99TH CONGRESS 1st Session | HOUSE OF REPRESENTATIVES | REPORT 99-373

INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1986

NOVEMBER 14, 1985.—Ordered to be printed

Mr. HAMILTON, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2419]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2419) to authorize appropriations for fiscal year 1986 for the intelligence and intelligence-related activities of the United States Government, for the Intelligence Community Staff, for the Central Intelligence Agency Retirement and Disability System, and for other purposes, having met, after full and free conference, having agreed to so recommend, do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Intelligence Authorization Act for Fiscal Year 1986".

TITLE I—INTELLIGENCE ACTIVITIES

AUTHORIZATION OF APPROPRIATIONS

SEC. 101. Funds are hereby authorized to be appropriated for fiscal year 1986 for the conduct of the intelligence and intelligence-related activities of the following elements of the United States Government:

(1) The Central Intelligence Agency.
(2) The Department of Defense.
(3) The Defense Intelligence Agency.
(4) The National Security Agency.

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(5) The Department of the Army, the Department of the Navy, and the Department of the Air Force.
(6) The Department of State.
(7) The Department of the Treasury.
(8) The Department of Energy.
(9) The Federal Bureau of Investigation.
(10) The Drug Enforcement Administration.

CLASSIFIED SCHEDULE OF AUTHORIZATIONS

SEC. 102. The amounts authorized to be appropriated under section 101, and the authorized personnel ceilings as of September 30, 1986, for the conduct of the intelligence and intelligence-related activities of the elements listed in such section, are those specified in the classified Schedule of Authorizations prepared by the Committee of Conference to accompany H.R. 2419 of the Ninety-ninth Congress. That Schedule of Authorizations shall be made available to the Committees on Appropriations of the Senate and House of Representatives and to the President. The President shall provide for suitable distribution of the Schedule, or of appropriate portions of the Schedule, within the executive branch.

AUTHORIZATION OF APPROPRIATIONS FOR COUNTERTERRORISM ACTIVITIES OF THE FEDERAL BUREAU OF INVESTIGATION

SEC. 103. (a) There is authorized to be appropriated for fiscal year 1986 the sum of $50,600,000 for the conduct of the activities of the Federal Bureau of Investigation to counter domestic and international terrorism.
(b) Of the sums authorized to be appropriated by subsection (a), $500,000 is authorized to be made available by the Attorney General for making payments in advance for expenses arising out of contractual and reimbursable agreements with state and local law enforcement agencies while engaged in cooperative activities to counter domestic and international terrorism.

PERSONNEL CEILING ADJUSTMENTS

SEC. 104. The Director of Central Intelligence may authorize employment of civilian personnel in excess of the number authorized for fiscal year 1986 under sections 102 and 202 of this Act when he determines that such action is necessary to the performance of important intelligence functions, except that such number may not, for any element of the Intelligence Community, exceed 2 per centum of the number of civilian personnel authorized under such sections for such element. The Director of Central Intelligence shall promptly notify the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate whenever he exercises the authority granted by this section.

RESTRICTION ON SUPPORT FOR MILITARY OR PARAMILITARY OPERATIONS IN NICARAGUA

SEC. 105. (a) Funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated

and expended during fiscal year 1986 to provide funds, materiel, or other assistance to the Nicaraguan democratic resistance to support military or paramilitary operations in Nicaragua only as authorized in Section 101 and as specified in the classified Schedule of Authorizations referred to in Section 102, or pursuant to Section 502 of the National Security Act of 1947, or to Section 106 of the Supplemental Appropriations Act, 1985 (P.L. 99-88).

(b) Nothing in this section precludes—

(1) administration, by the Nicaraguan Humanitarian Assistance Office established by Executive Order 12530, of the program of humanitarian assistance to the Nicaraguan democratic resistance provided for in the Supplemental Appropriations Act, 1985, or

(2) activities of the Department of State to solicit such humanitarian assistance for the Nicaraguan democratic resistance.

AUTHORIZATION OF APPROPRIATIONS FOR DESIGN AND CONSTRUCTION OF A RESEARCH AND ENGINEERING FACILITY AT THE NATIONAL SECURITY AGENCY HEADQUARTERS COMPOUND

SEC. 106. The National Security Agency is authorized to secure the design and construction of a research and engineering facility at its headquarters compound at Ft. Meade, Maryland. A single continuous contract may be employed to facilitate completion of the building authorized by this section, and the Secretary of Defense is authorized to contract for design and construction in advance of appropriations therefor, but the cost of such facility may not exceed $75,064,000. Of the amounts authorized to be appropriated under section 101(4) of this Act, there is authorized to be appropriated for fiscal year 1986 the sum of $21,364,000 for design and construction of the facility authorized by this section during fiscal year 1986.

TITLE II—INTELLIGENCE COMMUNITY STAFF

AUTHORIZATION OF APPROPRIATIONS

SEC. 201. There is authorized to be appropriated for the Intelligence Community Staff for fiscal year 1986 the sum of $22,083,000.

AUTHORIZATION OF PERSONNEL END-STRENGTH

SEC. 202. (a) The Intelligence Community Staff is authorized two hundred and thirty-three full-time personnel as of September 30, 1986. Such personnel of the Intelligence Community Staff may be permanent employees of the Intelligence Community Staff or personnel detailed from other elements of the United States Government.

(b) During fiscal year 1986, personnel of the Intelligence Community Staff shall be selected so as to provide appropriate representation from elements of the United States Government engaged in intelligence and intelligence-related activities.

(c) During fiscal year 1986, any officer or employee of the United States or a member of the Armed Forces who is detailed to the Intelligence Community Staff from another element of the United States Government shall be detailed on a reimbursable basis, except that any such officer, employee, or member may ge detailed on a non-

reimbursable basis for a period of less than one year for the performance of temporary functions as required by the Director of Central Intelligence.

INTELLIGENCE COMMUNITY STAFF ADMINISTERED IN SAME MANNER AS CENTRAL INTELLIGENCE AGENCY

SEC. 203. During fiscal year 1986, activities and personnel of the Intelligence Community Staff shall be subject to the provisions of the National Security Act of 1947 (50 U.S.C. 401 et seq.) and the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a et seq.) in the same manner as activities and personnel of the Central Intelligence agency.

TITLE III—CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM

AUTHORIZATION OF APPROPRIATIONS

SEC. 301. There is authorized to be appropriated for the Central Intelligence Agency Retirement and Disability Fund for fiscal year 1986 the sum of $101,400,000.

TITLE IV—PROVISIONS RELATING TO INTELLIGENCE AGENCIES

SEC. 401. (a) Title V of the National Security Act of 1947 (50 U.S.C. 413), relating to accountability for intelligence activities, is amended by adding at the end thereof the following:

FUNDING OF INTELLIGENCE ACTIVITIES

"SEC. 502. (a) Appropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity only if—

"(1) those funds were specifically authorized by the Congress for use for such activity; or

"(2) in the case of funds from the Reserve for Contingencies of the Central Intelligence Agency and consistent with the provisions of section 501 of this Act concerning any significant anticipated intelligence activity, the Director of Central Intelligence has notified the appropriate congressional committees of the intent to make such funds available for such activity; or

"(3) in the case of funds specifically authorized by the Congress for a different activity—

"(A) the activity to be funded is a higher priority intelligence or intelligence-related activity;

"(B) the need for funds for such activity is based on unforeseen requirements; and

"(C) the Director of Central Intelligence, the Secretary of Defense, or the Attorney General, as appropriate, has notified the appropriate congressional committees of the intent to make such funds available for such activity.

"(4) Nothing in this subsection prohibits obligation or expenditure of funds available to an intelligence agency in accordance with Sections 1535 and 1536 of title 31, United States Code.

"(b) Funds available to an intelligence agency may not be made available for any intelligence or intelligence-related activity for which funds were denied by the Congress.

"(c) As used in this section—

"(1) the term 'intelligence agency' means any department, agency, or other entity of the United States involved in intelligence or intelligence-related activities;

"(2) the term 'appropriate congressional committees' means the Permanent Select Committee on Intelligence and the Committee on Appropriations of the House of Representatives and the Select Committee on Intelligence and the Committee on Appropriations of the Senate; and

"(3) the term 'specifically authorized by the Congress' means that—

"(A) the activity and the amount of funds proposed to be used for that activity were identified in a formal budget request to the Congress, but funds shall be deemed to be specifically authorized for that activity only to the extent that the Congress both authorized the funds to be appropriated for that activity and appropriated the funds for that activity; or

"(B) although the funds were not formally requested, the Congress both specifically authorized the appropriation of the funds for the activity and appropriated the funds for the activity.".

(b) The table of contents at the end of the first section of such Act is amended by inserting the following after the item relating to section 501:

"Sec. 502. Funding of intelligence activities.".

(c) The amendment made by Section 401(a) of this Act shall not apply with respect to funds appropriated to the Director of Central Intelligence under the heading "ENHANCED SECURITY COUNTERMEASURES CAPABILITIES" in the Supplemental Appropriations Act, 1985 (Public Law 99-88).

COUNTERINTELLIGENCE CAPABILITIES IMPROVEMENTS REPORT

SEC. 402. (a) Within 120 days after the date of enactment of this Act, the President shall submit to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a report on the capabilities, programs, and policies of the United States to protect against, detect, monitor, counter, and limit intelligence activities by foreign powers, within and outside the United States, directed at United States Government activities or information, including plans for improvements which presently are within the authority of the executive branch to effectuate, and recommendations for improvements which would require legislation to effectuate.

(b) The report described in subsection (a) of this section shall be exempt from any requirement for publication or disclosure.

NOTICE TO CONGRESS OF CERTAIN TRANSFERS OF DEFENSE ARTICLES AND DEFENSE SERVICES

SEC. 403. (a)(1) During fiscal year 1986, the transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

(2) Paragraph (1) does not apply if—

(A) the transfer is being made to a department, agency or other entity of the United States (so long as there will not be a subsequent retransfer of the defense articles or defense services outside the United States Government in conjunction with an intelligence or intelligence-related activity); or

(B) the transfer—

(i) is being made pursuant to authorities contained in part II of the Foreign Assistance Act of 1961, the Arms Export Control Act, title 10 of the United States Code (including a law enacted pursuant to section 7307(b)(1) of that title), or the Federal Property and Administrative Services Act of 1949, and

(ii) is not being made in conjunction with an intelligence or intelligence-related activity.

(3) An intelligence agency may not transfer any defense articles or defense services outside the agency in conjunction with any intelligence or intelligence-related activity for which funds were denied by the Congress.

(b) As used in this section—

(1) the term "intelligence agency" means any department, agency, or other entity of the United States involved in intelligence or intelligence related-activities;

(2) the terms "defense articles" and "defense services" mean the items on the United States Munitions List pursuant to section 38 of the Arms Export Control Act (22 CFR part 121);

(3) the term "transfer" means—

(A) in the case of defense articles, the transfer of possession of those articles, and

(B) in the case of defense services, the provision of those services; and

(4) the term "value" means—

(A) in the case of defense articles, the greater of—

(i) the original acquisition cost to the United States Government, plus the cost of improvements or other modifications made by or on behalf of the Government; or

(ii) the replacement cost; and

(B) in the case of defense services, the full cost to the Government of providing the services.

TITLE V—GENERAL PROVISIONS

AUTHORITY FOR THE CONDUCT OF INTELLIGENCE ACTIVITIES

SEC. 501. The authorization of appropriations by this Act shall not be deemed to constitute authority for the conduct of any intelli-

gence activity which is not otherwise authorized by the Constitution or laws of the United States.

INCREASES IN EMPLOYEE COMPENSATION AND BENEFITS AUTHORIZED BY LAW

SEC. 502. Appropriations authorized by this Act for salary, pay, retirement, and other benefits for Federal employees may be increased by such additional or supplemental amounts as may be necessary for increases in such compensation or benefits authorized by law.

TITLE VI—FACILITATING NATURALIZATION OF CERTAIN FOREIGN INTELLIGENCE SOURCES

IMMIGRATION AND NATIONALITY ACT AMENDMENT

SEC. 601. Section 316 of the Immigration and Nationality Act (8 U.S.C. 1427) is amended by adding at the end thereof the following new subsection:

"(g)(1) Whenever the Director of Central Intelligence, the Attorney General and the Commissioner of Immigration determine that a petitioner otherwise eligible for naturalization has made an extraordinary contribution to the national security of the United States or to the conduct of United States intelligence activities, the petitioner may be naturalized without regard to the residence and physical presence requirements of this section, or to the prohibitions of section 313 of this Act, and no residence within the jurisdiction of the court shall be required: Provided, That the petitioner has continuously resided in the United States for at least one year prior to naturalization: Provided further, That the provisions of this subsection shall not apply to any alien described in subparagraphs (A) through (D) of paragraph 243(h)(2) of this Act.

"(2) A petition for naturalization may be filed pursuant to this subsection in any district court of the United States, without regard to the residence of the petitioner. Proceedings under this subsection shall be conducted in a manner consistent with the protection of intelligence sources, methods and activities.

"(3) The number of aliens naturalized pursuant to this subsection in any fiscal year shall not exceed five. The Director of Central Intelligence shall inform the Select Committee on Intelligence and the Committee on the Judiciary of the Senate and the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives within a reasonable time prior to the filing of each petition under the provisions of this subsection.".

TITLE VII—ADMINISTRATIVE PROVISIONS

USE OF PROCEEDS FROM DEFENSE DEPARTMENT COUNTERINTELLIGENCE OPERATIONS

SEC. 701. (a) During fiscal year 1986, the Secretary of Defense may authorize, without regard to the provisions of section 3302 of title 31, United States Code, use of proceeds from counterintelligence operations conducted by components of the Military Departments to offset necessary and reasonable expenses, not otherwise prohibited

by law, incurred in such operations, if use of appropriated funds to meet such expenses would not be practicable.

(b) As soon as the net proceeds from such counterintelligence operations are no longer necessary for the conduct of those operations, such proceeds shall be deposited into the Treasury as miscellaneous receipts.

(c) The Secretary of Defense shall establish policies and procedures to govern acquisition, use, management and disposition of proceeds from counterintelligence operations conducted by components of the Military Departments, including effective internal systems of accounting and administrative controls.

RETIREMENT BENEFITS FOR CERTAIN CENTRAL INTELLIGENCE AGENCY EMPLOYEES SERVING IN UNHEALTHFUL AREAS

SEC. 702. Section 251 of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note) is amended by inserting "(a)" after "SEC. 251." and by adding at the end thereof the following new subsection:

"(b) The Director of Central Intelligence may from time to time establish, in consultation with the Secretary of State, a list of places outside the United States which by reason of climatic or other extreme conditions are to be classed as unhealthful posts. Each year of duty at such posts, inclusive of regular leaves of absence, shall be counted as one and a half years in computing the length of service of a participant under this Act for the purpose of retirement, fractional months being considered as full months in computing such service. No extra credit for service at such unhealthful posts shall be credited to any participant who is paid a differential under section 5925 or 5928 of title 5, United States Code, for such service.".

TITLE VIII—ACCESS TO CRIMINAL HISTORY RECORDS FOR NATIONAL SECURITY PURPOSES

SEC. 801. (a) Part III of Title 5, United States Code, is amended by adding after chapter 89 the following new subpart:

"Subpart H—Access to Criminal History Record Information

"CHAPTER 91—ACCESS TO CRIMINAL HISTORY RECORDS FOR NATIONAL SECURITY PURPOSES

"§ 9101. Criminal history record information for national security purposes

"(a) As used in this section:

"(1) The term 'criminal justice agency' includes Federal, State, and local agencies and means: (A) courts, or (B) a Government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or Executive

order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

"(2) The term 'criminal history record information' means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, informations, or other formal criminal charges and any disposition arising therefrom, sentencing, correction supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. The term does not include those records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality.

"(3) The term 'classified information' means information or material designated pursuant to the provisions of a statute or Executive order as requiring protection against unauthorized disclosure for reasons of national security.

"(4) the term 'State' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of Pacific Islands, and any other territory or possession of the United States.

"(5) The term 'local' and 'locality' means any local government authority or agency or component thereof within a State having jurisdiction over matters at a county, municipal or other local government level.

"(b)(1) Upon request by the Department of Defense, the Office of Personnel Management, or the Central Intelligence Agency, criminal justice agencies shall make available criminal history record information regarding individuals under investigation by such department, office or agency for the purpose of determining eligibility for (A) access to classified information or (B) assignment to or retention in sensitive national security duties. Such a request to a State central criminal history record repository shall be accompanied by the fingerprints of the individual who is the subject of the request if required by State law and if the repository uses the fingerprints in an automated fingerprint identification system. Fees, if any, charged for providing criminal history record information pursuant to this subsection shall not exceed the reasonable cost of providing such information, nor shall they in any event exceed those charged to State or local agencies other than criminal justice agencies for such information.

"(2) This subsection shall apply notwithstanding any other provision of law or regulation of any State or of any locality within a State, or any other law of the United States.

"(3)(A) Upon request by a State or locality, the Department of Defense, the Office of Personnel Management, or the Central Intelligence Agency shall enter into an agreement with such State or locality to indemnify and hold harmless such State or locality, and its officers, employees and agents, from any claim against such State or locality, or its officer, employee or agent, for damages, costs and other monetary loss, whether or not suit is instituted, arising from the disclosure or use by such department, office or agency of crimi-

nal history record information obtained from the State or locality pursuant to this subsection, if the laws of such State or locality, as of the date of enactment of this section, otherwise have the effect of prohibiting the disclosure of such criminal history record information to such department, office, or agency.

"(B) When the Department of Defense, the Office of Personnel Management, or the Central Intelligence Agency and a State or locality have entered into an agreement described in subparagraph (A), and a claim described in such subparagraph is made against such State or locality, or its officer, employee, or agent, the State or locality shall expeditiously transmit notice of such claim to the Attorney General and to the United States Attorney of the district embracing the place wherein the claim is made, and the United States shall have the opportunity to make all determinations regarding the settlement or defense of such claim.

"(c) The Department of Defense, the Office of Personnel Management, or the Central Intelligence Agency shall not obtain criminal history record information pursuant to this section unless it has received written consent from the individual under investigation for the release of such information for the purposes set forth in paragraph (b)(1).

"(d) Criminal history record information received under this section shall be disclosed or used only for the purposes set forth in paragraph (b)(1) or for national security or criminal justice purposes authorized by law, and such information shall be made available to the individual who is the subject of such information upon request.".

(b) The table of contents of Part III of title 5, United States Code is amended by adding at the end thereof:

"Subpart G—Access to Criminal History Record Information

"91. Access to Criminal History Record Information for National Security Purposes ..... 9101".

SEC. 802. The amendments made by Section 801(a) of this Act shall become effective with respect to any inquiry which begins after the date of enactment of this Act conducted by the Department of Defense, the Office of Personnel Management, or the Central Intelligence Agency, for the purposes specified in paragraph (b)(1) of section 9101 of title 5, United States Code, as added by this Act.

SEC. 803. (a) Within two years after the date of enactment of this Act, the Department of Justice, after consultation with the Department of Defense, the Office of Personnel Management, and the Central Intelligence Agency, shall report to the appropriate committees of the Congress concerning the effect of Section 9101(b)(3) of title 5, United States Code, as added by this Act, including the effect of the absence of indemnification agreements upon States and localities not eligible under Section 9101(b)(3) of title 5, United States Code, for such agreements.

(b) Three years after the date of enactment of this Act, Section 9101(b)(3) of title 5, United States Code, shall expire.

And the Senate agree to the same.

LEE H. HAMILTON,
LOUIS STOKES,
DAVE MCCURDY,
ANTHONY C. BEILENSON,
ROBERT W. KASTENMEIER,
DAN DANIEL,
ROBERT A. ROE,
GEORGE E. BROWN, Jr.,
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BERNARD J. DWYER,
BOB STUMP,
ANDY IRELAND,
HENRY J. HYDE,
DICK CHENEY,
BOB LIVINGSTON,
BOB MCEWEN,

For consideration of matters within the jurisdiction of the Committee on the Judiciary under clause 1(m) of House Rule X,

PETER W. RODINO, Jr.,
ROMANO L. MAZZOLI,
DAN LUNGREN,

For consideration of matters within the jurisdiction of the Committee on Armed Services under clause 1(c) of House Rule X,

LES ASPIN,
SAMUEL S. STRATTON,
WM. L. DICKINSON,

Managers on the Part of the House.

DAVE DURENBERGER,
W.V. ROTH, Jr.,
BILL COHEN,
ORRIN G. HATCH,
FRANK H. MURKOWSKI,
CHIC HECHT,
MITCH MCCONNELL,
PATRICK J. LEAHY,
LLOYD BENTSEN,
SAM NUNN,
ERNEST F. HOLLINGS,
DAVID L. BOREN,
BILL BRADLEY,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2419) to authorize appropriations for fiscal year 1986 for the intelligence and intelligence-related activities of the United States Government, for the Intelligence Community Staff, for the Central Intelligence Agency Retirement and Disability System, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

TITLE I—INTELLIGENCE ACTIVITIES

Due to the classified nature of intelligence and intelligence-related activities, a classified annex to this joint explanatory statement serves as a guide to the classified Schedule of Authorizations by providing a detailed description of program and budget authority contained therein as reported by the Committee of Conference.

The actions of the conferees on all matters of difference between the two Houses (stated in the classified annex to the report accompanying the House bill, and the classified supplement that accompanied the report on the Senate bill) are shown below or in the classified annex to this joint statement.

A special conference group resolved differences between the House and the Senate regarding DOD Intelligence Related Activities, referred to as Tactical Intelligence and Related Activities (TIARA). This special conference group was necessitated by the differing committee jurisdictions between the two Houses and consisted of members of the House and Senate Committees on Armed Services and the House Permanent Select Committee on Intelligence.

The amounts listed for TIARA programs represent the funding levels jointly agreed to by the TIARA conferees and the House and Senate conferees for the Department of Defense Authorization Act, 1986 (H. Rept. 99-235). In addition, the TIARA conferees have agreed on the authorization level, as listed in the classified Sched-

ule of Authorizations, the joint statement, and its classified annex, for TIARA programs which fall into the appropriation categories of Military Pay and Military Construction.

SECTIONS 101 AND 102

Sections 101 and 102 of the conference report are identical to Sections 101 and 102 of the House bill, with the deletion of unnecessary technical parenthetical references. The Senate Amendment contained substantially similar provisions.

SECTION 103

Section 103 of the conference substitute authorizes appropriations of $50,600,000 for fiscal year 1986 for FBI domestic and international counterterrorism activities and authorizes the Attorney General to make advance payments to State and local law enforcement agencies cooperating in counterterrorism activities, not to exceed a total of $500,000, from funds authorized for FBI counterterrorism activities. The House bill had authorized $15,200,000 for FBI domestic terrorism activities in Section 103 and, by virtue of Sections 101 and 102 of that bill as it incorporated its accompanying classified Schedule of Authorizations, authorized a separate amount for FBI international counterterrorism activities. Section 106 of the Senate amendment, sponsored by Senator Bentsen, was substantially similar to Section 103 of the conference report, except that it authorized a total of $59,000,000 for FBI domestic and international terrorism activities and it specifically authorized forty additional counterterrorism motor vehicles for the FBI. The conferees note that these additional forty vehicles will be provided in fiscal year 1986 appropriations for the FBI.

The classified annex to this joint statement sets forth the allocation of the $50,600,000 provided in Section 103 of the conference report between the FBI domestic counterterrorism program and the FBI international counterterrorism program.

SECTION 104

Section 104 of the conference report authorizes the Director of Central Intelligence, under certain circumstances, to make personnel ceiling adjustments. Section 104 of the House bill contained a substantially similar provision. Section 104 of the Senate amendment is identical to Section 104 of the conference report.

SECTION 105

The House bill contained a provision, Section 105, prohibiting funds available to the Central Intelligence Agency, the Department of Defense, or any other element of the U.S. Government involved in intelligence activities from being obligated or expended during fiscal year 1986 for material assistance to the Nicaraguan democratic resistance. The provision also prohibited the obligation or expenditure of any such funds with the effect of providing arms, ammunition or other weapons of war for military or paramilitary operations in Nicaragua by any group, organization, movement, or individual. Section 105 of the House bill permitted the provision of

advice and intelligence information to the Nicaraguan democratic resistance.

The Senate bill had no similar provision.

The conferees carefully considered this issue in light of Congressional action subsequent to passage of Fiscal Year 1986 Intelligence Authorization bills in the House and the Senate, and in the context of the current situation in Nicaragua. The Conference Report contains a new Section 105 which restricts support for military or paramilitary operations in Nicaragua.

Section 105, as contained in the Conference Report, provides that funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated and expended during fiscal year 1986 to provide funds, material, or other assistance to the Nicaraguan democratic resistance to support military or paramilitary operations in Nicaragua only as authorized pursuant to Section 101 and as specified in the classified Schedule of Authorizations referred to in Section 102 of H.R. 2419, Section 502 of the National Security Act of 1947, or Section 106 of the Supplemental Appropriations Act, 1985.

Section 101 of the Fiscal Year 1986 Intelligence Authorization Act and as specified in the classified Schedule of Authorizations referred to in Section 102

Classified amounts are authorized in Section 101 for intelligence agency infrastructure expenditures related to activities such as the provision of information and advice to the Nicaraguan democratic resistance as described below. In addition, a specific classified authorization amount for communications equipment and related training is contained in the classified Schedule of Authorizations. This authorization is consistent with the action taken by the Congress in the Supplemental Appropriations Act (P.L. 99-88) to allow the United States Government to exchange information with the Nicaraguan democratic resistance. The classified authorization is designed to ensure that an exchange of information can be accomplished without compromising U.S. intelligence sources and methods.

Section 502 of the National Security Act of 1947, as contained in Section 401 of the Fiscal Year 1986 Intelligence Authorization Act

Subsection 502(b) states that no funds may be made available for any intelligence activity for which funds have been denied by the Congress. The conferees have agreed to deny all funding requested by the Administration for the paramilitary covert action program for Nicaragua. This Joint Explanatory Statement notes concerning Subsection 502(b) of the National Security Act that a program for which funding has been denied, but which has been restructured in a major way so as to effectively constitute a new program, may become eligible for funding. The conferees emphasize that under Section 502 of the National Security Act, the effect of their authorization action on the Administration's original budget request relating to military or paramilitary operations in Nicaragua is to make approval either of a reprogramming or of a transfer the only way

in which funds, materiel, or other assistance beyond what is authorized in Section 101 of this Conference Report and the Classified Schedule referred to in Section 102, as described above, and what may become available pursuant to Section 106 of P.L. 99–88, as described below, could be provided by the intelligence agencies to the Nicaraguan democratic resistance during fiscal year 1986 to support military or paramilitary operations in Nicaragua. The CIA Reserve for Contingencies will not, in other words, be available to fund such activity.

Section 106 of the Supplemental Appropriations Act, 1985 (P.L. 99–88)

Section 106 of the Supplemental Appropriations Act, 1985, provides for expedited Congressional consideration of a Presidential request for assistance for the Nicaraguan democratic resistance in addition to the $27 million appropriated for humanitarian assistance for the Nicaraguan democratic resistance in that Act.

The conferees note that they considered authorizing the intelligence agencies to provide transportation equipment to the Nicaraguan democratic resistance, but determined not to authorize funds for such equipment because the Nicaraguan Humanitarian Assistance Office established by Executive Order 12530 of August 29, 1985, pursuant to the International Security and Development Cooperation Act of 1985 (P.L. 99–83) and the Fiscal Year 1985 Supplemental Appropriations Act, already has the authority to provide transportation equipment as part of the humanitarian assistance program, and the provision of such equipment is not precluded by the definition of humanitarian assistance contained in those Acts so long as no modifications are made to the equipment designed to be used to inflict serious bodily harm or death.

The conferees note that under current law and the restriction contained in Section 105 of this Conference Report, the intelligence agencies may provide advice, including intelligence and counterintelligence advice, and information, including intelligence and counterintelligence information, to the Nicaraguan democratic resistance. Section 105 does not permit intelligence agencies to engage in activities, including training other than the communications training provided for pursuant to Section 105, that amount to participation in the planning or execution of military or paramilitary operations in Nicaragua by the Nicaraguan democratic resistance, or to participation in logistics activities integral to such operations.

Section 105 does not permit the departments, agencies, and entities described therein to engage in the solicitation of third countries to provide funds, materiel, or other assistance to the Nicaraguan democratic resistance to support military or paramilitary operations in Nicaragua. But Section 105(b)(2) does not restrict the solicitation by the Department of State through diplomatic channels of third country humanitarian assistance of the same kind that the Nicaraguan Humanitarian Assistance Office is authorized to provide to the Nicaraguan democratic resistance, so long as such third country assistance is furnished from the third country's own resources, and the United States does not enter into any arrangement conditioning, expressly or impliedly, the provision of U.S. as-

sistance to a third country on the provision of assistance by such third country to the Nicaraguan democratic resistance.

SECTION 106

Section 106 of the conference report authorizes appropriations for design and construction of a research and engineering facility at the National Security Agency headquarters compound. Section 106 of the conference report is identical to Section 105 of the Senate amendment. The House bill contained a corresponding provision by virtue of Sections 101 and 102 of the House bill and the classified Schedule of Authorizations incorporated therein by reference.

TITLE II—INTELLIGENCE COMMUNITY STAFF

SECTIONS 201, 202, AND 203

Title II of the conference report authorizes appropriations and personnel end-strengths for the Intelligence Community Staff for fiscal year 1986 and provides for administration of the Staff during fiscal year 1986 in the same manner as the Central Intelligence Agency. The House bill authorized $21,000,000 and 233 personnel for the Intelligence Community Staff for fiscal year 1986. The Senate amendment authorized $22,283,000 and 233 personnel. The conferees agreed to a total authorization of $22,083,000 and 233 personnel.

TITLE III—CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM

SECTION 301

Section 301 of the conference report authorizes appropriation of the sum of $101,400,000 for fiscal year 1986 for the Central Intelligence Agency Retirement and Disability Fund. Section 301 of the conference report is identical to Section 301 of the House Bill and Section 301 of the Senate amendment.

TITLE IV—PROVISIONS RELATING TO INTELLIGENCE AGENCIES

SECTION 401

Section 401 of the conference report adds a new Section 502 to the National Security Act of 1947. Section 502 of the National Security Act as contained in the conference report provides that appropriated funds available to U.S. intelligence agencies may be made available for an intelligence or intelligence-related activity only if: (1) Congress specifically authorized and appropriated such funds for such activities, (2) for releases from the CIA Reserve for Contingencies, the DCI has given prior notice of the release to the intelligence and appropriations committees of Congress consistent with Section 501 of the National Security Act, or (3) for funds made available by reprogrammings, transfers, or otherwise, the DCI, the Secretary of Defense, or the Attorney General, as appropriate, has given prior notice of such action to the intelligence committees and the appropriations committees.

Section 401 of the House bill contained provisions relating to intelligence funding substantially similar to Section 401 of the conference report, and also contained separate provisions relating to covert arms transfers which are incorporated with modifications in Section 403 of the conference report, discussed below. Section 103 of the Senate amendment contained the single fiscal year provision included in previous intelligence authorization bills corresponding to the provisions relating to intelligence funding contained in the House bill; the Senate amendment did not contain a provision corresponding to the House bill provisions on covert arms transfers.

Section 502 of the National Security Act (relating to intelligence funding) as contained in Section 401(a) of the conference report is the same as Section 502(a) of the National Security Act as contained in Section 401(a) of the House bill, with the following changes: (1) insertion at the beginning of Section 502 of the National Security Act of the word "Appropriated" to make clear that Section 502(a) of the National Security Act applies with respect to appropriated funds; (2) addition of a role for the Attorney General with respect to certain FBI and DEA funding; (3) addition of a provision making clear that nothing in Section 502 of the National Security Act prohibits obligation or expenditure of funds in accordance with Sections 1535 and 1536 of title 31, United States Code (the "Ecomony Act"); and (4) technical drafting changes such as renumbering of provisions and relocation of definitions.

Section 502(a)(3)(C) of the National Security Act as contained in the conference report ensures that the intelligence and appropriations committees of Congress will receive prior notice when funds specifically authorized for one activity are made available for a different intelligence or intelligence-related activity, by reprogramming, transfer or otherwise. The Director of Central Intelligence, the Secretary of Defense, or the Attorney General, as appropriate, bears responsibility for providing such prior notice.

Under Section 502(a)(3)(C) of the National Security Act as contained in the conference report, the DCI will be responsible for providing prior notice when the activity for which funds are being made available falls within the National Foreign Intelligence Program (NFIP) budget. The Secretary of Defense will be responsible for providing such notice when the activity falls within a Department of Defense intelligence-related budget category. The Attorney General will be responsible for providing such notice when the activity falls within the domestic terrorism budget of the Federal Bureau of Investigation or the Foreign Cooperative Investigations Program of the Drug Enforcement Administration (DEA). In any other case—that is, when the activity for which funds are being made available falls outside the NFIP, DOD intelligence-related budget categories, the FBI domestic terrorism budget, and the DEA Foreign Cooperative Investigations Program budget—the DCI will be responsible for providing such notice.

Section 502(b) of the National Security Act as contained in the conference report states that no funds may be made available for any intelligence activity for which funds were denied by the Congress. This prohibition applies to the use of all funds available to intelligence agencies, whether programmed or contingency. At the same time, it should be recognized that a program for which fund-

ing was denied by Congress, but which has been restructured in a major way so as to effectively constitute a new program, is not barred from being funded. However, the conferees agreed that restructured programs which address the same subject matter as programs denied by the Congress should be considered matters of Congressional interest and, by tradition and agreed upon procedures, would normally require reprogramming or transfer approval to initiate funding. The conferees further agreed that contingency funds could be used to fund such restructured programs if a timely response to unforeseen circumstances is required, the intelligence and appropriations committees have been notified at least 15 days prior to the program's initiation, and the use of contingency funds has not been specifically prohibited.

The concern was expressed that extremely unusual circumstances could be imagined in which prior notice to congressional committees of an activity might not be required by Section 501 of the National Security Act of 1947, but the method of funding the activity might require prior notice to congressional committees under Section 502 of the National Security Act as contained in the conference report. The conferees do not expect such an issue to arise in practice, but if it should arise, resolution of the issue should be guided by the principles of comity and mutual understanding as set forth in the statement of managers accompanying the conference report which included Section 501 of the National Security Act (House Report 96–1350). Under all circumstances, legally required notifications to congressional committees must be provided.

SECTION 402

The House bill contained a provision requiring the Director of Central Intelligence to review and evaluate the vulnerability of confidential United States Government activities abroad, and information concerning such activities, to efforts by foreign powers to detect, monitor, or counter such activities, or to acquire such information. The DCI was to report to the House and Senate intelligence committees on these matters, including plans for improvements to reduce such vulnerabilities. The Senate bill contained no comparable provision.

The conference substitute requires the President, within 120 days after the date of enactment, to submit to the House and Senate intelligence committees a report on the capabilities, programs, and policies of the United States to protect against, detect, monitor, counter, and limit intelligence activities by foreign powers, within and outside the United States, directed at United States Government activities or information, including plans for improvements which are within his authority to effectuate and recommendations for improvements which are not within his authority to effectuate. This report is to be exempt from any requirement for publication or disclosure.

The conferees intend that the President will submit within sixty days of the date of enactment of H.R. 2419 an interim report on the same subject as the full report required to be submitted within 120 days of enactment. In developing these reports, the conferees

expect the President to consult as appropriate with the intelligence committees with a view toward developing an agenda for action and to consider such information presented to those committees as those committees shall deem appropriate to make available to the President. Submission of the interim report within sixty days is of particular importance to the Senate conferees, since submission of the interim report will coincide with the preparation of a report to the Senate by the Senate Select Committee on Intelligence.

SECTION 403

Section 403 of the conference report is the same as Section 502(b) of the National Security Act as contained in Section 401(a) of the House bill, with the following changes: (1) Section 403 of the conference report applies only during fiscal year 1986 and (2) technical drafting changes such as renumbering of provisions and relocation of definitions. Section 403 requires prior notification to the intelligence committees of any covert arms transfer where the value of a single article or service exceeds $1 million. Prior notification is subject to the same terms and conditions as apply to the other significant anticipated intelligence activities under Section 501 of the National Security Act.

The conferees note that the intelligence committees and the Executive Branch have been engaged for well over a year in a cooperative process designed to produce mutual understandings of the term "significant anticipated intelligence activity" as used in Section 501 of the National Security Act of 1947 as it concerns covert action, and in particular covert arms transfers. The conferees express the hope that expeditious completion of this process and fulfillment of the understandings reached in that process will obviate any future need to define further in statute the term "significant anticipated intelligence activity."

TITLE V—GENERAL PROVISIONS

SECTION 501

Section 501 of the conference report makes clear that nothing in the Intelligence Authorization Act constitutes authority for the conduct of any intelligence or intelligence-related activity not otherwise authorized by the Constitution or laws of the United States. Section 501 of the conference report is identical to Section 501 of the House bill and Section 401 of the Senate amendment.

SECTION 502

Section 502 of the conference report authorizes increases, by such additional or supplemental amounts as may be necessary, of appropriations authorized by the Intelligence Authorization Act for salary, pay, retirement, and other benefits for Federal employees for increases in such compensation or benefits authorized by law. Section 502 of the House bill and Section 402 of the Senate amendment contained provisions substantially similar to Section 502 of the conference report.

TITLE VI—FACILITATING NATURALIZATION OF CERTAIN FOREIGN INTELLIGENCE SOURCES

SECTION 601

The Senate amendment to H.R. 2419 contained a provision amending section 316 of the Immigration and Nationality Act (8 U.S.C. 1427) to improve the ability of the United States to obtain foreign intelligence by authorizing the waiver of certain requirements for naturalization for certain persons who had made extraordinary contributions to the national security or to the conduct of U.S. intelligence activities. The requirements authorized to be waived were general residency and physical presence, the additional waiting period imposed on members of certain organizations, and the requirement that the naturalization petition be filed in the court which has jurisdiction over the petitioner's place of residence.

The House bill had no comparable provision.

The conferees agreed to the Senate provision, with several modifications designed to more clearly express Congressional intent in enacting the amendment to Section 316 of the Immigration and Nationality Act.

First, although the conferees recognized that the basic thrust of the legislation was to remove fixed chronological barriers to naturalization in a small number of very extraordinary cases, they concluded that it would nevertheless be prudent to require any alien naturalized pursuant to subsection 316(g) of the Immigration and Nationality Act to have continuously resided in the United States for at least one year. The conferees did not consider this requirement to be unduly burdensome, or to run counter to the underlying purpose of subsection 316(g), especially in light of the probability that resettlement and related administrative processing of the kinds of individuals that subsection 316(g) is designed to benefit normally will take at least several months, if not longer.

Second, the conferees agreed to add a proviso that the waiver authority cannot apply to any alien described in subparagraphs A through D of paragraph 243(h)(2) of the Immigration and Nationality Act (8 U.S.C. 1253(h)(2)), relating to persecutors, criminals, and counterintelligence risks. The conferees emphasize that in evaluating eligibility for waivers under subsection 316(g) in light of these disqualifying criteria, references to participation and assistance shall not apply to mere membership in or association with an organization that engages in persecution, but rather must be interpreted to apply to the personal acts of a potential petitioner. Many potential beneficiaries of the amendment are likely to have been members of the foreign intelligence services of other nations, for example the Soviet Committee for State Security (KGB) which has both foreign intelligence and domestic security responsibilities. A set of disqualification criteria that operated to exclude all members of such organizations would deprive subsection 316(g) of any practical utility, and no such anomalous result is intended by the conferees.

Third, the conferees agreed that the maximum number of aliens naturalized pursuant to subsection 316(g) in any fiscal year shall not not exceed five.

Fourth, the conferees agreed to a change in the Congressional notification specification that makes clear that the Intelligence and Judiciary Committees of each House are to be informed within a reasonable time prior to the filing of each petition under subsection 316(g). The conferees consider that a "reasonable time" normally would be not less than 30 days.

The conferees expect that the authority provided by subsection 316(g) will be used to reward those aliens who for a significant time have maintained a relationship with the United States. Only in rare instances should expedited citizenship be afforded to defectors with no previous relationship with the United States, and only after careful scrutiny should the promise of expedited citizenship be offered as an inducement for future services.

The conferees emphasize that private immigration legislation remains the preferred method for processing exceptions to Immigration and Nationality Act provisions, because it allows full Congressional consideration of the merits of individual cases. In any event, the Executive Branch should, in each case, determine whether a private bill or use of the waiver authority provided for in subsection 316(g) is most appropriate. The waiver authority is meant for special kinds of situations, and it should not normally be used as an alternative to be employed when efforts to enact private immigration legislation are unsuccessful.

The conferees also emphasize that in informing the Intelligence and Judiciary Committees of determinations to employ the authority in subsection 316(g), enough information must be supplied to the Committees to enable them to reach an informed opinion concerning such use. Thus, the conferees would expect that, consistent with due regard for the protection of intelligence sources and methods, the same kind of information would be supplied as that which is normally available to the Congress when it considers private immigration legislation. The conferees note that the Committees will be particularly interested in obtaining information bearing upon the criteria described in subparagraphs A through D of paragraph 243(h)(2) of the Immigration and Nationality Act. Nothing in Section 316(g) of the Immigration and Nationality Act in any way limits or supersedes the provisions of Title V of the National Security Act of 1947.

The second sentence of Section 316(g)(2) of the Immigration and Nationality Act, as contained in the conference report, does not increase any authority a federal court may now possess to maintain the confidentiality of its proceedings or records, nor does it provide the executive branch with any new authority vis-a-vis the federal courts. The conferees expect that a naturalization court will exercise its discretionary powers to protect intelligence sources, methods, and activities as appropriate.

The conferees expect the Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration to employ the same kind of high-level joint decisionmaking process in connection with the amendment as has been the case with respect to use of the authority contained in section 7 of the Central Intelligence Agency Act of 1949.

The conferees also expect that the Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration

will pay close attention to any views on use of subsection 316(g) which may be communicated by the Intelligence or Judiciary Committees.

The conferees note that, although subsection 316(g) of the Immigration and Nationality Act permits waiver of certain naturalization requirements, all other naturalization requirements, including that of good character, continue to apply.

TITLE VII—ADMINISTRATIVE PROVISIONS

SECTION 701

Section 701 of the conference report authorizes the Secretary of Defense to allow counterintelligence components of the military departments to spend the proceeds of counterintelligence operations for the necessary and reasonable expenses, not otherwise prohibited by law, of the same or similar counterintelligence operations, rather than remitting the proceeds of such operations to the U.S. Treasury as miscellaneous receipts, as currently provided for by Section 3302 of title 31, United States Code. Section 601 of the Senate bill contained a substantially similar provision.

The House bill had no similar provision.

The conferees agreed to the Senate provision with some modifications. These require that the funds received in the course of counterintelligence operations be used only when appropriated funds are not available or cannot practicably be used for counterintelligence purposes. Further, the Secretary of Defense is required to establish polices and develop regulations to control, audit, and account for all receipts into, and disbursements from, the pool of funds. The conferees agreed to accept the Senate provision, as modified, because its authority was to be limited to FY 1986 and with the understanding that, with the submission of the FY 1987 Congressional Budget Justification materials, the Department of Defense should provide recommendations for additional legislative changes, if necessary, to allow the use of appropriated funds to fully cover the requirements of the Foreign Counterintelligence programs. The DOD report should analyze the merits of such legislative changes.

SECTION 702

Section 702 of the conference report provides the Director of Central Intelligence the authority to establish a list of unhealthful posts at which Agency employees covered by the CIA Retirement and Disability System may opt to receive one-and-one-half year's credit toward retirement for one year's service at such an unhealthful post. Section 702 of the conference report is the same as Section 602 of the Senate amendment, with a change making clear that only posts outside the United States may be considered for designation as unhealthful posts.

The House bill had no comparable provision.

Section 702 of the conference report parallels similar provisions of the Foreign Service Act applicable to Foreign Service Officers. The conferees note, however, that this provision—like many others which have been proposed by the Administration in the past six

years—does not address the problems of all intelligence community employees who serve in similar circumstances. The intelligence committees have often before made this point to the leadership of the intelligence community, but to little avail.

The conferees agree that future proposals for adjustments to intelligence benefits, allowances, or retirement provisions should be presented with a comparison of how present law and circumstances of employment affect intelligence agencies' employees across the board and how the new proposals would change such provisions. In this way, the committees will be able to understand whether a particular provision covers the situations of all those intelligence agency employees who should be considered when legislative adjustments are made. The House conferees note in particular that they will be reluctant in the future to agree to proposals in the benefit, allowance, and retirement areas that do not address the concerns of all intelligence agencies whose employees serve under comparable circumstances.

The conferees believe that, unless some extremely unusual circumstance can be demonstrated, the Director's list of unhealthful locations abroad for purposes of this retirement provision will be the same as the list established by the Secretary of State under the comparable provisions of the Foreign Service Act of 1980.

TITLE VIII—ACCESS TO CRIMINAL HISTORY RECORDS FOR NATIONAL SECURITY PURPOSES

SECTIONS 801, 802, AND 803

Title VIII of the Senate amendment provided the Department of Defense (DOD), the Office of Personnel Management (OPM), and the Central Intelligence Agency (CIA) a right of access to state and local criminal history record information in determining eligibility for (1) access to classified information, (2) assignment to or retention in sensitive national security duties, and (3) acceptance or retention in the armed services.

The House bill contained no corresponding provision.

Title VIII of the conference report includes a modified version of the Senate provision.

Title VIII of the conferernce report consists of four sections. Section 801(a) adds a new section 9101 to title 5, United States Code, to provide DOD, OPM, and CIA a right of access to state and local criminal history record information in determining eligibility for (1) access to classified information or (2) assignment to or retention in sensitive national security duties. Section 801(b) makes conforming changes to the table of contents of Part III of title 5, United States Code. Section 802 establishes the effective date of the amendments to title 5 made by Section 801(a). Section 803 requires the Department of Justice to report to the Congress within two years after the date of enactment of H.R. 2419 on the effect of the indemnification provisions contained in Section 9101 of title 5, as enacted by H.R. 2419, and contains a sunset provision limiting to a three year period the indemnification provisions of Section 9101.

The conferees note that a majority of States and localities currently cooperate with DOD, OPM and CIA by making criminal his-

tory record information available voluntarily; some states, however, do not provide such access, either as a matter of policy or due to state laws limiting access to such information. Section 9101 of title 5 will provide a mandatory mechanism for DOD, OPM and CIA access to criminal history record information for national security purposes; however, the conferees do not intend the mandatory nature of the process established by Section 9101 to discourage existing voluntary cooperation.

Statement of Need

The conferees included Title VIII in the conference report based upon the following considerations:

—under the Constitution, the Congress has the responsibility and power to provide for the common defense and security of our Nation;

—to meet the interests of national security, DOD, OPM, and CIA conduct investigations of individuals for the purpose of determining eligibility for access to classified information or assignment to or retention in sensitive national security duties;

—to meet the interests of national security, DOD, OPM, and CIA need access to criminal history record information when conducting investigations of individuals for the purpose of determining eligibility for access to classified information or assignment to or retention in sensitive national security duties; and

—while many States and localities have cooperated voluntarily in providing criminal history record information to DOD, OPM, and CIA for the purpose of determining eligibility for access to classified information or assignment to or retention in sensitive national security duties, a significant number of States and localities because of their laws or policies have not done so, which has limited the ability of DOD, OPM and CIA to conduct effective investigations.

Enactment by the Congress of the provisions of Title VIII pursuant to its constitutional powers set forth in Section 8 of Article I of the Constitution will, by virtue of the Supremacy Clause in Article VI of the Constitution, supersede anything in the constitutions or laws of the several states which conflicts with Title VIII.

Explanation of Section 9101 of Title 5

Section 801(a) of the Intelligence Authorization Act for Fiscal Year 1986 enacts a new section 9101 of title 5, United States Code, with the caption "Criminal history record information for national security purposes." Section 9101 will provide DOD, OPM, and CIA a right of access to state and local criminal history record information in determining eligibility for (1) access to classified information or (2) assignment to or retention in sensitive national security duties.

Subsection 9101(a) defines the terms "criminal justice agency," "criminal history record information," "classified information," "State," "local," and "locality" used in Section 9101. The conferees note that the term "criminal history record information" does not include juvenile records, nor does it include the contents of intelligence or investigative files, although such records and files may continue to be provided on a voluntary basis. The term also does

not include the records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality. The conferees excluded such sealed records in deference to the strong policies of a number of States concerning the sealing of certain records; the conferees took care, however, to ensure that federal agencies will enjoy the same status with respect to sealed records as State and local criminal justice agencies enjoy under State and local law. Thus, if a State or locality allows its criminal justice agencies access to a sealed record which otherwise fits the definition of criminal history record information, it cannot deny DOD, OPM, or CIA access under Section 9101 to that record. The definition of "classified information" includes information classified pursuant to Executive Order (currently Executive Order 12356) or pursuant to the Atomic Energy Act of 1954.

Paragraph 9101(b)(1) provides that, upon request by DOD, OPM, or CIA, criminal justice agencies shall make available criminal history record information regarding individuals being investigated by DOD, OPM, or CIA as provided in otherwise applicable law for the purpose of determining eligibility for (1) access to classified information or (2) assignment to or retention in sensitive national security duties. The first category of eligibility determinations, those involving initial or continuing access to classified information, are subject to security clearance requirements established by the President, currently contained in Section 4.1 of Executive Order 12356, which provides: "A person is eligible for access to classified information provided that a determination of trustworthiness has been made by agency heads or designated officials and provided that such access is essential to the accomplishment of lawful and authorized Government purposes."

For restricted data, such determinations are subject to requirements established in the Atomic Energy Act of 1954. The second category of eligibility determinations, those involving sensitive national security duties, relate to positions which involve important national security functions, but which do not involve authorized access to classified information. Examples of such positions are DOD personnel who provide Presidential security support and military personnel responsible for loading nuclear weapons aboard airplanes or ships. These individuals do not necessarily need access to classified information to perform their duties, but their jobs nevertheless involve sensitive national security duties.

The conferees expect DOD, OPM, and CIA, respectively, to establish internal regulations identifying which components of those organizations are authorized to make requests for access to criminal history record information under Section 9101. The Department of Defense has stated that it expects the following DOD components to use the authority granted by Section 9101: Defensive Investigative Service, Naval Investigative Service, Air Force Office of Special Investigations, Army Intelligence and Security Command, and the National Security Agency.

Paragraph 9101(b)(1) requires DOD, OPM, and CIA requests under Section 9101 to State central criminal history record repositories for access to criminal history record information to be accompanied by the fingerprints of the individuals who are the subject of the requests, if State or local law so requires and if the re-

pository uses the fingerprints in an automated fingerprint identification system. When Section 9101 requires submission of fingerprints to repositories, DOD, OPM, and CIA will submit facsimiles of the fingerprints of individuals who are the subject of requests for information. In those occasional cases in which the facsimiles of fingerprints are illegible, unclassifiable or otherwise insufficient to use in the repository's automated fingerprint identification system, the repository will process the request using the name, date of birth and other identifying information submitted by DOD, OPM, and CIA with the request.

The conferees recognize that DOD, OPM, and CIA will also submit fingerprints, even when not required by Section 9101, when fingerprints are necessary to prevent misidentification by a State or locality of the individual who is the subject of the request for information, which might otherwise occur when the State or locality has records on individuals with similar names and other identifying information.

The conferees request that DOD, OPM, and CIA report to the appropriate committees of Congress within two years of the date of enactment of H.R. 2419 on the effect of the fingerprint submission requirement. The conferees urge DOD, OPM, and CIA and States and localities to cooperate in ensuring effective, accurate, timely and low-cost retrieval of criminal history record information as required by this statute. The conferees believe that DOD, OPM, and CIA should review their practices in obtaining and processing criminal history record information to keep abreast of rapidly changing technology, such as automated fingerprint identification systems.

Paragraph 9101(b)(1) also provides limitations on the fees States and localities may charge to DOD, OPM, and CIA for providing access to criminal history record information under Section 9101. The conferees note that many States and localities currently provide such services voluntarily at no charge, and the conferees hope that such cooperation without charge will continue. Nevertheless, after considering the national security interests of the Nation and the administrative and policy interests of the several States, the conferees concluded that States and localities should have the option of charging for the service which Section 9101 requires that they provide to DOD, OPM, and CIA.

To protect the federal fisc, the legislation provides that the fees a State or locality charges cannot exceed the reasonable cost of providing the criminal history record information. To protect the federal government against the possibility of discriminatory treatment by States and localities in setting fees for criminal history record information, the legislation provides that the fees charged to DOD, OPM, and CIA cannot exceed the fees the States and localities charge to State or local agencies which are non-criminal justice agencies. Thus, with respect to fees, the legislation provides that the States and localities need not charge DOD, OPM, or CIA when the States and localities provide criminal history record information under this section, but if they choose to do so, the States and localities may levy the lesser of the reasonable cost of providing the information, or the fee they charge to State or local non-criminal justice agencies. Funds authorized to be appropriated by H.R.

2419 to DOD intelligence components and to the CIA which are available for investigations for determining eligibility for access to classified information or for assignment to or retention in sensitive national security duties will be available for the payment of fees levied by States or localities for access to criminal history record information. The conferees are agreed that DOD, OPM, and CIA resources should be adjusted appropriately by the Congress in the future to provide the necessary funds from which such fees may be paid. The conferees request that DOD, OPM, and CIA report annually to the appropriate committees of Congress on their experience with respect to fees for access to criminal history record information under Section 9101.

Paragraph 9101(b)(2) provides that subsection 9101(b) applies notwithstanding any laws or regulations of States and localities and notwithstanding any other federal laws. Thus, subsection 9101(b) preempts any conflicting State or local laws and supersedes any inconsistent federal laws. It does not, of course, affect complementary federal statutes which do not conflict with subsection 9101(b), such as Section 520a of title 10, United States Code.

Paragraph 9101(b)(3) provides that upon request by a State or locality, DOD, OPM, or CIA shall enter into an agreement to indemnify and hold harmless such State or locality, and its officers, employees, and agents, from any claim based on disclosure or use by DOD, OPM, or CIA of criminal history record information obtained from the State or locality, if, upon the date of enactment of the legislation, State or local law has the effect of prohibiting disclosure of such information to DOD, OPM or CIA. The scope of indemnification includes damages, costs and other monetary loss, whether or not suit is instituted. The conferees expect DOD, OPM, and CIA to consult with each other and with the Department of Justice ensure that indemnification agreements into which DOD, OPM, and CIA enter under the authority of Section 9101 properly protect the interests of the United States.

The conferees expect the indemnification provision to be a one-time-only exception to the general policy against indemnification. In this legislation, because of the unique combination of national security concerns, issues of states rights, and a need to respect the privacy rights of Americans, the conferees concluded that this exception is appropriate. The conferees emphasize that, not only is the federal government forcing states to disclose criminal history record information, but also a State must make disclosure to the federal government even when the State's law, because of a legitimate concern for the accuracy of the underlying records and privacy of its citizens, directly prohibits the disclosure. But for this legislation, such a State would not be exposed to any liability.

While agreeing to the indemnification provision because of the special circumstances noted, the conferees are very concerned that it not unduly burden the federal government or otherwise generate unintended consequences. Therefore, the conferees have added subsection 803(b) to H.R. 2419, a three year sunset provision applicable only to Section 9101(b)(3), relating to indemnification. At the end of the three-year period, or sooner, the Congress will have the opportunity to decide whether to retain the existing indemnification pro-

vision, expand it to cover more States, adopt an immunity provision, or do nothing.

Paragraph 9101(b)(3) imposes upon a State or locality with which DOD, OPM, or CIA has entered into an indemnification agreement under the authority of Section 9101 a duty to notify the Attorney General and the appropriate United States Attorney expeditiously whenever a claim is made against the State or locality, or its officers, employees, or agents, which may be subject to the indemnification agreements. The requirement for expeditious notification ensures that the United States will have an effective opportunity to exercise the right granted to it by the legislation to make all determinations regarding the settlement or defense of the claim. Defense of the claim includes all aspects of litigation, including appeals.

Subsection 9101(c) provides the key requirement protecting the rights of individuals who are the subjects of DOD, OPM, and CIA requests under Section 9101 for criminal history record information. Subsection 9101(c) prohibits DOD, OPM, and CIA from obtaining such information about an individual under Section 9101 unless DOD, OPM, or CIA has received written consent from the individual for the release of such information for the purpose of determining eligibility for access to classified information or assignment to or retention in sensitive national security duties. Thus, the written consent of the individual under investigation is a prerequisite to a DOD, OPM, or CIA request under Section 9101 for access to State or local criminal history record information on that individual.

Subsection 9101(d) provides that DOD, OPM and CIA may not disclose or use criminal history record information obtained under Section 9101 except for determining eligibility for access to classified information, determining eligibility for assignment to or retention in sensitive national security duties, or for national security or criminal justice purposes authorized by law. As the text of Section 9101 makes clear, DOD, OPM and CIA may request criminal history record information under Section 9101 only for the purposes of determining eligibility for access to classified information or for assignment to or retention in sensitive national security duties; the reference to "national security or criminal justice purposes" in subsection 9101(d) does not change in any way that limitation on the permissible purposes for a request. However, when a specific need arises, DOD, OPM or CIA may disclose or use criminal history record information in its possession obtained under Section 9101 for authorized national security or criminal justice purposes. The conferees expect that this provision will be construed narrowly to permit access when necessary for such purposes, for example as part of an authorized criminal or counterintelligence investigation.

The conferees note that the reference to national security or criminal justice purposes does not include the much larger universe of routine uses described by DOD, OPM, or CIA under their routine use statements published in accordance with Section 552a of title 5, United States Code (Privacy Act of 1974). The reference to national security purposes does, however, include disclosure and use of criminal history record information in litigation of personnel security cases in the courts or before boards and agencies. The conferees also note that subsection 9101(d) constitutes a nondisclosure

statute for purposes of paragraph 552(b)(3) of title 5, United States Code (Freedom of Information Act).

Subsection 9101(d) also grants to an individual who is the subject of a DOD, OPM or CIA request under Section 9101 for criminal history record information a right of access to the information obtained by DOD, OPM, or CIA. The conferees are agreed that the written consent form required by subsection 9101(c) should include a specific notice to the individual whose consent is sought that he has a statutory right of access to the information received by DOD, OPM, or CIA pursuant to the consent under Section 9101. This individual right of access to the information received under Section 9101 by DOD, OPM and CIA is important to ensure that the individual is able to proffer any explanation, correction, or addition that such individual may wish to provide to facilitate an informed decision by the department, office or agency.

LIMITATION ON BUDGET AUTHORITY

Section 503 of the House bill ensured the consistency of House action on the Department of Defense Authorization Act, 1986 and the Intelligence Authorization Act, 1986. Subsequent action by the conference on the defense authorization act and by this conference ensures the harmony of authorization actions taken in those acts, obviating the need for the House provision. The Senate amendment contained no comparable provision. The conference substitute does not include the House provision.

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