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9/11 Commission Recommendations: Intelligence Budget

Thomas J. Nicola, American Law Division

October 23, 2004

Abstract. This report identifies the main recommendations of the 9/11 Commission with respect to the intelligence budget. This report also describes the intelligence budget process under current law to explain the effect of these recommendations and presents the current budget authorities of the Director of Central Intelligence, as well as budget provisions in two bills, S. 2774 and H.R. 5040, that include all Commission recommendations.

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Updated October 23, 2004

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9/11 Commission Recommendations: Intelligence Budget

Summary

This report identifies the main recommendations of the 9/11 Commission with respect to the intelligence budget. The National Commission on Terrorist Attacks, known as the 9/11 Commission, on July 22, 2004 recommended replacing the Director of Central Intelligence with a National Intelligence Director: (1) to oversee national intelligence centers on specific subjects of interest across the United States government; and (2) to manage the national intelligence program and oversee agencies that contribute to it. The National Intelligence Director would submit a unified budget for national intelligence and would receive an appropriation for national intelligence and apportion appropriated funds to appropriate agencies in the intelligence community.

The Commission also recommended that the top line of the intelligence budget should be made public and that Congress should pass a separate appropriations act for national intelligence rather than include funding for intelligence activities in the appropriations acts for the Department of Defense and those for other departments that have elements of the intelligence community. In addition, the Commission proposed that Congress should establish either a joint committee on intelligence or a single committee in each House of Congress that combines authorizing and appropriating authorities.

This report also describes the intelligence budget process under current law to explain the effect of these recommendations and presents the current budget authorities of the Director of Central Intelligence, as well as budget provisions in two bills, S. 2774 and H.R. 5040, that include all Commission recommendations.

The Senate on October 6, 2004 agreed to S. 2845, the National Intelligence Reform Act of 2004, that would implement many of the Commission's intelligence budget recommendations. The Senate later accepted a conference with the Senate.

The House on October 8, 2004 agreed to H.R. 10, the 9/11 Recommendations Implementation Act, that would grant the National Intelligence Director many of the budget responsibilities and authorities that the National Security Act of 1947 delegates to the Director of Central Intelligence. After deleting the text of S. 2845 as passed by the Senate, and inserting in lieu thereof the text of the House-passed H.R. 10, the House agreed to S. 2845 and requested a conference with the Senate.

The Senate on October 9, 2004 passed S.Res. 245, to improve the effectiveness of the Senate Select Committee on Intelligence and for other purposes, to create the Subcommittee on Intelligence in the Committee on Appropriations after rejecting an amendment to grant jurisdiction over intelligence appropriations to the Select Committee on Intelligence.

The conference committee held a public meeting on October 20, 2004.

This report will be updated to reflect major legislative developments.

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9/11 Commission Recommendations: Intelligence Budget

The National Commission on Terrorist Attacks, known as the 9/11 Commission, on July 22, 2004 recommended replacing the Director of Central Intelligence with a National Intelligence Director: (1) to oversee national intelligence centers on specific subjects of interest across the United States government; and (2) to manage the national intelligence program and oversee agencies that contribute to it.¹ The National Intelligence Director (NID) would submit a unified budget for national intelligence that reflects priorities chosen by the National Security Council and an appropriate balance among the varieties of technical and human intelligence, collection, and analysis. The NID would receive an appropriation for national intelligence and apportion the funds to the appropriate agencies, in line with that budget, and have authority to reprogram funds among the national intelligence agencies to meet any new priority.²

The Commission also recommended that the overall amount of money being appropriated for national intelligence no longer should remain secret and that Congress should pass a separate appropriations act for intelligence.³ It also said that because it believed that congressional oversight for intelligence is not functioning adequately, Congress should establish either a joint committee on intelligence based on the model of the Joint Committee on Atomic Energy or a single committee in each House of Congress that combines authorizing and appropriating authorities.⁴

The Commission made this recommendation after it concluded that the Director of Central Intelligence (DCI) has “too many jobs,” i.e., to run the Central Intelligence Agency; to manage the loose confederation of 15 agencies or parts of agencies that comprise the intelligence community; and to serve as the analyst in chief for the government, sifting evidence and directly briefing the President as principal intelligence advisor.⁵ Although, the Commission observed, the DCI is responsible for the performance of the intelligence community, it asserted that the Director lacks

¹ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* § 13.2, 411 (Official Government Edition 2004) (hereinafter *9/11 Commission Report*).

² *Id.* at 412.

³ *Id.* at 416.

⁴ *Id.* § 13.4 at 420.

⁵ *Id.* at 409; section 103 of the National Security Act of 1947, ch. 343 (1947), 50 U.S.C. 403-3, grants these three responsibilities to the Director of Central Intelligence.

authorities critical for any agency head including, among other things, control over purse strings.⁶

A brief discussion of the meanings of the terms “intelligence community” and “intelligence budget” and a description of the current intelligence budget process helps to explain the effect of these recommendations.

Intelligence Community. Section 3a(3) of the National Security Act of 1947, as amended, 50 U.S.C. § 401a, states that the term “intelligence community” includes

the Office of the Director of Central Intelligence, including the Office of the Deputy Director for Central Intelligence, the National Intelligence Council, and such other offices as the Director may designate; the Central Intelligence Agency [CIA]; the National Security Agency [NSA], the Defense Intelligence Agency [DIA], the National Geospatial-Intelligence Agency [NGA, formerly the National Imagery and Mapping Agency]; the National Reconnaissance Office [NRO]; other offices of the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence components of the Army, Navy, Air Force, Marine Corps, Federal Bureau of Investigation, Department of the Treasury, Department of Energy, and Coast Guard; the Bureau of Intelligence and Research of the Department of State; the elements of the Department of Homeland Security concerned with analyzing foreign intelligence information; and such other elements of any other department or agency as may be designated by the President, or designated jointly by the Director of Central Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

Intelligence Budget. The intelligence budget has three components, the National Foreign Intelligence Program (NFIP), the Joint Military Intelligence Program (JMIP), and the Tactical Intelligence and Related Activities (TIARA) Program.⁷ Section 3(6) of the National Security Act of 1947, as amended, 50 U.S.C. § 401a, states that the term “National Foreign Intelligence Program ” refers to:

all programs, projects, and activities of the intelligence community, as well as any other programs of the intelligence community designated jointly by the Director of Central Intelligence and the head of a United States department or agency or by the President. Such term does not include programs, projects, or activities of the military departments to

⁶ 9/11 Commission Report § 13.2, 409..

⁷ CRS Report 94-261 F, *Intelligence Spending: Should Total Amounts Be Made Public?* at CRS-3, by Richard A. Best, Jr. and Elizabeth B. Bazan (hereinafter *Intelligence Spending*).

acquire intelligence solely for the planning and conduct of tactical military operations by the United States armed forces.

The National Foreign Intelligence Program (NFIP) consists of intelligence programs, projects, and activities undertaken in support of decisionmaking at the national level and conducted by the CIA, DIA, NSA, NRO, NGA, and other agencies in the Washington area.⁸ The Joint Military Intelligence Program (JMIP) and the Tactical Intelligence and Related Activities (TIARA) Program refer to intelligence-related activities. JMIP supports Defense Department-wide activities. The TIARA Program includes a “diverse array of reconnaissance and target acquisition programs which are a functional part of the basic military force structure and provide direct support to military operations.”⁹ TIARA programs are conducted by intelligence components of the Department of Defense in support of unified commanders and subordinate echelons in conducting military operations in addition to meeting some national level requirements.¹⁰

Current Intelligence Budget Process.¹¹ A large majority of the budget for the components of the intelligence budget (NFIP, JMIP and the TIARA Program) for the CIA, NSA, DIA, NRO, and NGA is hidden in the appropriations act for the Department of Defense.¹² The House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence conduct extensive oversight hearings, almost always in closed sessions, and report authorization bills and reports with classified annexes.¹³ The Intelligence Committees do not have exclusive jurisdiction over authorizations for intelligence program expenditures; the House and Senate Committees on Armed Services have jurisdiction over some intelligence activities in the authorization acts for the Department of Defense and authorizations for these activities are classified.¹⁴

The Subcommittees on Defense of the House and Senate Committees on Appropriations review intelligence budget requests and approve funding levels.¹⁵ Funding for most intelligence activities included in the defense appropriations bills is not identified as such either in legislation itself or in the accompanying reports, but

⁸ *Id.*

⁹ *Id.* at n. 2, quoting from U.S. Congress, House of Representatives, 103d Cong., 1st Sess., Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 1994*, H.Rept. 103-162, pt. 1, p. 12 (1993).

¹⁰ *Intelligence Spending* at CRS-3.

¹¹ See CRS Report RS21945, *The U.S. Intelligence Budget: A Basic Overview*, by Stephen Daggett, for more information.

¹² *Id.*

¹³ *Id.* at CRS-8.

¹⁴ *Id.* at CRS-10.

¹⁵ *Id.*

does appear in classified annexes to the reports which Senators and Members of Congress can read under guidelines designed to protect secrecy.¹⁶

It has been estimated that more than 85% of the intelligence budget is executed by agencies not under control of the Director of Central Intelligence.¹⁷ The appropriation in the DOD appropriations act for NFIP agencies, including the CIA, is given directly to the Secretary of Defense, who disburses appropriated funds to the various agencies, including NFIP's largest ones, the National Security Agency, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency,¹⁸ entities located in the Department of Defense.

The remaining portion of the budgets for intelligence elements, such as those in the FBI in the Department of Justice and in the Departments of State, Treasury, and Energy, is funded in appropriations acts for the departments of which they are a part, but all of these combined represent a small percentage of total intelligence expenditures.¹⁹

Current DCI Budget Authorities. The 9/11 Commission asserted that, “The only budget power of the DCI over agencies other than the CIA lies in coordinating budget requests of the various intelligence agencies into a single program for submission to Congress.”²⁰ Nonetheless, a recitation of budget authorities that have been granted to the Director by the National Security Act of 1947, as amended, and by Executive Order 12333 of December 4, 1981, as amended by Executive Order 13355 of August 27, 2004, reveals that the DCI has additional budget authorities. Authorities granted in the National Security Act include:

section 103(c)(1) of the National Security Act, 50 U.S.C. § 403-3(c)(1)(A) and (B), which authorizes the DCI “to facilitate the development of an annual budget for intelligence and intelligence-related activities of the United States by—developing and presenting to the President an annual budget for the National Foreign Intelligence Program; and participating in the development by the Secretary of Defense of the annual budgets for the Joint Military Intelligence Program and the Tactical Intelligence and Related Activities Program”;

section 104(b), 50 U.S.C. § 403-4(b), which requires the DCI “to provide guidance to elements of the intelligence community for the preparation of their annual budgets and shall approve

¹⁶ *Id.* at CRS-8 and CRS-10.

¹⁷ CRS Report RL32506, *The Position of Director of National Intelligence: Issues for Congress*, at CRS-3, by Alfred Cumming, *citing* Report of the Commission on the Roles and Capabilities of the United States Intelligence Community, *Preparing for the 21st Century: An Appraisal of the U.S. Intelligence*, at. xix (Mar. 1, 1996).

¹⁸ *Id.*

¹⁹ *Intelligence Spending* at CRS-9.

²⁰ *9/11 Commission Report* § 13.2, 410.

such budgets before their incorporation in the National Foreign Intelligence Program (NFIP)”;

section 104(c), 50 U.S.C. § 403-4(c), which provides that, “No funds made available under the National Foreign Intelligence Program may be reprogrammed [i.e., shifted between programs, projects, or activities within a single appropriations account] by any element of the intelligence community without the prior approval of the Director of Central Intelligence except in accordance with procedures issued by the Director. The Secretary of Defense shall consult with the Director of Central Intelligence before reprogramming funds made available under the Joint Military Intelligence Program”;

section 104(d), 50 U.S.C. § 403-4(d), which provides that the DCI, “with the approval of the Director of Management and Budget, may transfer funds [i.e., shift from one appropriations account to another] appropriated for a program within the National Foreign Intelligence Program to another such program and, in accordance with procedures to be developed by the Director and the heads of affected departments and agencies, may transfer personnel authorized for an element of the intelligence community to another such element for periods up to a year.” This authority is granted subject to some conditions, such as that no transfer of funds or personnel from the Federal Bureau of Investigation can be involved and that no transfer can take place if the secretary or department head objects to the transfer. Authority to object to a transfer generally may not be delegated, but the Secretary of Defense may delegate it only to the Deputy Secretary of Defense.

On August 27, 2004, President George W. Bush signed Executive Order 13355²¹ “Strengthened Management of the Intelligence Community” that amended Executive Order 12333 “United States Intelligence Activities” of December 4, 1981, as amended.²² Section 3 “Strengthened Control of Intelligence Funding” of Executive Order 13355 amended section 1.5 (n), (o), and (p) of Executive Order 12333, to provide that:

1.5 *Director of Central Intelligence.* In order to discharge the duties and responsibilities prescribed by law, the Director of Central Intelligence shall be responsible directly to the President and the NSC [National Security Council] and shall: . . .

(n)(1) Develop, determine, and present with the advice of heads of departments or agencies that have an organization within the intelligence community,

²¹ 69 Fed. Reg. 53593 (Sept. 1, 2004); also accessible at [<http://www.whitehouse.gov>].

²² See 50 U.S.C. § 401 nt., for a reprint of the text of Executive Order 12333.

the annual consolidated NFIP [National Foreign Intelligence Program] budget. The Director shall be responsible for developing an integrated and balanced national intelligence program that is directly responsive to the national security threats facing the United States. The Director shall submit such budget (accompanied by dissenting views, if any, of the head of a department or agency that has an organization within the intelligence community) to the President for approval; and

(2) Participate in the development by the Secretary of Defense of the annual budgets for the Joint Military Intelligence Program (JMIP) and the Tactical Intelligence and Related Activities (TIARA) Program.

(o)(1) Transfer, consistent with applicable law and with the approval of the Director of the Office of Management and Budget, funds from an appropriation for the NFIP to another appropriation for the NFIP or to another NFIP component;

(2) Review, and approve or disapprove, consistent with applicable law, any proposal to: (i) reprogram funds within an appropriation for the NFIP; (2) transfer funds from an appropriation for the NFIP to an appropriation that is not for the NFIP within the intelligence community; or (iii) transfer funds from an appropriation that is not for the NFIP within the intelligence community to an appropriation for the NFIP; and

(3) Monitor and consult with the Secretary of Defense on reprogrammings or transfers of funds within, into, or out of, appropriations for the JMIP and the TIARA Program.

(p)(1) Monitor implementation and execution of the NFIP budget by the heads of departments or agencies that have an organization within the intelligence community, including, as necessary, by conducting program and performance audits and evaluations;

(2) Monitor implementation of the JMIP and the TIARA Program and advise the Secretary of Defense thereon;

(3) After consultation with the heads of relevant departments, report periodically, and not less often than semiannually, to the President on effectiveness of implementation of the NFIP Program by organizations within the intelligence community, for which purpose the heads of departments and agencies shall ensure that the Director has access to programmatic, execution, and other appropriate information.

S. 2447 and H.R. 5040: All Commission Recommendations. On September 7, 2004, Senator John McCain and cosponsors introduced S. 2447, 108th Cong., 2d Sess., the 9/11 Commission Report Implementation Act of 2004, which, he said, “addresses each of the Commission’s 41 recommendations.”²³ Representative Christopher Shays and cosponsors introduced an identical bill, H.R. 5040, 108th Cong., 2d Sess., on September 9, 2004. Section 111 “National Intelligence Authority” of these bills would create the National Intelligence Authority as an independent establishment in the executive branch of government. Section 112 “National Intelligence Director” would establish the NID, to be appointed by the President with the advice and consent of the Senate. Section 132 “Responsibilities of the National Intelligence Director” would provide, with respect to the intelligence budget, that the Director “shall (1) develop and present to the President a unified budget for the intelligence and intelligence-related activities of the United States government; [and] (2) ensure a unified budget for the intelligence and intelligence-related activities of the United States government that reflects an appropriate balance among the varieties of technical and human intelligence methods and analysis; . . .”

Section 133 “Authorities of the National Intelligence Director” has a number of provisions relating to the intelligence budget, but before reciting them it should be noted that S. 2774 and H.R. 5040 would substitute the “National Intelligence Program” in place of the “National Foreign Intelligence Program,” which is defined in 3(6) of the National Security Act of 1947, as amended, 50 U.S.C. § 401a(6). Section 102(6) “Definitions” of S. 2774 and H.R. 5040 states that the term “National Intelligence Program”--

(A)(i) refers to all national intelligence programs, projects, and activities of the elements of the intelligence community; and

(ii) includes all programs, projects, and activities (whether or not pertaining to national intelligence) of the National Intelligence Authority, the Central Intelligence Agency [the text gives full names but acronyms are used here], NSA, NGA, NRO, the Office of Intelligence of the FBI, and the Directorate of Information and Infrastructure Protection of the Department of Homeland Security; but

²³ 150 *Congressional Record* S8864 (daily ed. Sept. 4, 2004); a reprint of S. 2774 begins at S8884.

(B) does not refer--

(i) to any program, project, or activity pertaining solely to the requirements of a single department, agency, or element of the United States government; or

(ii) to any program, project, or activity of the military departments to acquire intelligence solely for the planning and conduct of tactical military operations by the United States armed forces.

The definition of the “national intelligence program” is more comprehensive than the current definition of the “national foreign intelligence program” in section 3(6) of the National Security Act. Section 175 of S. 2774 and H.R. 5040 would amend section 3(6) to substitute the above definition of the NIP in place of the current definition of the NFIP.

Section 102(1) of S. 2774 and H.R. 5040 would define “intelligence” to include “foreign intelligence and counterintelligence.” “Foreign intelligence” would be defined in section 102(2) as “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.” “Counterintelligence” would be defined as “information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities” in section 102(3). Section 102(5) would provide that “national intelligence” and “intelligence related to the national security” (A) each refer to intelligence which pertains to the interests of more than one department or agency of the government; and (B) do not refer to counterintelligence or law enforcement activities conducted by the Federal Bureau of Investigation except to the extent provided for in procedures agreed to by the National Intelligence Director and the Attorney General, or otherwise as expressly provided for in this title.” These definitions are identical to those in current law at section (5)3 of the National Security Act of 1947, 50 U.S.C. § 401a(5).

As noted earlier, section 133 of S. 2774 and H.R. 5040 has a number of subsections that relate to the NID’s authority over the budget for the National Intelligence Program, specifically:

(b) Determination of budgets for NIP and other intelligence. -- The NID [except for subsection titles which generally use acronyms, the bill text uses full words but this recitation uses acronyms] shall determine the annual budget for intelligence and intelligence-related activities of the United States government by--

(1) developing and presenting to the President an annual budget for the NIP, including, in furtherance of

such budget, the review, modification, and approval of budgets of the intelligence community within the NIP utilizing the budget authorities in subsection (d)(1);

(2) providing guidance on the development of annual budgets for such elements of the intelligence community as are not within the NIP utilizing the budget authorities in subsection (d)(2);

(3) participating in the development by the Secretary of Defense of the annual budget for military intelligence programs and activities outside the NIP;

(4) having direct jurisdiction of amounts appropriated or otherwise made available for the NIP as specified in subsection (e);

(5) managing and overseeing the execution, and, if necessary, the modification of the annual budget for the NIP, including directing the reprogramming and reallocation of funds, and the transfer of personnel, among and between elements of the intelligence community within the NIP utilizing the authorities in subsections (f) and (g).

(c) Scope of NIP and JMIP.-- The NID and the Secretary of Defense shall jointly review the programs, projects, and activities [ppas] under the JMIP in order to identify the ppas within the JMIP as of the date of the enactment of this act that pertain to national intelligence. Any ppas so identified are to be carried out instead within the NIP.

Section 184 “Termination of the Joint Military Intelligence Program” of S. 2774 and H.R. 5040 would eliminate the JMIP effective October 1, 2005.

(d) Budget Authorities.--(1)(A) The NID shall direct, coordinate, prepare, modify, and present to the President the annual budgets of the elements of the intelligence community within the NIP, in consultation with the heads of the elements.

(B) The budget of an element of the intelligence community may not be provided to the President for transmission to Congress unless the Director has approved such budget.

(2)(A) The Director shall provide guidance for the development of the annual budgets for such elements of the intelligence community as are not within the NIP;

(B) The heads of the elements of the intelligence community referred to in subparagraph (A) shall coordinate closely with the Director in the development of the budgets of such elements, before the submission of their recommendations on such budgets to the President.

(e) Jurisdiction of Funds under the NIP.—Notwithstanding any other provision of law and consistent with section 504 of the National Security Act of 1947 (50 U.S.C. § 414), any amounts appropriated or otherwise made available for the NIP shall be appropriated to, and under the direct jurisdiction of, the NID.

(f) Role of Reprogramming.—(1) No funds under the NIP may be reprogrammed by any element of the intelligence community within the NIP without the prior approval of the NID except in accordance with procedures issued by the Director.

(2) The Director shall consult with the appropriate committees of Congress regarding modifications of existing procedures to expedite the reprogramming of funds within the NIP.

(g) Transfer of funds or personnel within the National Intelligence Program.—(1)(A) In addition to any other authorities available under law for such purposes, the NID, with the approval of the Director of the Office of Management and Budget, may transfer funds appropriated for a program within the NIP to another such program and, in accordance with procedures developed by the NID and heads of the departments and agencies concerned, may transfer personnel authorized for an element of the intelligence community to another such element.

(B) The NID may delegate a duty of the Director under this subsection only to the Deputy National Intelligence Director.

(2) A transfer of funds or personnel may be made under this subsection only if–

(A) the funds or personnel are being transferred to an activity that is a higher priority intelligence activity;

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

(C) the transfer does not involve a transfer of funds to the Reserve for Contingencies of the Central Intelligence Agency.

Section 133(g)(2) of H.R. 2774 and H.R. 5040 would continue in identical language three conditions on the authority of the NID to transfer funds or personnel that currently apply to transfers by the DCI in section 104(d)(2) of the National Security Act of 1947, 50 U.S.C. § 403-4(c), but would omit two conditions, one relating to the FBI and the other relating to objections to transfers, that now apply. Section 104(d)(2) of the 1947 Act states that, “A transfer of funds or personnel may be made under this subsection only if– (i) [the first three conditions are identical to those in section 133(g)(2) of S. 2774 and H.R. 5040] . . . ; (iv) the transfer does not involve a transfer of funds or personnel from the Federal Bureau of Investigations; and (v) . . . the Secretary or head of the department which contains the affected element or elements of the intelligence community does not object to such transfer.” Authority to object to a transfer generally may not be delegated by a secretary or department head, but the Secretary of Defense may delegate it only to the Deputy Secretary of Defense.

Section 133(g)(3)(4) and (5), which would relate to the period of availability of transferred funds and requirements for reporting transfers of funds and personnel to some congressional committees, would be identical to corresponding sections of section 104(d)(3), (4), and (5) of the National Security Act, 50 U.S.C. § 403-4(d)(3),(4), and (5), that currently apply to the Director of Central Intelligence.

Section 161 “Availability to Public of Certain Intelligence Funding Information” of S. 2774 and H.R. 5040 would require the President to disclose to the public for each year after Fiscal Year 2005 (1) the aggregate amount of appropriations requested in the budget of the President for the fiscal year concerned for intelligence and intelligence-related activities of the United States government and for each element or component of the intelligence community. It would direct Congress to disclose to the public for each year after Fiscal Year 2005 the aggregate amount of funds appropriated by Congress for the fiscal year concerned for intelligence and intelligence-related activities of the U.S. government and for each element or component of the intelligence community.

Section 302 “Reorganization of Congressional Jurisdiction” of S. 2774 and H.R. 5040 would provide that the 108th Congress shall not adjourn until each House has adopted necessary changes to its rules such that, effective at the start of the 109th Congress jurisdiction over proposed legislation, messages, petitions, memorials and other matters related to intelligence shall reside in either a joint Senate-House authorizing committee using the model of the former Joint Committee on Atomic Energy, or a committee in each chamber with combined authorization and appropriations authority.²⁴ The proposed Joint Committee on Intelligence or the House and Senate Committees on Intelligence would be required to have not more than 9 members who would serve without term limits; at least one member of either the Joint Committee or House and Senate Intelligence Committees must also serve on the Committee on Armed Services, Judiciary, and Foreign Affairs and at least one member must serve on a Subcommittee on Defense of the Committee on Appropriations. The Joint Committee or the House and Senate Intelligence Committees would have authority to issue subpoenas, would have majority representation that would not exceed minority party representation by more than one member in each House; and would have a subcommittee devoted solely to oversight.

S. 2845. The Senate on October 6, 2004 by a vote of 96 to 2 agreed to S. 2845, 108th Cong., 2d Sess., the National Intelligence Reform Act of 2004, sponsored by Senators Susan M. Collins and Joseph I. Lieberman with cosponsors.²⁵ The bill would change many important definitions in section 3 of the National Security Act of 1947, 50 U.S.C. § 401a, that would appear to affect the scope of reforms it would make to implement the 9/11 Commission’s recommendations. Section 2 of S. 2845 would slightly modify a portion of the current definitions of the terms “national intelligence” and “intelligence related to the national security” in section 3(5) of the National Security Act of 1947. “Intelligence which pertains to the interests of more than one department or agency of the government” in current law would be replaced with “intelligence which pertains, as determined consistent with any guidelines issued by the President, to the interests of more than one department or agency of the government.”

The terms “intelligence” and “intelligence related to the national security” under current law “do not refer to counterintelligence or law enforcement activities conducted by the Federal Bureau of Investigation except to the extent provided for in procedures agreed to by the Director of Central Intelligence and the Attorney General, or otherwise as expressly provided for in this title.” Section 2 of S. 2845 would amend this exception to provide that these terms “do not refer to law enforcement activities conducted by the Federal Bureau of Investigation except to the extent provided for in procedures agreed to by the National Intelligence Director and the Attorney General, or otherwise as expressly provided for in law,” thereby dropping the exception for counterintelligence.

The definition in section 2 of S. 2845 of the term “counterintelligence” would vary slightly from the one in current law at section 3(3) of the National Security Act,

²⁴ See CRS Report RL32525, *A Joint Committee on Intelligence: Proposals and Options from the 9/11 Commission and Others* by Frederick M. Kaiser.

²⁵ 150 *Congressional Record* S10543 (daily ed. Oct. 6, 2004).

which provides that it means “information gathered and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.” The amended definition would provide that “counterintelligence” is “foreign intelligence gathered, and information gathering and other activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities, but does not include personnel, physical document, or communications security programs.” The definition of “intelligence community” is similar to the one in current law at section 3(4) of the National Security Act of 1947, 50 U.S.C. § 401a, but would add “National Intelligence Authority” as part of the community, substitute “National Intelligence Director” in place of “Director of Central Intelligence,” and delete “Office of the Director of Central Intelligence.”

Section 2 of S. 2845 would replace the current definition of the “National Foreign Intelligence Program” in section 3(6) of the National Security Act, 50 U.S.C. § 401(6), with the following one to be designated as the “National Intelligence Program”:

The term “National Intelligence Program”--

(A)(i) refers to all national intelligence programs, projects, and activities of the elements of the intelligence community;

(ii) includes all programs, projects, and activities (whether or not pertaining to national intelligence) of the National Intelligence Authority, the Central Intelligence Agency, the National Security Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, the Directorate of Intelligence of the Federal Bureau of Investigation and the Office of Information Analysis of the Department of Homeland Security; and

(iii) includes any other program, project, or activity of a department, agency, or element of the United States government relating to national intelligence unless the National Intelligence Director and the head of the department, agency, or element concerned determine otherwise; but

(B) except as provided in subparagraph (A)(ii), does not refer to any program, project, or activity of the military departments, included in any program, project, or activity of the Defense Intelligence Agency that is not part of the National Foreign Intelligence Program as of the date of the enactment of this act, to

acquire intelligence principally for the planning and conduct of joint and tactical military operations by the United States armed forces.

Nonetheless, section 338 “Components of the National Intelligence Program,” of S. 2845 provides that “Notwithstanding any other provision of this act, the National Intelligence Program shall consist of all programs, projects, and activities that are part of the National Foreign Intelligence Program as of the effective date of this section.” This section also would require the National Intelligence Director and the Secretary of Defense within specified time periods jointly to review programs, projects, and activities of the Joint Military Intelligence Program (JMIP) and the Tactical Intelligence and Related Activities (TIARA) Program as of the effective date of the section. These officers also would be tasked jointly to review programs, projects, and activities of the Defense Intelligence Agency that support the intelligence staff of the Chairman of the Joint Chiefs of Staff, the intelligence staffs of the unified combatant commands, and the portions of the sensitive compartmented communications systems that support Department of Defense components. Section 338 would mandate that the National Intelligence Director must report to the President recommendations regarding which of the reviewed programs, projects, and activities should be included in the National Intelligence Program, together with any comments that the Secretary of Defense considers appropriate. Section 338 became part of S. 2845 when the Senate by voice vote adopted a modified floor amendment offered by Senator John W. Warner.²⁶

In addition to the changes to definitions made by section 2 of S. 2845, the bill would reform intelligence organizations. Section 101 “National Intelligence Authority” of S. 2845 would create the National Intelligence Authority as an independent establishment in the executive branch of government. Section 102 “National Intelligence Director” would establish the position of National Intelligence Director [NID]. Section 112 “Responsibilities of National Intelligence Director” would require the NID, with respect to the intelligence budget, to (1) determine the annual budget for the intelligence and intelligence-related activities of the United States; and (2) manage and oversee appropriations for the National Intelligence Program.

Section 113 “Authorities of National Intelligence Director” of S. 2845 contains several subsections that relate to the budget. Subsection (b) “Determination of Budgets for NIP and Other Intelligence Activities” provides that:

The National Intelligence Director shall determine the annual budget for the intelligence and intelligence-related activities of the United States government under section 112(a)(a) by—

- (1) providing to the heads of the departments containing agencies or elements within the

²⁶ See 150 *Congressional Record* S10516-S10518 (daily ed. Oct. 6, 2004), for the text, debate, and vote on this amendment, No. 3875.

intelligence community and that have one or more programs, projects, or activities [ppas] within the National Intelligence Program [NIP], and to the heads of such agencies and elements guidance for development of the NIP budget pertaining to such agencies or elements;

(2) developing and presenting to the President an annual budget for the NIP after consultation with the heads of agencies or elements, and the heads of their respective departments, under paragraph (1), including, in furtherance of such budget, the review, modification, and approval of budgets of the agencies or elements of the intelligence community with one or more ppas within the NIP utilizing the budget authorities in subsection (c)(1);

(3) providing guidance on the development of annual budgets for each element of the intelligence community that does not have any ppa within the NIP utilizing the authorities in subsection (c)(2);

(4) participating in the development by the Secretary of Defense of the annual budget for military intelligence programs and activities outside the NIP;

(5) receiving the appropriations for the NIP as specified in subsection (d) and allotting and allocating funds to agencies and elements of the intelligence community; and

(6) managing and overseeing the execution by the agencies or elements of the intelligence community [ic], and, if necessary, the modification of the annual budget for the NIP, including directing the reprogramming and transfer of funds, and the transfer of personnel, among and between the elements of the ic within the NIP utilizing the authorities in subsections (f) and (g).

Section (c) “Budget Authorities” of section 113 states that:

(1)(A) In developing and presenting an annual budget for the elements of the ic within the NIP under subsection (b)(1), the NID shall coordinate, prepare, and present to the President the annual budgets of those elements, in consultation with the heads of those elements.

(B) If any portion of the budget for an element of the ic within the NIP is prepared outside the Office of the NID, the Director—

(i) shall approve such budget before submission to the President; and

(ii) may modify, or may require modifications, of such budget to meet the requirements and priorities of the Director before approving such budget under clause (i).

(C) The budget of an agency or element of the ic with one or more ppas within the NIP may not be provided to the President unless the Director has first approved such budget as it pertains to those ppas within the NIP.

(2)(A) The Director shall provide guidance for the development of annual budgets for each agency or element of the ic that does not have any ppa within the NIP.

(B) The heads of the agencies or elements of the ic, and the heads of their respective departments, referred to in subparagraph (A) shall coordinate closely with the Director in the development of the budgets of such agencies or elements, before the submission of their recommendations on such budgets to the President.

Section 113(d) “Jurisdiction of Funds Under NIP” provides that:

(1) Notwithstanding any other provision of law and consistent with section 504 of the National Security Act of 1947 (50 U.S.C. 414) [Funding of Intelligence Activities], any amounts appropriated or otherwise made available for the NIP shall be appropriated to the National Intelligence Authority and, pursuant to subsection (e), under the direct jurisdiction of the NID.

(2) The Director shall manage and oversee the execution by each element of the intelligence community of any amount

appropriated or otherwise made available to such element under the NIP.

Section 113(e) “Accounts for Administration of NIP Funds” of S. 2845 states that:

(1) The Secretary of the Treasury shall, in consultation with the NID, establish accounts for the funds under the jurisdiction of the Director under subsection (d) for purposes of carrying out the responsibilities and authorities of the Director under this act with respect to the NIP.

(2) The National Intelligence Director shall—

(A) control and manage the accounts established under paragraph (1); and

(B) with the concurrence of the Director of the Office of Management and Budget, establish procedures governing the use (including transfers and reprogrammings) of funds in such accounts.

(3)(A) to the extent authorized by law, a certifying official shall follow the procedures established under paragraph (2)(B) with regard to each account established under paragraph (1). Disbursements from any such account shall only be made against a valid obligation of such account.

(B) In this paragraph, the term “certifying official,” with respect to an element of the ic, means an employee of the element who has responsibilities specified in section 3528(a) [“Responsibilities and relief from liability of certifying officials”] of title 31, United States Code.

(4) The NID shall allot funds deposited in an account established under paragraph (1) directly to the elements of the ic concerned in accordance with the procedures established under paragraph (2)(B).

(5) Each account established under paragraph (1) shall be subject to chapters 13 [“Appropriations”] and 15 [“Appropriation Accounting”] of title 31, United States Code, other than section 1503 [“Comptroller General reports of amounts for which no accounting is made] and 1556 [“Comptroller General: reports on appropriation accounts] of that title.

(6) Nothing in this subsection shall be construed to impair or otherwise affect the authority granted by subsection (g)(3) or by section 5 [General authority of (Central Intelligence) Agency] or 8 [Central Intelligence Agency; appropriations; expenditures] of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403f, 403j).

Section 113(f) “Role in Reprogramming or Transfer to NIP Funds by Elements of the Intelligence Community” provides that:

(1) No funds made available under the NIP may be reprogrammed or transferred by any agency or element of the ic without the prior approval of the NID except in accordance with procedures issued by the Director.

(2) The head of the department concerned shall consult with the Director before reprogramming or transferring funds appropriated or otherwise made available to an agency or element of the ic that does not have a ppa within the NIP.

(3) The Director shall, before reprogramming funds appropriated or otherwise made available for an element of the ic within the NIP, consult with the head of the department or agency having jurisdiction over such element regarding such reprogramming.

(4)(A) The Director shall consult with the appropriate committees of Congress regarding modifications of existing procedures to expedite the reprogramming of funds within the NIP.

(B) Any modification of procedures under subparagraph (A) shall include procedures for the notification of the appropriate committees of Congress of any objection raised by the head of a department or agency to a reprogramming proposed by the Director as a result of consultations under paragraph (3).

Section 113(g) “Transfers or Reprogramming of Funds and Transfer of Personnel within NIP” states that:

(1) In addition to any other authorities available under law for such purposes, the NID, with the approval of the Director of the Office of Management and Budget and after consultation with the heads of

the departments containing agencies or elements within the ic to the extent their subordinate agencies or elements are affected, with the heads of such subordinate agencies or elements, and with the Director of the Central Intelligence Agency to the extent the Central Intelligence Agency is affected may—

(A) transfer or reprogram funds appropriated for a program within the NIP to another such program;

(B) review, and approve or disapprove, any proposal to transfer or reprogram funds from appropriations that are not part of the NIP to appropriations for the NIP;

(C) in accordance with procedures to be developed by the NID, transfer personnel of the ic funded through the NIP from one element of the ic to another element of the ic; and

(D) in accordance with procedures to be developed by the NID and the heads of the departments and agencies concerned, transfer personnel of the ic not funded through the NIP from one element of the ic to another element of the ic.

(2) A transfer of funds or personnel may be made under this subsection only if—

(A) the funds or personnel are being transferred to an activity that is a higher priority intelligence activity;

(B) the transfer does not involve a transfer of funds to the Reserve for Contingencies; and

(C) the transfer does not exceed applicable ceilings established in law for such transfers;

(D) the personnel are not uniformed; and

(E) uniformed services personnel, except that the Director may transfer military positions or billets if such transfer is for a period not to exceed three years; and

(F) nothing in section 143(i) [relating to staff of the National Counterterrorism Center] or 144(f) [relating to the Directorate of Intelligence in the National Counterproliferation Center] shall be construed to authorize the Director to specify or require the head of a department, agency, or element of the United States government to approve a request for the transfer, assignment, or detail of uniformed services personnel, except that the Director may take such action with regard to military positions or billets if such transfer is for a period not to exceed three years.

(3) Funds transferred under this subsection shall remain available for the same period as the appropriations account to which transferred.

(4) Any transfer of funds under this subsection shall be carried out in accordance with existing procedures applicable to reprogramming notifications for the appropriate congressional committees. Any proposed transfer for which notice is given to the appropriate congressional committees shall be accompanied by a report explaining the nature of the proposed transfer and how it satisfies the requirements of this subsection. In addition, the congressional intelligence committees shall be promptly notified of any transfer of funds made pursuant to this subsection in any case in which the transfer would not have otherwise required reprogramming notification under procedures in effect as of October 24, 1992.

(5)(A) The NID shall promptly submit to the appropriate committees of Congress a report on any transfer of personnel made pursuant to this subsection. The Director shall include in any such report an explanation of the nature of the transfer and how it satisfies the requirements of this subsection.

The succeeding subparagraphs provide that the term “appropriate committees of Congress” means, regarding a transfer of funds, (i) the Senate and House

Committees on Appropriations and the Senate Select Committee on Intelligence of the Senate and the House Permanent Select Committee on Intelligence; (ii) regarding a transfer of personnel to or from the Department of Defense, the committees and select committees referred in (i) and the Senate and House Committees on Armed Services; regarding a personnel transfer to or from the Federal Bureau of Investigation, the committees referred to in (i) and the Senate and House Committees on the Judiciary; and regarding a personnel transfer to or from the Department of Homeland Security, the committees and select committees referred to in (i) and the Senate Committee on Governmental Affairs and the House Select Committee on Homeland Security.

During Senate floor consideration of S. 2845 on October 4, 2004, the Senate by a vote of 62 to 29 agreed to a motion to table (reject) an amendment offered by Senator Robert C. Byrd that, among other things, would have limited the authority of the National Intelligence Director to transfer funds appropriated for a program within the National Intelligence Program to another such program only if the transfer (a)(i) would result in a cumulative transfer out of any department, agency, or element, as appropriate, funded in the NIP in a single fiscal year of less than \$100,000,000; and (ii) less than 5 percent of amounts available to such department, agency, or element; and (b) the transfer would not eliminate a program. A fund transfer would have been allowed without regard to this limitation if the head of the department, agency, or element concerned concurred in it. Authority to concur could have been delegated only to the deputy of the head of the department, agency, or element concerned.²⁷ H.R. 10 as passed by the House contains limitations on authority to transfer personnel and funds that are similar in some respects or identical in others to those in the Byrd amendment.

Section 201 “Availability to Public of Certain Intelligence Funding Information” of S. 2845 states that:

(a) Amount Requested Each Fiscal Year. The President shall disclose to the public for each fiscal year after fiscal year 2005 the aggregate amount of appropriations requested in the budget of the President for such fiscal year for the National Intelligence Program.

(b) Amounts Authorized and Appropriated Each Fiscal Year. Congress shall disclose to the public for each fiscal year after fiscal year 2005 the aggregate amount of funds authorized to be appropriated by Congress for such fiscal year for the National Intelligence Program.

Section 201(c) “Study of Disclosure of Additional Information” would require the National Intelligence Director to conduct a study to assess the feasibility of disclosing to the public the aggregate amount of appropriations requested in the

²⁷ See 150 *Congressional Record* S10201 (daily ed. Oct. 1, 2004) and 150 *Congressional Record* S10329-S10329 (daily ed. Oct. 4, 2004), for the text of and vote on this amendment, No. 3845, respectively.

President's budget for each element of the intelligence community and the aggregate amount of funds authorized to be appropriated and the aggregate amount appropriated by Congress for each fiscal year for each element of the ic. It would direct that this study must address whether or not disclosure to the public of these amounts would harm the national security of the United States and take into specific account concerns relating to disclosing such information for each element of the ic. The Director would be required to submit a report on this study to Congress not later than 180 days after the effective date of the section.

Comparing the text of the provisions relating to the intelligence budget of S. 2845 with those of S. 2774 and H.R. 5040, which would address all of the recommendations of the 9/11 Commission and which placed them in legislative language, reveals that S. 2845 appears to have acquiesced in most of these recommendations.

An October 18, 2004 letter to the chair and vice chair of the conference committee presented the views of the Bush Administration on S. 2845 and H.R. 10 as passed by the Senate and House. It said that, "The Administration supports the strong budget authority provided to the NID in S. 2845. To be effective, the NID must have clear authority to determine the national intelligence budget, strong transfer and reprogramming authorities, explicit authority to allocate appropriations, and the ability to ensure execution of funds by national intelligence agencies consistent with the direction of the NID. S. 2845 would provide such budget authority."²⁸ The letter expressed Administration opposition to disclosing information relating to the amount of the intelligence budget, a provision that appears in section 201(a) of S. 2845.²⁹

In an October 20, 2004 letter to the chair of the conference committee, the Chair and Vice Chair of the 9/11 Commission said that they agreed generally with Bush Administration views expressed in the October 18 letter regarding authorities of the National Intelligence Director. It said that:

The National Intelligence Director must have authority to approve and submit a unified budget for national intelligence that reflects priorities chosen by the National Security Council and a significant role in determining the budgets for intelligence agencies outside the National Security Program, including those within the Department of Defense. The NID must also have authority to apportion funds appropriated for national intelligence to the national intelligence agencies and authority to reprogram those funds as needed in accordance with the normal reviews and approvals of OMB and the appropriate oversight committees of the Congress.

²⁸ Letter from Joshua B. Bolten, Director of the Office of Management and Budget, and Condoleeza Rice, Assistant to the President for National Security Affairs, to Representative Peter Hoekstra and Senator Susan Collins 2 (October 18, 2004) (White House letter).

²⁹ *Id.* at 6.

The intelligence elements of the Federal Bureau of Investigation must be part of the National Intelligence Program budget under the overall supervision of the National Intelligence Director. Lack of collaboration between the FBI and other intelligence agencies crippled pre-9/11 efforts to find eventual hijackers in the U.S. and recognize their intentions. The Bureau's intelligence and counterterrorism efforts must be conducted as part of a unified national effort.

. . .

We differ with the White House on the question of secrecy of the aggregate intelligence budget. We believe the overall budget number should be unclassified. The benefits of transparency for congressional oversight and public review are significant. No analysis or testimony provided to the Commission demonstrates a need for continued classification of the overall intelligence budget.³⁰

The letter added that, "If the National Intelligence Director does not have strong authorities, then we do not believe such a position should be created. Half-hearted reform would leave us worse off than we are today."³¹

H.R. 10. On October 8, 2004, the House by a vote of 282 to 134 agreed to H.R. 10, 108th Cong., 2d Sess., the 9/11 Recommendations Implementation Act, sponsored by Speaker J. Dennis Hastert with cosponsors.³² Pursuant to the special order (rule) under which H.R. 10 was considered, H.Res. 827, 108th Cong., 2d Sess., the House, after passing H.R. 10, took S. 2845 as passed by the Senate from the Speaker's table, struck all of the text of that bill and inserted in lieu thereof the text of H.R. 10 as passed by the House, agreed to S. 2845 as so amended, and requested a conference committee with the Senate.

Section 1011 "Reorganization and Improvement of Management of Intelligence Community" of H.R. 10 would amend section 102 of the National Security Act of 1947, 50 U.S.C. § 403, to change the caption to "National Intelligence Director," to establish the position of National Intelligence Director not located within the Executive Office of the President, and to grant the Director principal responsibility to "(1) serve as head of the intelligence community; (2) act as the principal adviser to the President, to the National Security Council, and the Homeland Security Council for intelligence matters related to the national security; and (3) through the heads of departments containing elements of the intelligence community, and the

³⁰ Letter from Thomas H. Kean, Chair, and Lee H. Hamilton, Vice Chair, 9/11 Commission, to Representative Peter Hoekstra 1-2 (October 20, 2004).

³¹ *Id.* at 2.

³² 150 *Congressional Record* H8977 (daily ed. Oct. 8, 2004). See H.R. Rept. 108-724, pt. 2, 108th Cong., 2d Sess. (House Committee on Armed Services) (2004) for a section-by-section analysis of intelligence reorganization provisions related to budget responsibilities and authorities of the National Intelligence Director.

Central Intelligence Agency, manage and oversee the execution of the National Intelligence Program.”

Section 1012 “Revised Definition of National Intelligence” of H.R. 10 would amend section 3(5) of the National Security Act, 50 U.S.C. § 401a(5), to provide that:

the terms “national intelligence” and “intelligence related to national security” refer to all intelligence, regardless of the source from which derived and including information gathered within or outside the United States, that—

(A) pertains, as determined consistent with any guidance issued by the President, to more than one government agency; and

(B) that involves—

(i) threats to the United States, its people, property, or interests;

(ii) the development, proliferation, or use of weapons of mass destruction; or

(iii) any other matter bearing on United State national or homeland security.

The amended definitions of the terms “national intelligence” and “intelligence related to the national security” would differ from the current ones in section 3 of the National Security Act of 1947, 50 U.S.C. § 401a, quoted in the above section entitled “Legislation Addressing All Commission Recommendations.” The amended definitions would delete a portion of the current definitions which state that the terms “national intelligence” and “intelligence related to the national security” “. . . do not refer to counterintelligence or law enforcement activities conducted by the Federal Bureau of Investigation except to the extent provided for in procedures agreed to the Director of Central Intelligence and the Attorney General, or otherwise as expressly provided for in this title.”

Section 1074 “Redesignation of National Foreign Intelligence Program as National Intelligence Program” of H.R. 10 would strike the word “Foreign” from the definition of the NFIP in section 3(6) of the National Security Act of 1947, 50 U.S.C. § 401a, leaving the term “National Intelligence Program,” but retaining the current text of the definition which states that it refers to--

all programs, projects, and activities of the intelligence community, as well as any other programs of the intelligence community designated jointly by the Director of Central

Intelligence [to be replaced in H.R. 10 by the National Intelligence Director] and the head of a United States department or agency or by the President. Such term does not include programs, projects, or activities of the military departments to acquire intelligence solely for the planning and conduct of tactical military operations by United States armed forces.

Section 1011 of H.R. 10 would amend section 102A(c) of the National Security Act of 1947, 50 U.S.C. § 403-1, with the caption “Budget Authorities” to provide that:

(1)(A) The National Intelligence Director shall develop and present to the President on an annual basis a budget for intelligence and intelligence-related activities of the United States.

(B) In carrying out subparagraph (A) for any fiscal year for the components of the budget that comprise the National Intelligence Program, the National Intelligence Director shall provide guidance to the heads of departments containing elements of the intelligence community, and to the heads of the elements of the intelligence community, for development of budget inputs to the National Intelligence Director.

(2)(A) The National Intelligence Director shall participate in the development by the Secretary of Defense of the annual budgets for the Joint Military Intelligence Program and for Tactical Intelligence and Related Activities.

(B) The National Intelligence Director shall provide guidance for the development of the annual budget for each element of the intelligence community that is not within the National Intelligence Program.

(3) In carrying out paragraphs (1) and (2), the National Intelligence Director may, as appropriate, obtain the advice of the Joint Intelligence Community Council.

(4) The National Intelligence Director shall ensure the effective execution of the annual budget for intelligence and intelligence-related activities.

(5)(A) The National Intelligence Director shall facilitate the management and execution of funds appropriated for the National Intelligence Program.

(B) Notwithstanding any other provision of law, in receiving funds pursuant to relevant appropriations acts for the National Intelligence Program, the Office of Management and

Budget shall apportion funds appropriated for the National Intelligence Program to the National Intelligence Director for allocation to the elements of the intelligence community through the host executive departments that manage programs and activities that are part of the National Intelligence Program.

(C) The National Intelligence Director shall monitor the implementation and execution of the National Intelligence Program by the heads of the elements of the intelligence community that manage programs and activities that are part of the National Intelligence Program, which may include audits and evaluations, as necessary and feasible.

(6) Apportionment and allotment of funds shall be subject to chapter 13 [“Appropriations”] and section 1517 [“Prohibited obligations and expenditures”] of title 31, United States Code, and the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 621 *et seq.*)

(7)(A) The National Intelligence Director shall provide a quarterly report, beginning April 1, 2005, and ending April 1, 2007, to the President and the Congress regarding implementation of this section.

(B) The National Intelligence Director shall report to the President and the Congress not later than 5 days after learning of any instance in which a departmental comptroller acts in a manner inconsistent with the law (including permanent statutes, authorization acts, and appropriations acts), or the direction of the National Intelligence Director, in carrying out the National Intelligence Program.

Section 1011 of H.R. 10 would amend section 102A(d) of the National Security Act of 1947, 50 U.S.C. § 403-1, with the caption “Role of National Intelligence Director in Reprogramming” to state that:

(1) No funds made available under the National Intelligence Program may be transferred or reprogrammed without the prior approval of the National Intelligence Director, except in accordance with procedures prescribed by the National Intelligence Director.

(2) The Secretary of Defense shall consult with the National Intelligence Director before transferring or reprogramming funds made available under the Joint Military Intelligence Program.

Section 1101 of H.R. 10 would amend section 102(e) of the National Security Act of 1947, 50 U.S.C. § 403-1, with the caption “Transfer of Funds or Personnel within National Intelligence Program” to provide that:

(1) In addition to any other authorities available under law for such purposes, the National Intelligence Director, with the approval of the Office of Management and Budget—

(A) may transfer funds appropriated for a program within the National Intelligence Program to another such program; and

(B) in accordance with procedures to be developed by the National Intelligence Director and the heads of the departments and agencies concerned, may transfer personnel authorized for an element of the intelligence community to another such element for periods up to one year.

(2) The amounts available for transfer in the National Intelligence Program in any given fiscal year, and the terms and conditions governing such transfers, are subject to the provisions of annual appropriations acts and this subsection.

(3)(A) A transfer of funds or personnel may be made under this subsection only if—

(i) the funds or personnel are being transferred to an activity that is a higher priority intelligence activity;

(ii) the need for funds or personnel for such activity is based on unforeseen requirements;

(iii) the transfer does not involve a transfer of funds to the Reserve for Contingencies of the Central Intelligence Agency;

(iv) in the case of a transfer of funds, the transfer results in a cumulative transfer of funds out of any department or agency, as appropriate, funded in the National Intelligence Program in a single year—

(I) that is less than \$100,000,000, and

(II) that is less than 5 percent of amounts available to a department or agency under the National Intelligence Program; and

(v) the transfer does not terminate a program.

(B) A transfer may be made without regard to a limitation set forth in clause (iv) or (v) of

subparagraph (A) if the transfer has the concurrence of the head of the department or agency involved. The authority to provide such concurrence may only be delegated by the head of the department or agency involved to the deputy of such officer.

(4) Funds transferred under this subsection shall remain available for the same period as the appropriations account to which transferred.

Remaining provisions of the amended section 102(A) of the National Security Act of 1947 relate to notifying relevant congressional committees of transfers of funds and personnel and are substantially the same as reporting requirements in current law at section 104(d), 50 U.S.C. § 403-4(d) that apply to the Director of Central Intelligence, but would add a new one to require that transfers of personnel to or from the Department of Justice must be reported to the House and Senate Committees on the Judiciary.

Generally, the budget provisions in H.R. 10 would grant to the National Intelligence Director budget responsibilities and authorities that the National Security Act of 1947 currently delegates to the Director of Central Intelligence.³³ The House appears not to have acquiesced in the 9/11 Commission's recommendation that Congress should appropriate a single appropriations act for intelligence and intelligence-related activities in the National Intelligence Program to the National Intelligence Director, who would apportion funds to appropriate agencies. As noted earlier, section 1011 of H.R. 10 would amend section 102A(c)(5)(b) of the National Security Act to provide that, "Notwithstanding any other provision of law, in receiving funds pursuant to relevant appropriations acts for the National Intelligence Program, the Office of Management and Budget shall apportion funds appropriated for the National Intelligence Program to the National Intelligence Director for allocation to the elements of the intelligence community through the host executive departments that manage programs and activities that are part of the National Intelligence Program."

As described above, section 1011 of H.R. 10 also would amend section 102(e) of the National Security Act of 1947 to impose new limitations on the cumulative amount of funds that may be transferred out of any department or agency, as appropriate, funded in the National Intelligence Program in a single fiscal year to less than \$100,000,000, and less than 5 percent of amounts available to a department or agency under the NIP, and a transfer could not terminate a program. A fund transfer would be allowed without regard to these limitations if the head of a department or agency involved concurred in it. Authority to provide such concurrence could only be delegated by the department or agency head to his or her deputy. As noted in the discussion of S. 2845 above, the Senate rejected an amendment offered by Senator Robert C. Byrd that would have imposed these limitations.

³³ See the above section entitled "Current DCI Authorities" for summaries of and citations to these provisions.

H.R. 10 does not contain a provision that would make the aggregate amount of intelligence funding available to the public as recommended by the 9/11 Commission.³⁴

The October 18, 2004 White House letter which presented the views of the Bush Administration on H.R. 10 and S. 2845 expressed a preference for budget authorities that S. 2845 would grant to the National Intelligence Director. It added, however, that, “The Administration is pleased that H.R. 10 would prevent disclosure of sensitive information relating to the intelligence budget. Disclosing to the nation’s enemies, especially during wartime, the amounts requested by the President, and provided by the Congress, for the conduct of the nation’s intelligence activities would harm the national security.”³⁵

The letter also said that, “The Administration supports the definition of “national intelligence” contained in H.R. 10. This definition will further strengthen the NID and help to promote greater information sharing inside and outside the intelligence community.”³⁶

S.Res. 445: Senate Appropriations Subcommittee on Intelligence.

The Senate by a vote of 79 to 6 adopted S.Res. 445, to improve the effectiveness of the Senate Committee on Intelligence and for other purposes, on October 9, 2004.³⁷ Section 402 established the Subcommittee on Intelligence in the Senate Committee on Appropriations with “jurisdiction over funds for intelligence matters as determined by the full committee.”

When S. 445 was brought to the Senate floor immediately after passage of S. 2845, it provided that the Subcommittee on Intelligence “. . . shall have jurisdiction over funding for intelligence matters.”³⁸ On October 7, 2004, the Senate by voice vote agreed to an amendment offered by Senator Mitch McConnell for Senator Byrd to add “as determined by the Senate Committee on Appropriations” after “matters.”³⁹

As noted earlier, the 9/11 Commission recommended that Congress should enact a single appropriations act for intelligence⁴⁰ and that either a joint committee, on the model of the Joint Committee on Atomic Energy, or a single committee in each

³⁴ *9/11 Commission Report* § 13.2, 416.

³⁵ White House letter at 2.

³⁶ *Id.* at 6.

³⁷ *150 Congressional Record* S10925 (daily ed. Oct. 9, 2004).

³⁸ *150 Congressional Record* S10544 (daily ed. Oct. 6, 2004).

³⁹ *150 Congressional Record* S10664 (daily ed. Oct. 7, 2004, Book II) (Amendment No. 3986).

⁴⁰ *9/11 Commission Report* § 13.2, 416.

chamber should have jurisdiction over intelligence authorizing and appropriating legislation.⁴¹

On October 7, 2004, the Senate by a vote of 23 to 74 rejected an amendment offered by Senator John McCain, the sponsor of S. 2774, which addressed all Commission recommendations, that would have amended the Standing Rules of the Senate to give jurisdiction “over all proposed legislation, messages, petitions, memorials and other matters relating to appropriation, rescission of appropriations, and new spending authority related to funding for intelligence matters” to the Select Committee on Intelligence, which has jurisdiction over intelligence authorizations.⁴²

⁴¹ *Id.* § 13.4, 420.

⁴² See 150 *Congressional Record* S10632-S10646 (daily ed. Oct. 7, 2004, Book II) for the text of and debate and vote on this amendment, No. 3999.