirements, operational exigencies, and opportunities within the Intelligence Community that arise outside the normal budget cycle. This proposal, which is new for FY2011, would be a two-year pilot program and would be funded through appropriations already included in the FY2011 budget request. This proposal would provide greater flexibility to the DNI to address unanticipated issues as they arise in the Intelligence Community and the world. I want to emphasize that the reserve is not an ODNI reserve but one that would be available to meet critical, emergent needs of the entire Intelligence Community.

4. Treasury accounts for Defense intelligence elements:

Section 437, also a new proposal, creates express, discretionary authority for the Secretary of Defense to transfer to Department of the Treasury accounts funds provided for expenditure by intelligence elements within the Department of Defense. These accounts may receive transfers and reimbursement from transactions between the Defense intelligence elements and other entities, and the Director of National Intelligence may also transfer funds into these accounts. This proposal would make it easier for those elements to reconcile their fund balances with the

Treasury, which would enable them to have a more up-to-date and accurate accounting for funds expended and funds available and thus assisting their audit posture.

5. Updating authorities:

Finally, we have submitted a group of proposals designed to fine-tune existing authorities, including a number of technical changes needed as a result of the IRTPA and other relevant statutes. These include provisions to:

- Provide the President the opportunity to fill vacancies in positions within the DNI requiring Presidential appointment and Senate confirmation from a broader pool of office-holders.
- Reconcile two conflicting provisions of the Electronic Communications Privacy Act: 18 U.S.C. 2709(a) requires an electronic communication service provider to provide “subscriber information . . . toll billing records information, or electronic communication transactional records” upon receipt of a national security letter. Subsection (b) of that section allows the FBI to request subscriber information and toll billing records in a national security letter, but the “electronic communication transactional records” language has been left out of that subsection. Section 507, which corrects this inconsistency, is a new provision for FY 2011.
- Strike outdated reporting requirements, modify certain existing ones, and make technical changes to the National Security Act and the Central Intelligence Agency Act.

Some of the proposals described above have appeared in prior Intelligence Authorization bills; only a few are new in the FY2011 submission. The recent events at Fort Hood, Detroit and Times Square have prompted a number of assessments of the performance, structure and

authorities of the Intelligence Community, including such issues as the state of information sharing in the Intelligence Community and whether the DNI needs additional authorities. Moreover, as you know, the National Counterintelligence Executive is currently reviewing the counterintelligence authorities of the Office of the National Counterintelligence Executive to determine whether they are sufficient. Finally, we are constantly working with the Department of Justice and other elements of the Intelligence Community to assess the effectiveness of the Foreign Intelligence Surveillance Act and the USA-PATRIOT Act, both of which have provisions expiring in the next two years. I'd like to share some thoughts with you on three of these broader issues.

The first is the question of DNI authorities. This is an important question, especially as we evaluate how to address the recommendations made by this committee in its *Report on the Attempted Terrorist Attack on Northwest Airlines Flight 253*, in the McLaughlin report to the DNI on the Fort Hood and Northwest Flight 253 incidents, and in the White House-led review of the U.S. watchlisting system and of the performance of the intelligence, homeland security, and law enforcement communities arising from the attempted Northwest bombing. These recommendations resulted from three careful and deliberative investigations, and the ODNI is working now to develop the steps necessary to respond to these recommendations.

As you know, there are those, such as former DNI McConnell, who vigorously advocate increasing the authorities of the DNI. There is no question that the DNI's current authorities result from a series of compromises, and that to some extent the position uneasily straddles the middle ground between the so-called "Secretary of Intelligence" and something more like a traffic policeman. But whether or not the DNI needs additional authorities, other than those

requested as part of the Administration's proposed bill, is a difficult question to answer, and will need to be carefully evaluated. The Administration's proposed bill addresses the necessary changes we have identified to date.

I think it is important to confront these questions directly and overtly. I would suggest that we not start a discussion of these issues with draft legislation. Indeed, it may be that no new authorities are needed, and that we need only to make better use of the authorities that currently exist. While the McLaughlin report made a number of recommendations, it noted that “[m]ost of this can be accomplished within individual agencies or under existing DNI authorities.” The ODNI is currently looking at the issues raised by this Committee's report, as well as those in the McLaughlin report and the White House review, in order to identify things that need to be fixed, discuss what needs to be done to fix them, determine which fixes can be accomplished within existing authorities or by the Executive branch, and only at the end of this process decide if new legislation is required. We will keep our oversight committees informed of our work in this regard, and would like to work with you as we identify solutions.

A second issue I want to mention is the Foreign Intelligence Surveillance Act (FISA). Three provisions of FISA, added by the USA-PATRIOT Act, are due to expire on February 28, 2011. In addition, the FISA Amendments Act of 2008 expires in December of 2012. The Administration strongly supports reauthorization of these provisions. We want to start working with the committee, in a bipartisan manner, to ensure that there is no lapse in these authorities, and as you know we have supported certain modifications to the existing provisions to provide additional protections for the privacy of law-abiding Americans while maintaining the effectiveness of these important authorities.

Of course, wrapped up in this discussion is whether other changes are needed to FISA to ensure that the Intelligence Community has the tools it needs to protect the nation. Assistant Attorney General Kris is going to talk more about these issues, but we want to work with the Department of Justice and with this committee both to propose legislation if it is necessary to fill gaps in our ability to collect and make use of vital intelligence and to make sure that any legislative proposals carefully balance enhanced capabilities with appropriate protections for Americans' civil liberties and privacy interests. However, we have not identified a need for additional legislation, other than those changes included in the Administration's proposed bill, at this time.

In a similar vein, we are looking at the rules governing the collection, retention and dissemination of information about U.S. persons, and the related but legally distinct rules governing retention and dissemination of FISA information. As you know these rules are very complex and often inconsistent from agency to agency; the McLaughlin report cited them as an impediment to effective information sharing within the Intelligence Community. The ODNI is conducting a review of these rules to determine whether they can be simplified and harmonized without lessening critical protections for privacy and civil liberties. It may be that no legislative changes are needed and that we simply need to ensure that agency procedures fully exercise the existing statutory authorities, and Intelligence Community personnel understand the full scope of the agency procedures. But this is an area where we intend to work closely with you and your staff.

We look forward to working with you on the various proposals in the Administration's FY11 Intelligence Authorization package, and we hope that we can have a fruitful dialogue on

issues of concern to the Congress that may or may not lend themselves to resolution by legislation. We are always available to answer any questions you or your staff may have regarding the Administration's bill.