

CRS Report for Congress

Director of National Intelligence Statutory Authorities: Status and Proposals

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Director of National Intelligence

Statutory Authorities: Status and Proposals

Summary

In passing the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) in 2004, Congress approved the most comprehensive reform of the U.S. Intelligence Community since its establishment over 50 years ago. Principal among enacted changes was the establishment of a new position of the Director of National Intelligence (DNI) to manage the Intelligence Community.

Some observers have questioned whether the statute gives the DNI sufficient authority to implement the 2004 intelligence reforms enacted by Congress. Others believe that the DNI's existing authorities are substantially stronger than those of the former Director of Central Intelligence (CIA), but that the DNI must more effectively assert those authorities.

While acknowledging his strengthened authorities under the 2004 Act, and conceding that he had not issued certain guidance to the Intelligence Community clarifying those authorities, DNI Michael McConnell asked Congress to further enhance his authority – new authority which he says he needs if he is to effectively lead the Community.

The Senate Intelligence Committee responded to the DNI's request by approving an FY2008 Intelligence Authorization Bill (S. 1538; S.Rept. 110-75) that contains several new DNI authorities, including the authority to: conduct accountability reviews of significant Intelligence Community failures and deficiencies; address information sharing deficiencies; and, approve interagency financing of national intelligence centers.

The House Intelligence Committee in its bill approved a more limited number of new authorities, noting its disappointment that the DNI had not taken a more directive role in coordinating the Intelligence Community and thereby suggesting that the DNI is ineffectively asserting his existing authorities.

In examining the DNI's current authorities, it is clear that they are substantially stronger than those held by the former DCI, but whether they are sufficient to implement mandated reforms will depend on several factors. They include whether the authorities themselves are adequate, the DNI's determination and willingness to assert them, the extent to which the DNI receives presidential and congressional support, and the DNI's ability to successfully establish a transparent intelligence budget process that will permit him to make and effectively enforce informed and corporate Intelligence Community budget decisions.

This report reviews the congressional debate over authorities that occurred during consideration of the 2004 Act; examines the DNI's request for more authority and the congressional response to date; compares several of the DNI's authorities with those of former DCIs; and, examines some potential Congressional concerns. This report will be updated as new information becomes available.

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Director of National Intelligence Statutory Authorities: Status and Proposals

Background

On April 21, 2005, Ambassador John Negroponte was confirmed as the first Director of National Intelligence (DNI), a position established by the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458; hereafter, the Intelligence Reform Act). There was considerable media speculation at the time as to whether the new DNI would have the authority necessary to effectively manage the Intelligence Community, long viewed by observers as more of a loose confederation of 16 separate intelligence entities than an integrated community. On January 22, 2007, Ambassador Negroponte was nominated as Deputy Secretary of State, and retired Admiral J. Michael McConnell was confirmed as his successor on February 7, 2007.

Historically, the Director of Central Intelligence (DCI) had three primary responsibilities that were codified in the National Security Act, as amended. First, the DCI was responsible for providing national intelligence (as opposed to tactical intelligence for military commanders) to the President and other senior officials, and “where appropriate,” to Congress. Second, the DCI served as head of the Intelligence Community with authorities to establish priorities for collection and analysis, to develop and present to the President the annual budget for national intelligence programs, and, within tightly prescribed limits, to transfer funds and personnel from one part of the National Foreign Intelligence Program (NFIP), renamed the National Intelligence Program (NIP) under the Intelligence Reform Act, to another. And, third, the DCI served as head of the Central Intelligence Agency (CIA), directing the collection of information by human sources, supervising the wide-ranging analytical efforts of the CIA, and, when directed by the President, undertaking covert actions.

Many outside observers, Members of Congress, and various commissions over the years argued that the DCI position was unworkable. They contended that DCIs, frustrated by the challenges involved in managing the entire Intelligence Community, focused narrowly on the CIA, and that the result was an ill-coordinated intelligence effort that has poorly served the Nation. Some also asserted that DCIs lacked adequate legal authorities to establish priorities and to ensure compliance by intelligence agencies beyond the CIA. In particular, it was suggested that major intelligence agencies in the Department of Defense (DOD) — the National Security Agency (NSA), the National Reconnaissance Office (NRO), and the National Geospatial Agency (NGA) — have been more responsive to the needs of the military services than to the requirements of national policymakers. And, finally, some observers, while conceding that DCI authorities under the National Security Act were limited, nevertheless contended that DCIs failed to fully assert their authorities,

particularly when their priorities conflicted with those of the Secretary of Defense, viewed by many as the dominant voice in the Intelligence Community because of the Secretary's control over an estimated eighty-five percent of the intelligence budget.

In July 2004 the 9/11 Commission (the National Commission on Terrorist Attacks Upon the United States) recommended that the DCI position be replaced by a National Intelligence Director to manage the national intelligence program and oversee the agencies that contribute to it. In response, a number of bills were introduced and, after extended deliberations, Congress approved and the President signed on December 17, 2004, the Intelligence Reform Act. It established the new position of DNI along with a separate head of the CIA. Having accepted this principle, however, there were significant differences of opinion about the particular authorities that should be given to the DNI, especially with regard to the preparation and execution of the budgets of the large intelligence agencies in DOD. These differences were addressed by a provision in the act (section 1018) requiring that the President issue guidelines to ensure that the DNI's authorities are exercised in a way that "respects and does not abrogate the statutory responsibilities" of other departments. No such guidelines have been issued. Some maintain that this reflects the fact that in asserting his existing authorities, the DNI has not done so in a way that has caused DOD or other agencies housing intelligence components to call for the issuance of the guidelines.

The Intelligence Reform Act assigns to the DNI two of the three principal responsibilities formerly performed by the DCI. The DNI will provide intelligence to the President, other senior officials, and Congress, and the DNI will head the Intelligence Community. But, unlike DCIs, the DNI will not oversee the CIA. Rather, the act establishes the new position of Director of the Central Intelligence Agency (DCIA), who will report to the DNI. The act also restates the major responsibilities of the DCIA, which include (1) collecting intelligence through human sources and by other appropriate means (but with no police, subpoena, or law enforcement powers or internal security functions); (2) correlating and evaluating intelligence related to the national security and providing appropriate dissemination of such intelligence; (3) providing overall direction for and coordination of collection by human sources outside the U.S., in coordination with other government departments; (4) performing other functions and duties related to intelligence affecting the national security as the President or DNI may direct [a formulation that, some observers believe, is intended to encompass the planning and carrying out of covert actions]; and (5), under the DNI's direction, coordinating relationships between U.S. intelligence services and those of other countries.

DNI Calls For Stronger, Clearer Authorities

In April 2007, DNI McConnell reportedly told a conference of federal officials that he lacks sufficient authority to lead the 16-agency Intelligence Community because, except for the CIA, he has no direct line management authority over the

remaining 15 agencies, since each is part of another Cabinet-level department.¹ The same month, the Administration proposed to Congress a FY2008 Intelligence Authorization Act containing several new DNI authorities.

Also in April, as part of a new initiative to improve integration and collaboration within the Intelligence Community, DNI McConnell announced a “100 Day Plan” that included a proposal to revise “existing statutes, regulations, and directives,” as part of an effort to “delineate clearly the roles and responsibilities of the heads of Intelligence Community components, as well as to clarify DNI authority regarding national intelligence agencies.”²

Despite his call for new authorities, DNI McConnell in an October 10, 2007 follow-up report noted that the Intelligence Reform Act had “significantly clarified and strengthened DNI authorities,” but acknowledged that Intelligence Community leadership had “not fully defined those authorities in guidance” to the Intelligence Community.”³ Such an acknowledgment may suggest a recognition by the DNI that he has not have fully asserted his existing authorities.

Congressional Intelligence Committees Adopt Different Approaches; House Committee Criticizes DNI

The two congressional intelligence committees appear to have taken somewhat differing approaches to the issue of DNI authorities. In its version of the FY2008 Intelligence Authorization Act,⁴ the Senate Intelligence Committee approved several proposals intended to strengthen the DNI authorities, while the House Intelligence

¹ Shawn Waterman, “State of Security: DNI: Lacking Authority,” *United Press International*, April 10, 2007. The following agencies are members of the U.S. Intelligence Community: Central Intelligence Agency, Defense Intelligence Agency, Department of Energy, Department of Homeland Security, Department of State, Department of Treasury, Drug Enforcement Administration, Federal Bureau of Investigation, National Geospatial-Intelligence Agency, National Reconnaissance Office, National Security Agency, U.S. Air Force, Army, Coast Guard, Marine Corps, and Navy.

² See “United States Intelligence Community (IC) 100 Day Plan for Integration and Collaboration,” April 11, 2007, p. 11, Office of the Director of National Intelligence, [<http://www.dni.gov>]. The plan, according to DNI McConnell, is based on the National Intelligence Strategy of the United States of America, which former DNI John Negroponte issued in 2005, and represents the first phase of a DNI-sponsored effort that is intended to demonstrate short-term progress and build momentum for Intelligence Community integration.

³ See “United States Intelligence Community 500 Day Plan for Integration and Collaboration,” October 10, 2007, p. 14, Office of the Director of National Intelligence, [<http://www.dni.gov>]. The “500 Day Plan” represents the second phase of a DNI-sponsored effort to sustain and accelerate Intelligence Community integration and collaboration.

⁴ S. 1538, FY2008 Intelligence Authorization Act, passed in the Senate by a voice vote on October 3, 2007.

Committee in its version adopted a more limited number of new authorities and expressed disappointment that the DNI had not played a more aggressive role in coordinating the Intelligence Community using his existing authorities.

Senate Intelligence Committee Approves New DNI Authorities

The Senate bill⁵ would give the DNI several new authorities, including the authority to:

- conduct accountability reviews of significant failures or deficiencies within the Intelligence Community;⁶
- use National Intelligence Program funds to address deficiencies or needs that arise in intelligence information access or sharing capabilities;⁷
- delegate to certain senior officials the authority to protect intelligence sources and methods from unauthorized disclosure;⁸
- approve interagency financing of national intelligence centers;⁹
- convert competitive service positions and incumbents within the Intelligence Community to excepted positions;¹⁰
- provide enhanced pay authority for critical position in portions of the Intelligence Community where that authority does not exist;¹¹
- authorize Intelligence Community elements, under certain circumstances, to adopt compensation, performance management, and scholarship authorities that have been authorized for any other Intelligence Community element;¹² and, the authority to;
- through the DNI's Director of Science and Technology and under the direction of the DNI, establish engineering standards and

⁵ S. 1538, FY2008 Intelligence Authorization Act.

⁶ Ibid, Sec. 401.

⁷ Ibid, Sec. 402.

⁸ Ibid, Sec. 403.

⁹ Ibid, Sec. 404.

¹⁰ Ibid, Sec. 405.

¹¹ Ibid.

¹² Ibid.

specifications applicable to each acquisition of a major system by the Intelligence Community.¹³

House Intelligence Committee Approves Fewer New DNI Authorities

The House bill¹⁴ would provide the DNI with a more limited number of new authorities, including the authority to:

- to have federal employees detailed to the Community Management Staff on a non-reimbursable basis, if they serve in such positions for less than a year.¹⁵
- provide incentive awards to federal employees and military personnel assigned to the DNI's office;¹⁶

In its report, which accompanied the Intelligence Authorization Bill, the House Intelligence Committee noted its disappointment that DNI “has not assumed a more directive role in coordinating the Intelligence Community.”¹⁷ The Committee also expressed its concern that the DNI “has not taken a consistent approach on whether the ODNI [Office of the Director of National Intelligence] will serve as coordinator, or executor, of Intelligence Community functions”¹⁸ and that the DNI “remains unable to set goals and requirements for important skills, including foreign language capability.”¹⁹

Both the Senate and House bills would give the DNI the authority to delegate authority to approve certain travel on common carriers to the head of individual Intelligence Community elements;²⁰

¹³ Ibid, Sec. 407.

¹⁴ H.R. 2082.

¹⁵ Ibid, Sec. 104.

¹⁶ Ibid, Sec. 405.

¹⁷ See H.Rept. 110-131, accompanying H.R. 2082, the FY2008 Intelligence Authorization Act, p. 20.

¹⁸ See H.Rept. 110-131, accompanying H.R. 2082, FY2008 Intelligence Authorization Act, pp. 20-21.

¹⁹ Ibid, p. 21.

²⁰ S. 1538, Sec. 304 and H.R. 2082, Sec. 306.

2004 Intelligence Reform Act Strengthens DNI Authorities

To strengthen the DNI's authority, Congress in 2004 approved the Intelligence Reform Act, providing the DNI additional powers in certain areas, including in those of personnel, tasking, and acquisition. Arguably, most important, the act enhanced the DNI's control over the budgets of the Intelligence Community's 16 agencies. According to one observer, the DCI had "been pressing his nose against the glass looking in," having never possessed the DNI's budget clout.²¹ Other observers acknowledge that the act provided the DNI more authority, but question whether this enhanced authority will be sufficient and whether the DNI will aggressively assert it in any case.

Budget Authority

The Intelligence Reform Act accords the DNI several new and enhanced budget authorities that were unavailable to DCIs. First, it provides that at the DNI's exclusive direction, the Director of the Office of Management and Budget (OMB) shall "apportion," or direct, the flow of congressionally appropriated funds from the Treasury Department to each of the cabinet level agencies containing Intelligence Community elements.²² This change is designed to strengthen the DNI's control over Intelligence Community spending. If, for example, an agency fails to comply with certain of the DNI's spending priorities, the DNI can withhold that agency's funding. DCIs had no such authority.

Second, the DNI is authorized to "allot" or "allocate" appropriations directly at the sub-cabinet agency and department level, providing the DNI additional control over spending.²³ If a departmental comptroller refuses to act in accordance with a DNI spending directive, the law requires that the DNI notify Congress of such refusal.²⁴ DCIs had no such authority or reporting obligation.

Third, the DNI is authorized to "develop and determine" the National Intelligence Program (NIP) budget.²⁵ By contrast, DCIs were authorized to "*facilitate* [emphasis added] the development" of the Intelligence Community's annual budget.

Fourth, the DNI is authorized to "ensure the effective execution of the budget," and to monitor its implementation and execution.²⁶ Except in the case of the CIA, DCIs had no such authority.

²¹ Interview with a senior Intelligence Community official.

²² P.L. 108-458, Sec. 102A(c)(5)(B).

²³ *Ibid.*, Sec. 102A(c)(5)(A).

²⁴ *Ibid.*, Sec. 102A(c)(7)(B).

²⁵ *Ibid.*, Sec. 102A(c)(1)(B).

²⁶ *Ibid.*, Sec. 102A(c)(4).

Fifth, the DNI is authorized to provide budget guidance to those elements of the Intelligence Community not falling within the NIP.²⁷ Again, DCIs had no such authority.

Notwithstanding these stronger budget authorities, the DNI's power to influence and shape DOD intelligence spending is generally seen as essentially the same as that enjoyed by DCIs. The Intelligence Reform Act authorizes the DNI to "participate in the development by the Secretary of Defense of the Joint Military Intelligence Program and the Tactical Intelligence and Related Activities Program."²⁸ The role of DCIs in such activity was also "participatory" in nature.

Transfer and Reprogramming Authority

The DNI, with OMB approval, is authorized to transfer or reprogram NIP funds after affected department heads, or in the case of the CIA, its director, have been "consulted."²⁹ DCIs, by contrast, were permitted to transfer such funds, but only if the affected parties did not object.

Personnel Transfer Authority

The DNI, with the OMB approval, is authorized to transfer personnel within the Intelligence Community for periods not to exceed two years. Before doing so, however, the DNI is required to jointly develop with department and agency heads procedures to govern such transfers. DCIs, by contrast, could transfer such personnel only if the affected parties did not object and only for periods up to one year.³⁰

Appointment Authority

The Intelligence Reform Act gives the DNI expanded appointment authority and increases the number of positions over which the DNI can exercise such authority.³¹

²⁷ Ibid., Sec. 102A(c)(3)(B).

²⁸ Ibid., Sec. 102A(c)(3)(A). The Joint Military Intelligence Program, or JMIP, and the Tactical Intelligence and Related Activities Program, or TIARA, subsequently were consolidated into the National Intelligence Program in September 2005.

²⁹ Ibid., Sec. 102A(d).

³⁰ Ibid., Sec. 102A(e).

³¹ Ibid., Sec. 1014. These positions include the Director of the National Security Agency; the Director of the National Reconnaissance Office; the Director of the National Geospatial-Intelligence Agency; the Assistant Secretary of State for Intelligence and Research; the Director of the Office of Intelligence of the Department of Energy (DOE), the Director of the Office of Counterintelligence, DOE; the Assistant Secretary for Intelligence Analysis, Department of the Treasury; the Executive Assistant Director (EAD) for Intelligence, the Federal Bureau of Investigation (FBI) or any successor to that position; and, the Assistant Secretary of Homeland Security for Information Analysis. In 2006, DOE consolidated the Office of Intelligence and Office of Counterintelligence into the new Office of Intelligence and Counterintelligence under the control of DOE's Senior Intelligence Officer. In 2005, (continued...)

Specifically, the DNI's "concurrence" is required before a department or an agency head having jurisdiction over a certain appointment can appoint an individual to fill such a vacancy, or recommend to the President an individual to be nominated to fill the such a vacancy, as the case may be. Absent DNI concurrence, the DNI, or the department head, may advise the President directly of such nonconcurrence. DCI appointment authorities were more limited, both in terms of the degree of concurrence authority and with regard to the number of positions over which the DCI exercised such authority.

Acquisition Authority

The DNI is authorized to serve as the exclusive milestone decision authority on major acquisitions, except with respect to DOD programs, in which case the DNI shares joint authority with the Secretary of Defense.³² DCIs had no such statutorily-based authority.

Tasking Authority

The DNI is authorized to "... manage and direct the tasking of, collection, analysis, production, and dissemination of national intelligence...by approving requirements and resolving conflicts."³³ Although DCIs were authorized to exercise certain collection authorities, statutory authorities did not explicitly address analysis, production, and dissemination authorities.

Authority Over National Counterterrorism Center (NCTC)

The Intelligence Reform Act establishes a hybrid structure, one in which the NCTC director reports to the DNI with regard to counterterrorism intelligence analysis and operations, and to the President with regard to the development and coordination of national interagency counterterrorism policy.³⁴ The act specifically stipulates that the NCTC director reports to the President, rather than to the DNI, with respect to "...planning and progress of joint counterterrorism operations (other than intelligence operations)."³⁵ While DCIs had unqualified control over the DCI's

³¹ (...continued)

the FBI consolidated the EAD for Counterterrorism and Counterintelligence and the EAD for Intelligence into a single EAD for National Security.

³² Ibid., Sec. 102(A)(q).

³³ Ibid., Sec. 102A(f)(ii)(I) and (II).

³⁴ Ibid., Sec. 1021. Section 1021 of P.L. 108-458 codifies the existence of NCTC, which initially was established under Executive Order (EO) 13358. With regard to the establishment of NCTC, there is a potential conflict between the statute and EO 13358. See CRS Report RL32816, *National Counterterrorism Center: Implementation Challenges and Issues for Congress*.

³⁵ P.L. 108-458, Sec. 1021, amending Title I of the National Security Act of 1947 by adding Sec. 119(c)(3). The March 2005 Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction expressed concerns about
(continued...)

Counterterrorism Center, the authorities of the DCI's Center's authorities did not extend beyond the Intelligence Community, whereas certain of NCTC's authorities, by contrast, extend across the executive branch.³⁶

Some observers suggest that the new and enhanced authorities described above could be interpreted differently by different agencies. They note that section 1018 of the act requires that the President issue guidelines to ensure that the DNI's authorities are implemented in "in a manner that respects and does not abrogate the statutory authorities" of other departments. Although such guidelines have not been promulgated, as was noted earlier, some observers believe that if such guidelines were to be issued, they could serve to weaken the DNI's authorities.

Potential Congressional Concerns

Some commentators have suggested that ambiguities exist within the Intelligence Reform Act that cover complex relationships among disparate agencies with their own statutory authorities. In such a situation, much will undoubtedly depend on how the DNI understands his position, and on the patterns of cooperation and deference that are set in his tenure. Congress may be especially interested in the relationships between the DNI and the Defense Department and the law enforcement community.

Whether the DNI's authorities under the act are sufficient to meet the demands of effective management remains to be seen. What is more clear, however, is that the statute provides the DNI substantially more authority — not only in regard to the budget, but also in the areas of personnel, tasking, and acquisition — than DCIs have had under the National Security Act of 1947, as amended. Just how much *more* overall authority the DNI will actually wield will depend on several factors. Among them: (1) will the DNI aggressively assert the new authorities? (2) will the President and Congress back the DNI if he does? (3) and, will the DNI successfully establish a transparent Intelligence Community budget process that will permit him to make and effectively enforce informed budget decisions?

³⁵ (...continued)

NCTC's "hybrid character" (p. 328).

³⁶ See the *Congressional Record*, December 8, 2004, with regard to Senate consideration of the conference report to accompany S. 2845, the Intelligence Reform and Terrorism Prevention Act of 2004, in which Senator Joseph I. Lieberman is quoted as stating that NCTC's Directorate of Strategic Operational Planning would conduct strategic operational planning for "...the entire Executive branch – ranging from the combatant commands, to the State Department, to the FBI's Counterterrorism Division to the Department of Health and Human Services to the CIA" (p. 11971).