



# Intelligence Authorization Legislation: Status and Challenges

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## Summary

Since President Bush signed the FY2005 Intelligence Authorization bill (P.L. 108-487) in December 2004, no subsequent intelligence authorization legislation was enacted until the FY2010 bill was signed by President Obama in October 2010 (after the end of FY2010), becoming P.L. 111-259. Although the National Security Act requires intelligence activities to be specifically authorized, this requirement has been satisfied in recent years by one-sentence catchall provisions in defense appropriations acts authorizing intelligence activities. This procedure meets the statutory requirement but has, according to some observers, weakened the ability of Congress to oversee intelligence activities.

In May 2011, Congress passed the Intelligence Authorization Act for FY2011, which did contain a classified schedule of authorizations; on June 8, the President signed the bill and it became P.L. 112-18. In December 2011, both the House and Senate passed H.R. 1892, the Intelligence Authorization for FY2012, which also contained a classified schedule. H.R. 1892 was signed into law by the President on January 3, 2012 (P.L. 112-87). The passage of these two bills appears to reflect a determination to underscore the continuing need for specific annual intelligence authorization legislation.

Annual intelligence authorization acts were first passed in 1978 after the establishment of the two congressional intelligence committees and were enacted every year until 2005. These acts provided specific authorizations of intelligence activities and were accompanied by reports that provided detailed guidance to the nation's intelligence agencies. However, in practice, the absence of intelligence authorization acts has meant that key intelligence issues have been addressed in defense authorization acts and defense appropriations acts that focus primarily on the activities of the Department of Defense.

Several Members have maintained that this procedure has been characterized by misplaced priorities and wasteful spending estimates that could run into billions. One example is the eventual cancellation of a highly classified and very costly overhead surveillance system that had been approved without support from the two intelligence committees.

Some also argue that the ability to link together the collection and analytical efforts of intelligence agencies must extend well beyond the Defense Department given the challenges of the 21<sup>st</sup> century and that intelligence authorization legislation is essential to ensure the effectiveness of this linkage. When congressional approval of intelligence programs is limited to defense authorizations and appropriations legislation, the result arguably can be an overemphasis on military missions by the intelligence community.

Other observers counter, however, that, even without intelligence authorization acts, Congress makes its views known to the intelligence community and that defense authorization and appropriations acts continue to provide adequate legislative authority for major acquisition efforts of agencies that are in large measure integral parts of the Defense Department. Even with renewed enactment of intelligence authorization legislation in 2010 and 2011 many important intelligence issues are addressed in defense authorization and appropriations acts.

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## Introduction

*No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.* [U.S. Constitution, Article I, Section 9]

Over the years Congress has devised complex procedures for appropriations and authorization, but the pattern has been to separate the authorization and appropriation process and to establish separate committees to address the separate functions. Although intelligence spending has historically been shrouded in secrecy, the Constitution, statutory law, and legislative branch procedures apply to intelligence agencies as they do for all government departments and agencies.

It is the purpose of this report to assess the effects of the absence of intelligence authorization legislation subsequent to FY2005 and indicate the substantial but limited effects of the FY2010 Intelligence Authorization Act (P.L. 111-259). It is recognized that the statutory requirements have been met by the catchall provisions in appropriations acts. The report will not focus on the reasons why Congress did not pass intelligence authorization; it is sufficient to note that Members did not choose to compromise disagreements either amongst themselves or with the White House on issues they considered important. In the absence of authorization legislation, intelligence activities continue to be carried out, and expensive and complex intelligence systems continue to be approved; but the process is somewhat different from that intended when the intelligence committees were established in the late 1970s and there are significant implications for congressional oversight of intelligence activities and, arguably, for the nation's intelligence effort as a whole.

## Background

To carry out the constitutional duty of funding government activities, Congress has established a two-step process. First, it authorizes an agency or program. Secondly, Congress appropriates funds for the authorized agency or program. The separation of authorization and appropriations legislation provides Congress with an opportunity to permit one set of committees (authorizing committees) to address the needs of programs in their jurisdictions while another set of committees (appropriations committees) is designed to consider the finances of the federal government as a whole and guard against excess spending. In general, authorizing committees and their staffs develop extensive expertise in their agencies. Appropriations committees focus on allocating funds within an overall budget total. Appropriations committees are more limited in staff and generally do not delve into the detailed activities of government departments. Authorization committees, however, have enough staff to undertake more detailed evaluations of agency programs and monitor implementation of congressional guidance.

Appropriations bills (or continuing resolutions) must be enacted every year, but agencies and activities may be authorized on a standing basis. Such authorizations are provided to most agencies that carry out their designated responsibilities year after year. Some important agencies and programs, however, are authorized on an annual basis. In the 1960s, the size and complexity of defense programs led to a congressional determination to authorize the nation's defense effort on an annual basis and, since that time, the purview of national defense authorization acts has been expanded to include specific policy directions for all types of military activities and programs, ranging from personnel to procurement of major weapons systems. Defense

authorization bills became a main focus of legislative interest and have guaranteed that congressional concerns are continuously addressed by the Defense Department.<sup>1</sup>

In the 1970s similar procedures would be established for intelligence agencies. A standing authorization for the Central Intelligence Agency (CIA) was provided by the National Security Act of 1947 (P.L. 80-235), and this was thought to be adequate. There was no perceived need for annual authorizations for CIA for over a quarter century, and the activities of other intelligence agencies were authorized as part of their parent departments' authorizations. In the mid-1970s, however, Congress, concerned about intelligence agencies operating behind a wall of secrecy, and at times engaged in improper activities, created the two intelligence committees to provide oversight. The respective rules that established the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI) provided that "no funds would be expended by national intelligence agencies unless such funds shall have been previously authorized by a bill or joint resolution passed by the Senate [House] during the same or preceding fiscal year to carry out such activity for such fiscal year."<sup>2</sup> (Both resolutions provided an exception for continuing appropriations bills or resolutions.) In 1985, Section 504 of the National Security Act was tightened to require appropriated funds available to an intelligence agency could be obligated or expended for an intelligence or intelligence-related activity only if "those funds were specifically authorized by the Congress for use for such activities."<sup>3</sup>

After the establishment of the two intelligence committees, the appropriations committees came to defer more to them; one senior member of the House Appropriations Committees has been quoted as explaining in 1983, "Our subcommittee has backed off and done less as [HPSCI] has become more important. My own view is if you've got a committee dealing day in and day out with intelligence, that's the way it should be."<sup>4</sup>

Today, the intelligence committees have extensive staffs—approximately 40 each for SSCI and HPSCI. The House committee has subcommittees devoted to terrorism, human intelligence, analysis, and counterintelligence; intelligence community management; technical and tactical intelligence; and oversight and investigations. The Senate committee is not divided into subcommittees. Both committees annually conduct numerous classified hearings and a few unclassified hearings relating to intelligence activities and programs. Most intelligence spending

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<sup>1</sup> Prior to that time there had standing authorizations for specific levels of military forces; much of the impetus for annual authorization bills derived from efforts by the Army and Air Force to obtain hundred of sites in the U.S. for anti-aircraft missiles; there was a perception that neither the executive branch or the appropriations committees were effectively overseeing the process. The eventual result was annual defense authorization bills with large and detailed accompanying reports that provided congressional guidance for all types of military activities and programs.

<sup>2</sup> S.Res. 400 from the 94<sup>th</sup> Congress, Section 12; H.Res. 658 from the 95<sup>th</sup> Congress, Section 11(I).

<sup>3</sup> 50 U.S.C. 414(a)(1). The requirement for "specific authorization" was added to the National Security Act by the Intelligence Authorization Act for FY1986 (P.L. 99-169), Section 401(a). The report accompanying the House version of H.R. 2419 (which became P.L. 99-169), stated that, "Specifically authorized is defined to mean that the activity and the amounts to be spent for that activity have been identified in a formal budget request to the Congress and that Congress has either authorized those funds to be appropriated and they have been appropriated, or, whether or not the funds have been requested, the Congress has specifically authorized a particular activity, and authorized and appropriated funds for that activity." U.S. Congress, 99<sup>th</sup> Congress, 1<sup>st</sup> session, House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 1986*, H.Rept. 99-106, Part 1, May 15, 1985, p. 8. A concern existed at the time that funds had been used by the Reagan Administration for intelligence activities in Central America that lacked congressional support or even awareness.

<sup>4</sup> Quoted by Frank Smist, Jr., *Congress Oversees the United States Intelligence Community, 1947-1989* (Knoxville, TN: University of Tennessee Press, 1990), p. 245.

is appropriated by the defense appropriations legislation prepared by the defense appropriations subcommittees, which each have approximately 15-20 staff members to cover the entire defense budget.

The first intelligence authorization bill that became law was that for FY1979 (P.L. 95-370); the Senate had passed an authorization bill the year before, but the House, not then having its own intelligence committee, took no action on the bill. From FY1979 to FY2005, annual intelligence authorization bills were enacted, although on many occasions the intelligence authorization acts were not signed until well into the fiscal year for which they authorized funds.<sup>5</sup>

When appropriations legislation has passed prior to enactment of intelligence authorization bills, Congress has met the requirement for specific authorization of intelligence activities through the use of a “catchall” provision in defense appropriations acts. For example, Section 8080 of the Consolidated Security, Disaster, and Continuing Appropriations Act, 2009 (P.L. 110-329), enacted on September 30, 2008, states:

Funds appropriated by this Act, or made available by the transfer of funds in this Act, for intelligence activities are deemed to be specifically authorized by the Congress for purposes of section 504 of the National Security Act of 1947 (50 U.S.C. 414) during fiscal year 2009 until the enactment of the Intelligence Authorization Act for Fiscal Year 2009.

This provision meets the requirements of the National Security Act while acknowledging the potential for subsequent passage of an intelligence authorization act. Similar provisions have been included in other defense appropriation acts and in various supplementary appropriations bills since, almost always, appropriation bills are enacted prior to intelligence authorization bills.<sup>6</sup>

A section of some 60 words has thus been routinely substituted for bills that, along with their accompanying reports (with classified annexes), normally run to hundreds of pages. Undoubtedly, the executive branch gives consideration to congressional concerns, even those expressed informally, but the report language and guidance contained in an intelligence authorization bill undoubtedly does not have the prescriptive effects of enacted legislation.

After the enactment of P.L. 108-487, the Intelligence Authorization Act for FY2005, on December 23, 2004, until September 2010, the two intelligence committees reported authorization bills (of which some have been passed by the respective chambers and one of which—that for FY2008—passed by both houses only to be vetoed by the President). Each of these bills was accompanied by a report that provided extensive guidance for intelligence agencies and addressed a number of issues that the committees considered important. Such issues included a requirement for Senate confirmation of the Deputy CIA Director as well as the directors of the NRO, NSA, and NSA; the establishment of a Space Intelligence Center; and providing additional authorities to the Director of National Intelligence (DNI) along with a provision that requires reports when acquisition costs for intelligence systems pass certain cost growth thresholds. Important to some Members was the inclusion of provisions establishing an Inspector General for the entire intelligence community. The Senate bill for FY2009, S. 2996, sought to provide the DNI greater flexibility to coordinate the intelligence community response to

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<sup>5</sup> The act for FY1991 was not signed until the eleventh month of the fiscal year, on August 14, 1991, an earlier bill having been pocket-vetoed.

<sup>6</sup> Intelligence authorization bills for only three fiscal years (1979, 1983, and 1989) were enacted prior to the beginning of those years.

an emerging threat that “should not depend on the budget cycle and should not be constrained by general limitations in appropriations law (e.g. 31 U.S.C. 1346) or other prohibitions on interagency financing of boards, commissions, councils, committees, or similar groups.”<sup>7</sup> These bills did not become law and intelligence programs were authorized by defense appropriations legislation between December 2004 and October 2010.<sup>8</sup>

In 2009, both the House and Senate intelligence committees reported intelligence authorization bills for FY2010 (H.R. 2701 and S. 1494 respectively). Each contained provisions that would require Senate confirmation of additional intelligence leaders and establish a statutory inspector general for the entire intelligence community. However, provisions in H.R. 2701 that would require more extensive notifications of covert actions drew strong objections from the Administration. S. 1494 passed the Senate on September 16, 2009, by a voice vote, but floor consideration of the House bill did not occur.

FY2010 intelligence authorization legislation did become law, albeit without specific authorization of intelligence programs; it is discussed below.

## **Funding for a Changed Intelligence Environment**

The need for closer integration of the nation’s intelligence effort was a principal finding of the various assessments of the performance of the intelligence community prior to the 9/11 attacks and Operation Iraqi Freedom. The assessments concluded that intelligence agencies had not effectively coordinated the acquisition and dissemination of available intelligence.<sup>9</sup> In response, the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) established the position of DNI (and the Office of the DNI (ODNI)) with wide-ranging authorities over all intelligence agencies. The provisions included responsibility for preparing and ensuring the effective execution of the National Intelligence Program (NIP), which includes acquisition for major intelligence systems.<sup>10</sup> The intent was to provide the DNI with significantly broader

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<sup>7</sup> U.S. Congress, 110<sup>th</sup> Congress, 2d session, Senate, Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2009*, S.Rept. 110-333, May 8, 2008, p. 24.

<sup>8</sup> In 2005, HPSCI notes that it lacks “full visibility over some defense intelligence programs that do not clearly fall into the Joint Military Intelligence Program (JMIP) or under Tactical Intelligence and Related Activities (TIARA) categories [predecessors of the MIP]. Specifically, the Committee notes that individual services may have intelligence or intelligence-related programs such as science and technology projects of information operations programs related to systems, precluding sufficient visibility for program oversight.” U.S. Congress, 109<sup>th</sup> Congress, 1<sup>st</sup> session, House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2006*, H.Rept. 109-101, June 2, 2005, p. 16. The real-world problem is that intelligence and intelligence-related programs can be components of other military programs, greatly complicating the use of categories designed for aligning congressional oversight responsibilities. The Department of Defense (DOD) attempted to address this issue in a recent directive on the MIP; “The term [MIP] excludes capabilities associated with a weapons system whose primary mission is not intelligence.” DOD Directive 5205.12, November 14, 2008, *Military Intelligence Program (MIP)*, November 14, 2008, Section 3.a.

<sup>9</sup> National Commission on Terrorist Attacks Upon the United States, Final Report, *The 9/11 Commission Report*, Washington: Government Printing Office, [2004], pp. 407-411; U.S. Congress, 107<sup>th</sup> Congress, 2<sup>nd</sup> session, Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, S.Rept. 107-351/H.Rept. 107-792, December 2002, pp. 33-117; U.S., Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States*, March 31, 2005, pp. 311-350.

<sup>10</sup> 50 U.S.C. 403-1(c).

coordinative responsibilities and authorities than had been exercised by the former Director of Central Intelligence (DCI). The DCIs had not only responsibilities for the entire intelligence community but were also in direct charge of the CIA; the Intelligence Reform Act created a separate position of CIA Director, leaving DNIs responsible for coordinating the interagency intelligence effort.

The NIP includes funding for the largest intelligence agencies—the Central Intelligence Agency (CIA), the National Security Agency (NSA), the National Reconnaissance Office (NRO) and the National Geospatial-Intelligence Agency (NGA). The Military Intelligence Program (MIP)—which is separate from the NIP—consists of the intelligence efforts that are designed (and funded) to support the needs of the Department of Defense (DOD) and its components. Most of the major intelligence agencies serve both national and military consumers, and the largest agencies, except the CIA,<sup>11</sup> are part of DOD.

After the DNI prepares a consolidated NIP and it is approved by the White House, it is forwarded to Congress as part of the Administration's overall annual budget submission along with relevant Congressional Budget Justification Books (CBJBs). The two intelligence committees review the NIP, holding hearings and preparing intelligence authorization legislation and accompanying committee reports. The two armed services committees also review national intelligence programs that are undertaken by DOD agencies (which constitute the bulk of the NIP largely due to the costs involved in satellite and signals intelligence systems). To facilitate and encourage cooperation between armed services and intelligence committees, the rules that established the intelligence committees provided that some Members (at least one on HPSCI and two on SSCI) serve on both committees. Although there is considerable overlap between the oversight responsibilities of armed services and intelligence committees, intelligence authorization bills provide Congress with a means to address the entire intelligence effort from a perspective broader than that of the Defense Department.

A central challenge in overseeing intelligence activities is that budgeting and acquisition procedures were designed during the Cold War era when there were sharp distinctions between national and tactical intelligence and national-level consumers were largely limited to senior Washington policymakers. Today, in many cases, intelligence agencies serve an increasingly diverse variety of consumers throughout the government. Systems designed and operated to support policymakers in multiple agencies, such as reconnaissance satellites, are known as “national-level” systems. In many cases, however, they also produce information of direct interest to military commanders and a variety of other federal offices and, especially in regard to terrorist threats, even to state and local level officials. On the other hand, tactical military intelligence is designed (and funded) to be used by a single military service. Today, this information may also be of direct interest to national-level policymakers, especially in crisis situations. Although the original lines of demarcation between national and tactical intelligence have long since lost much of their importance for consumers of intelligence products, these categories are embedded in law and regulations and serve as the basis for acquisition and budgeting efforts. The cost of intelligence activities for national-level consumers was \$47.5 billion for FY2008;<sup>12</sup> military

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<sup>11</sup> CIA activities are not under the jurisdiction of the armed services committees, but funding for the CIA is “hidden” in defense authorization (and appropriations) legislation; that is, the intelligence funds are not identified separately but are added to totals for other accounts.

<sup>12</sup> Office of the Director of National Intelligence, “DNI Releases Budget Figure for 2008 National Intelligence Program,” News Release No. 17-08, October 28, 2008.

intelligence, which primarily supports military operations, easily adds billions more although exact figures remain classified.

Both intelligence committees review the NIP, but responsibilities differ in regard to oversight of defense-wide and tactical intelligence systems. The House intelligence committee is responsible for authorizing “intelligence and intelligence-related activities of all ... departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense.”<sup>13</sup> The Senate intelligence committee is not assigned responsibility for tactical intelligence and intelligence-related activities, which remain under the purview of the Senate Armed Services Committee (SASC). As a result, conference committees on intelligence authorization bills have always included members of the SASC.

The goal of the post-9/11 reform effort has been to encourage transformation from the agency-centric practices of the past to “a true Intelligence enterprise established on a collaborative foundation of shared services, mission-centric operations, and integrated mission management.”<sup>14</sup> In addition to well known threats from terrorist groups and hostile regional powers, the intelligence community should be organized to confront “a growing array of emerging missions that expands the list of national security (and hence, intelligence) concerns to include infectious diseases, science and technology surprises, financial contagions, economic compensation, environmental issues, energy interdependence and security, cyber attacks, threats to global commerce and transnational crime.”<sup>15</sup> Such a configuration of the intelligence community, if achieved, will involve systems and capabilities that extend well beyond DOD. The future evolution of the nation’s intelligence effort lies beyond the scope of this report, but most observers believe that its focus should not be on strictly military concerns and that the range of collection efforts and of “customers” is much wider than in previous decades.

## **A Brief Case Study: The Challenge of Satellites and Other Overhead Surveillance Programs**

Some observers suggest that the absence of intelligence authorization legislation since FY2005 has had especially significant budgetary implications for overhead collection systems. For the national intelligence agencies in DOD—NSA, NGA, and the NRO—technical collection and processing systems are very expensive. Satellites, in particular, often cost over \$1 billion each. Based on comments made by senior members of the Senate Intelligence Committee, there have been major disputes over some programs with substantial budgets.<sup>16</sup> In 2004 media reports indicated that one classified satellite program originally opposed by the Senate intelligence committee, but supported by appropriations committees and HPSCI, almost doubled in cost from \$5 billion to nearly \$9.5 billion.<sup>17</sup> In 2007 SSCI’s report on the FY2008 authorization bill sharply

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<sup>13</sup> U.S. Congress, House of Representatives, Rule X(11)(b)(1)(D)(ii).

<sup>14</sup> Office of the Director of National Intelligence, *Vision 2015: A Globally Networked and Integrated Intelligence Enterprise*, [2008], p. 5.

<sup>15</sup> *Ibid.*, p. 4.

<sup>16</sup> Concerns have also been expressed by the Subcommittee on Oversight of the House Permanent Select Committee on Intelligence, “Initial Assessment on the Implementation of the Intelligence Reform and Terrorism Prevention Act of 2004,” July 27, 2006: “[M]any of the major acquisition programs at the National Reconnaissance Office, the National Security Agency, and the National Geospatial-Intelligence Agency have cost taxpayers billions of dollars in cost overruns and schedule delays.” (P. 14)

<sup>17</sup> Dana Priest, “New Spy Satellite Debated on Hill,” *Washington Post*, December 11, 2004, p. A1.

criticized the space radar program (that apparently included both intelligence and non-intelligence components) and directed that no NIP funds be spent on the program.<sup>18</sup> Although that bill was not enacted, the program was eventually terminated in March 2008.

An October 2008 HPSCI report concluded: “there is no comprehensive space architecture or strategic plan that accommodates current and future national security priorities.”<sup>19</sup> Further, “the Intelligence Community and DOD seem at odds with each other over satellite program requirements. Without adequately defining the requirements of the combatant commanders, the Air Force and Intelligence Community are forced to hit an ever-moving or invisible target in managing overhead program requirements.”<sup>20</sup> Although some believe that “DOD needs its own space architecture to meet the needs of the war fighter ... executive branch [spokesmen have] stated several times that it is not in the best interest of the country to pursue separate national and military space architectures.”<sup>21</sup>

HPSCI’s report criticizes satellite programs that include funding by both the NIP and the Military Intelligence Program. The NIP is controlled by the DNI and SSCI and HPSCI have oversight responsibilities for it. The MIP, on the other hand, is controlled by the Secretary of Defense and the two armed services committees (with HPSCI having shared oversight of the MIP). HPSCI’s report indicates that there are also differences within DOD over some satellite surveillance programs that reflect different perspectives of the Under Secretary of Defense for Intelligence (who also reports to the DNI as well as the Secretary of Defense) and the Under Secretary of Defense for Acquisition, Technology, and Logistics, who is responsible for DOD acquisitions efforts.

Although the USD(I) advocates for intelligence, the USD(I) does not have acquisition decision authority within the DOD. The USD(AT&L) decides all acquisition matters.

The inability of the USD(I) to control the final acquisition decision for a program can lead to decisions over jointly funded programs that do not equally benefit the national and military customer.<sup>22</sup>

The reported difficulties in achieving consensus in DOD and the executive branch have been reflected in different organizational proposals made by different congressional oversight committees. For instance, the FY2007 Defense Authorization Act (P.L. 109-364) included a provision for the establishment of an operationally responsive space program office, separate from the NRO, that would develop space systems for combatant commanders<sup>23</sup> to address

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<sup>18</sup> U.S. Congress, 110<sup>th</sup> Congress, 1<sup>st</sup> session, Senate, Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2008*, S.Rept. 110-75, May 31, 2007, p. 47.

<sup>19</sup> U.S. Congress, 110<sup>th</sup> Congress, 2d session, House of Representatives, Permanent Select Committee on Intelligence [Subcommittee on Technical and Tactical Intelligence], *Report on Challenges and Recommendations for United States Overhead Architecture*, H.Rept. 110-914, October 3, 2008, p. 2.

<sup>20</sup> Ibid, p. 11

<sup>21</sup> Ibid, p. 9

<sup>22</sup> Ibid, p. 9.

<sup>23</sup> The future status of the Operationally Responsive Program remains uncertain; see U.S. Government Accountability Office, *Defense Space Activities: DOD Needs to Further Clarify the Operationally Responsive Space Concept and Plan to Integrate and Support Future Satellites*, GAO Report GAO-08-831, July 2008. In addition one independent commission has recommended combining the NRO and the Air Force Space and Missile Systems Center into a new organization that would report both to the Secretary of Defense and the DNI; see Institute for Defense Analyses, *Leadership, Management, and Organization for National Security Space: Report to Congress of the Independent* (continued...)

concerns that some systems may be viewed in isolation from others without adequate concern for the implications of a specific decision for the entire interlinked effort. Arguably, it is the intelligence committees that have the mandate to ensure the coherence of the intelligence acquisition effort throughout the federal government and that the primary vehicles for ensuring coherence are annual authorization bills. Skeptics might see proposals for operationally responsive space systems as potentially duplicative of intelligence community programs.

HPSCI also noted that within DOD there may be differences in approaches between the Under Secretary of Defense for Intelligence (USD(I)), who is the principal DOD point of contact with the DNI, and the Under Secretary of Defense for Acquisition, Technology, and Logistics, who may be more responsive to service needs.<sup>24</sup> Taking a different approach, the Senate-passed version of S. 3001, the FY2009 Defense Authorization bill, provided<sup>25</sup> that the USD(I) may not establish or maintain “a capability to execute programs of technology or systems development or acquisition.” The Administration objected to this provision, arguing that such provisions would prevent the USD(I) from carrying out the activities for which it was created,<sup>26</sup> and it was deleted from the final version of the bill. The FY2009 act, P.L. 110-417, requires instead that DOD produce a consolidated position: “the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, shall establish a policy and an acquisition strategy for intelligence, surveillance, and reconnaissance payloads and ground stations for manned and unmanned aerial vehicle systems. The policy and acquisition strategy shall be applicable throughout the Department of Defense and shall achieve integrated research, development, test, and evaluation, and procurement commonality.” The DOD report is to be provided both to the armed services and intelligence committees.

In addition, P.L. 110-417 also included a requirement for the DNI and Secretary of Defense to conduct a comprehensive review of the nation’s space policy including a description of current and planned space acquisition programs. This report was to be submitted to the armed services and intelligence committees by December 2009, but preparation was reportedly delayed for several months. If the executive branch prepares a comprehensive space architecture the two intelligence committees would have major responsibilities to review it and to weigh its recommendations in an effort to authorize necessary programs and personnel with whatever modifications Congress finds appropriate. Other committees—especially the armed services and appropriations committees—would also have responsibilities to review such architectures.

Congress returned to the issue in FY2011 Defense Authorization legislation. Section 911 of P.L. 111-383 provides that the Secretary of Defense and the DNI shall develop an integrated process for national security space architecture planning, development, coordination, and analysis.

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(...continued)

*Assessment Panel on the Organization and Management of National Security Space*, July 2008.

<sup>24</sup> Concern over the relationships between these two offices was reflected in language that was included in the Senate version of the Defense Authorization Act for FY2009, but removed after strong White House complaints.

<sup>25</sup> In Section 922.

<sup>26</sup> U.S., Office of Management and Budget, Statement of Administration Policy, S. 3001–National Defense Authorization Act for FY2009, September 9, 2008, p. 2.

## Related Concerns about Intelligence Oversight

Concerns about the effectiveness of congressional intelligence oversight have been expressed both by Members and by outside observers for some time. As noted above, the need for closer integration of the nation's intelligence effort was a principal finding of the various assessments of the intelligence community's performance prior to the 9/11 attacks and Operation Iraqi Freedom. These assessments had concluded that intelligence agencies had not effectively coordinated the acquisition and dissemination of information on terrorism.

The 9/11 Commission was especially critical of congressional oversight:

So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want or need. The United States needs a strong, stable and capable congressional committee structure to give America's national intelligence agencies oversight, support, and leadership.

...

Tinkering with the existing structure is not sufficient. Either Congress should create a joint committee for intelligence, using the Joint Atomic Energy Committee as its model, or it should create House and Senate committees with combined authorizing and appropriations powers.<sup>27</sup>

In response to the 9/11 Commission's recommendations, the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) established the position of DNI (and the Office of the DNI (ODNI)) with wide-ranging authorities over all intelligence agencies.<sup>28</sup> Many recommendations of the 9/11 Commission were eventually adopted by Congress and the Bush Administration, including several that pertained to intelligence oversight,<sup>29</sup> but Congress neither established a joint intelligence committee nor has it moved to create a committee having both authorizing and appropriating authorities.<sup>30</sup>

A joint intelligence committee, patterned after the Joint Atomic Energy Committee (JCAE), was suggested for consideration by the 9/11 Commission. The JCAE was an exceptional entity that was created in 1946 with broad oversight responsibilities for the newly established Atomic Energy Commission (AEC). As one CRS report has noted, "The [JCAE] combined both legislative and oversight functions which, for most of the life of the committee, essentially

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<sup>27</sup> National Commission on Terrorist Attacks Upon the United States, Final Report, *The 9/11 Commission Report*, Washington: Government Printing Office, [2004], pp. 419, 420.

<sup>28</sup> The ODNI, which includes the National Counterterrorism Center (NCTC), is understood to have a staff of over 1500 positions. Some Members have expressed concern that the ODNI was growing too large and generating unnecessary reports from agencies. They argued that the congressional consensus is that the ODNI is to be "a coordinator, not a doer of functions." U.S. Congress, 110<sup>th</sup> Congress, 2d session, House of Representatives, Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2009*, H.Rept. 110-665, May 21, 2008, Minority Views, p. 118.

<sup>29</sup> Total levels of funding for the NIP was made public on October 30, 2007, and again on October 28, 2008, in accordance with P.L. 110-53, the Implementing Recommendations of the 9/11 Commission Act of 2007. NIP funding is appropriated to the DNI, the House Intelligence Committee has an oversight subcommittee; the Senate has removed term limits for members of SSCI. The amount appropriated for FY2007 was \$43.5 billion; the amount for FY2008 was \$47.5 billion.

<sup>30</sup> For background on intelligence oversight structures, see CRS Report RL32525, *Congressional Oversight of Intelligence: Current Structure and Alternatives*, by L. Elaine Halchin and Frederick M. Kaiser.

preempted all other congressional committees except the Committee on Appropriations, from having any say whatever over the items in the JCAE's jurisdiction."<sup>31</sup> Although the AEC had a permanent authorization, beginning in 1954, the JCAE reported authorization legislation for new construction projects and real estate acquisition. In 1963 the annual AEC authorization covered all activities of the commission and this practice continued until both the AEC and the JCAE were disbanded in the mid-1970s. In 1946, atomic energy was largely related to atomic bombs, and a small, secretive congressional committee seemed appropriate when the JCAE was established; two decades later, when the AEC's focus had shifted to the civilian uses of nuclear energy, Congress chose to revert to regular forms of congressional oversight.

In general, there was a close working relationship between the JCAE and the appropriators, and appropriations and authorization levels were consistent.<sup>32</sup>

The other major suggestion of the 9/11 Commission was to consider "a single committee in each house of Congress, combining authorizing and appropriating authorities."<sup>33</sup> The relationship between authorizing and appropriations committees has a long history in the U.S. Congress that lies beyond the scope of this report.<sup>34</sup> Since the 1920s, however, appropriations and authorization legislation have been separate. Annual appropriations acts govern most government activities; some government activities are authorized by standing authorization legislation, but others, especially those related to DOD, are authorized on an annual basis. Annual authorization bills for DOD have been enacted since FY1960 and have become broad in scope, authorizing funding for almost every appropriations account in the DOD budget.

Given the practice followed by Congress for over eight decades, proposals to make authorizations and appropriations the responsibility of one committee in each chamber would be viewed with caution, especially by existing Committees on Appropriations.<sup>35</sup> Thus far, Congress has not been inclined to adopt this measure, but, partially in response to encouragement to be responsive to the 9/11 Commission, two steps have been taken. First, in 2004 the Senate adopted S.Res. 445 (of the 108<sup>th</sup> Congress), which (along with removing term limits for members of SSCI and other changes in SSCI rules) established within the Committee on Appropriations a Subcommittee on Intelligence with "jurisdiction over funding for intelligence matters, as determined by the Senate Committee on Appropriations." This subcommittee, however, has never been established.

H.Res. 35 in the 110<sup>th</sup> Congress established a Select Intelligence Oversight Panel within the House Appropriations Committee. This initiative creating a 13-member panel preserved the budgetary responsibilities of the Appropriations Committee, but created a panel composed of Members from both the appropriations and intelligence committees to recommend funding for intelligence activities to be included in the defense appropriations act. These recommendations were used by the defense subcommittee in developing the classified annexes accompanying the

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<sup>31</sup> See CRS Report RL32538, *9/11 Commission Recommendations: Joint Committee on Atomic Energy—A Model for Congressional Oversight?*, by Christopher M. Davis, p. 14.

<sup>32</sup> For further discussion of the implications of using the JCAE model for an intelligence committee, see CRS Report RL32538, *9/11 Commission Recommendations: Joint Committee on Atomic Energy—A Model for Congressional Oversight?*, by Christopher M. Davis, p. 14.

<sup>33</sup> *9/11 Commission Report*, p. 420.

<sup>34</sup> See, however, CRS Report R42388, *The Congressional Appropriations Process: An Introduction*, by Jessica Tollestrup; and the Government Accountability Office, *Principles of Federal Appropriations Law (Red Book)*.

<sup>35</sup> See CRS Report RL32659, *Consolidating Intelligence Appropriation and Authorization in a Single Committee: 9/11 Commission Recommendation and Alternatives*, by Sandy Streeter.

defense appropriations bill,<sup>36</sup> but there has been, however, little public information about the functioning of the panel.

In November 2007, the Senate Intelligence Committee held a hearing to examine congressional oversight of U.S. intelligence activities, which indicated strong disquiet about prevailing procedures for addressing intelligence budgets. Chairman Rockefeller noted steps taken by the committee in the aftermath of 9/11 and described a Memorandum of Agreement (MOA) with the Senate Appropriations Committee and the Subcommittee on Defense Appropriations designed to improve the flow of information between the two committees by allowing staff from each committee to attend hearings and markups of the other committee. Senator Bond, the vice chairman, criticized the MOA as not having led to significant changes. He argued that the intelligence committee, with a staff of some 40 professionals, was better positioned to assess the merits of intelligence programs. His testimony indicated that the problem of inadequate coordination existed even when intelligence authorization bills had been enacted:

In 2000, the previous administration proposed a new collection program. Our Intelligence Committee analysis indicate[d] the program would cost substantially more than estimated and the utility of data collected did not justify the cost. Chairman Shelby and Vice Chairman Graham opposed the program. Chairman Rockefeller and I have supported program termination as well....

It took until recent time to end a program that at least should have been terminated a number of years ago, and unfortunately, all told, the loss to the taxpayers is astronomical, in the billions of dollars.<sup>37</sup>

At the hearing former Members of Congress Lee Hamilton and Timothy Roemer, who had both served on the 9/11 Commission, reiterated their concerns with the current process. Former Representative Hamilton noted that the 9/11 Commission had judged congressional oversight of intelligence as being “dysfunctional” and noted that intelligence community officials tend to focus on committees that directly control funds; they

work hard to get the answer they want from the people who control their dollars. They take advantage of the fact that defense appropriators are mightily distracted from intelligence oversight because of their other responsibilities.<sup>38</sup>

When asked about his experience as chairman of HPSCI, Mr. Hamilton recalled:

And when I was chairman of the Intelligence Committee, we were frequently, continually bypassed. How did I deal with that? Well, I dealt with it by very, very close contact consultation with the chairman of the Appropriations Committee and the chairman of the Defense Subcommittee. And I tried to persuade them of the value of committee recommendations.<sup>39</sup>

Later in the hearing, Mr. Roemer added that intelligence agencies can “game” the system:

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<sup>36</sup> See U.S. Congress, House of Representatives, 110<sup>th</sup> Congress, 1<sup>st</sup> session, Committee on Appropriations, *Department of Defense Appropriations Bill, 2008*, H.Rept. 110-279, July 30, 2007, p. 3.

<sup>37</sup> Congressional Quarterly, Congressional Transcripts, “Senate Select Committee on Intelligence Holds Hearing on Intelligence Oversight,” November 13, 2007.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

they can circumvent that authorizing committee that has spent months doing budget oversight, that has spent years doing language capabilities and requirements and how that is for the rebuilding of our human resources and our human capabilities, and they go to two or three people on the Appropriations Committee and get around months and years of work on the authorizing committee.

Mr. Hamilton concluded that:

the Senate of the United States and the House of the United States is not doing its job. And because you're not doing the job, the country is not as safe as it ought to be, because one of my premises is that robust oversight is necessary for a stronger intelligence committee.<sup>40</sup>

## **The Intelligence Authorization Act of FY2010**

During the 111<sup>th</sup> Congress it was evident that there was determined interest in the enactment of intelligence authorization legislation, but it was also evident that there existed significant issues on which agreement would be difficult. A House bill (H.R. 2701) was reported by the House Intelligence Committee in June 2009. A Senate version (S. 1494) was reported in July 2009 and passed by the Senate in September 2009. It was sent to the House, but was held at the Speaker's desk. H.R. 2701 was given floor consideration in February 2010 and was passed by the House. Neither the House nor the Senate version was supported by the Administration, and after extensive discussions, another Senate intelligence authorization bill (S. 3611) was reported in July 2010 and passed by the Senate in August 2010. This version was then incorporated into H.R. 2701 and passed the Senate in September 2010. It was subsequently accepted by the House just before the end of FY2010. It was ultimately signed by the President on October 7, 2010, and became P.L. 111-259.

According to media accounts, the issues that prevented earlier consideration of the legislation were the appropriate notification of Members of Congress of covert actions and other sensitive activities—whether the practice of notifying just the chairmen and ranking Members of the intelligence committees along with other congressional leaders was adequate.<sup>41</sup> Some provisions provoked veto threats from the Administration and views of Members and senior executive branch officials were reconciled only after extensive discussions in the spring of 2010. Also difficult were provisions that affected parallel authorities of the DNI and the Secretary of Defense and the intelligence oversight role of the Government Accountability Office (GAO). Congressional efforts to oversee detention and interrogation practices after the 9/11 attacks and to establish specific penalties for intelligence personnel using certain interrogation techniques were major subjects of disagreement (although some of these were addressed in the Supplemental Appropriations Act of 2010, P.L. 111-212).

Inasmuch as the new fiscal year would begin prior to the enactment of P.L. 111-259, the act did not contain a classified annex for FY2010 similar to those that previous intelligence authorization acts incorporated to set spending levels for specific programs. The act addressed the issue of notification of covert actions in a way that avoided a veto and established the position of

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<sup>40</sup> Ibid.

<sup>41</sup> See CRS Report R40691, *Sensitive Covert Action Notifications: Oversight Options for Congress*, by Richard F. Grimmett.

Inspector General for the intelligence community. It provided for the possibility of a greater oversight role for the GAO, and gave the DNI new acquisition and management authorities.

## **Intelligence Authorization Legislation for FY2011 and 2012**

In the 112<sup>th</sup> Congress there was renewed determination to pass intelligence authorization legislation, and H.R. 754, the Intelligence Authorization bill for FY2011, was passed by the House in May 2011. Subsequently, it was accepted by the Senate with a voice vote and was signed by the President on June 8, 2011, becoming P.L. 112-18. The bill provided, in addition to a classified schedule of authorizations, only a few provisions relating to efforts to identify counterintelligence concerns, a report on the recruitment and retention of racial and ethnic minorities, and a provision commending members of the intelligence community for their role in the mission that killed Osama Bin Laden on May 1, 2011.

By December 2011 both the House and Senate passed an intelligence authorization bill for FY2012. The bill, H.R. 1892, passed the House on September 9 by a 384-14 vote, but was amended by the Senate by a voice vote and returned to the House on December 14. The House agreed with the Senate amendment on December 16. The President signed H.R. 1892 into law on January 3, 2012 (P.L. 112-87). This FY2012 authorization contains a classified schedule of authorizations and included a number of provisions providing burial allowances for civilian employees of intelligence agencies who die while engaged in operations involving substantial elements of risk. The legislation also includes a provision permitting the establishment of accounts into which funds appropriated for Defense intelligence efforts can be transferred as well as transfers from the Director of National Intelligence. The funds transferred are to remain available for the same time period and the same purpose as the appropriations from which transferred. This provision is designed to improve the management of intelligence appropriations that are provided both to DOD and to the Office of the Director of National Intelligence.

## **Intelligence Authorization Legislation for FY2013**

On May 17, 2012, the House Permanent Select Committee on Intelligence completed the markup of H.R. 5743, to intelligence authorization bill for FY2013, passing the legislation by a unanimous vote of 19-0. According to the May 17 press release of the Intelligence Committee, H.R. 5743 includes \$300 million of new initiatives and \$400 million of intelligence enhancements. The bill is “significantly below last year’s enacted budget, but up modestly from the President’s budget request, and is completely in line with the House Budget Resolution.” The bill “holds personnel at last year’s levels and authorizes an initiative to achieve major efficiencies and improved performance in Information Technology.”

Among other things H.R. 5743, as passed by the House committee:

- Increases funding for counterintelligence against foreign spies.
- Authorizes a new Defense Clandestine Service.
- Enhances counter terrorism efforts to continue the fight against al Qaeda and its affiliates around the world.

- Increases oversight on the spending of domestic intelligence agencies.
- Supports global coverage initiatives of the intelligence community to ensure the US is postured to address emerging issues and threats around the world.

In addition, the House Intelligence Committee approved unanimously a performance audit report of the Department of Defense's Intelligence and Reconnaissance program. The report, based on a nine-month study, identifies ways to make these programs more effective and efficient. Details and the key recommendations of the performance audit are included in the classified annex of the Committee's bill. For a complete discussion of the FY2013 intelligence authorization bill (H.R. 5743) see the committee's report, H.Rept. 112-490, of May 22, 2012. On May 31, 2012, the House of Representatives passed H.R. 5743, the FY2013 intelligence authorization bill, by a vote of 386-28.

On July 24, 2012, the Senate Select Committee on Intelligence agreed to the text of S. 3454, the Intelligence Authorization Act for FY2013, passing the legislation by a vote of 14-1, and the bill was reported to the Senate on July 30, 2012.

On February 13, 2012, the Senate Select Committee on Intelligence noted that the NIP unclassified aggregate request from the President was \$52.6 billion aggregate for FY2013.

Among other things, S. 3454 as passed by the Senate committee:

- Prohibits persons possessing an active security clearance from entering into contracts with the media to provide analysis about classified intelligence activities.
- Prohibits the same personnel from entering into such contracts for a period of one year after they leave government service.<sup>42</sup>
- Designates only the Director or Deputy Director of intelligence community elements and their designated public affairs staff may provide background or off-the-record information regarding intelligence activities to the media.<sup>43</sup>
- Requests that DNI publish specific requirements for personnel with access to classified information, to include non-disclosure agreements, prepublication review, and disciplinary actions.<sup>44</sup>
- Requires the Attorney General to report back to the committee on the effectiveness of and improvements for investigating and prosecuting unauthorized disclosures and to report on potential improvements.<sup>45</sup>
- Requires the intelligence community to develop a comprehensive insider threat program management plan.<sup>46</sup>

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<sup>42</sup> U.S. Congress, 112<sup>th</sup> Congress, 2<sup>nd</sup> session, Senate, Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2013*, S. Rept. 112-192, July 30, 2012, p. 8, Section 505.

<sup>43</sup> S.Rept. 112-192, p. 8, Section 506.

<sup>44</sup> S.Rept. 112-192, p. 8, Section 507.

<sup>45</sup> S.Rept. 112-192, p. 8, Section 508.

<sup>46</sup> S.Rept. 112-192, p. 9, Section 509.

- Denies a current or future federal pension to an individual who has violated a non-disclosure agreement.<sup>47</sup>
- Bans individuals with security clearances to retain their clearance if they knowingly disclose classified information concerning a classified covert action.<sup>48</sup>
- Organizes the Homeland Security Intelligence Program (HSIP) within the Department of Homeland Security.<sup>49</sup>
- Requires the Attorney General to provide a copy of every classified Office of Legal Counsel (OLC) opinion provided to the intelligence community on or after September 11, 2001.<sup>50</sup> The committee noted that previous requests for OLC opinions have not routinely been accommodated. Opinions that are submitted often do not provide the level of detail required for the committee to perform its oversight function.
- Revises the definition of “intelligence agency” to include all elements of the intelligence community.<sup>51</sup>

The “Committee Comments” in the report focused on the unauthorized disclosure of classified information, stating their “grave concern” with “both the quantity and substance” of the disclosures, subsequently influencing the introduction of these new provisions to prevent and detect future unauthorized disclosures. While no one agency or branch of government was believed to be more responsible than others, the committee called upon the executive branch to be vigilant and aggressively investigate and prosecute those found to be responsible.<sup>52</sup>

Senator Wyden (D-OR), cast the only “no” vote for S. 3454. Senator Wyden objected to Section 511, allowing the DNI and heads of the intelligence community to deny current or future federal pensions to individuals who have violated their non-disclosure agreement. Senator Wyden’s concerns are the broad authority given to the intelligence agencies without explanation of the due process by which they would take away pensions.<sup>53</sup> Director of National Intelligence, James Clapper, in his April 12, 2011, response to the committee, stated similar concerns and asked the committee to remove this section.<sup>54</sup>

## Conclusion

In recent years the U.S. intelligence community has begun a transformation from the agency-centric practices to “a true Intelligence enterprise established on a collaborative foundation of shared services, mission-centric operations, and integrated mission management.”<sup>55</sup> In addition to

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<sup>47</sup> S.Rept. 112-192, p. 11, Section 511.

<sup>48</sup> S.Rept. 112-192, p. 11, Section 512.

<sup>49</sup> S.Rept. 112-192, p. 11, Section 601.

<sup>50</sup> S.Rept. 112-192, p. 12, Section 604.

<sup>51</sup> S.Rept. 112-192, p. 13, Section 606, refers to Section 3(4) of the National Security Act.

<sup>52</sup> S. Rept, 112-192, p. 14, Committee Comments.

<sup>53</sup> S. Rept, 112-192, p. 24, Minority Views of Senator Wyden.

<sup>54</sup> S. Rept, 112-192, Additional Views, James R. Clapper.

<sup>55</sup> Office of the Director of National Intelligence, *Vision 2015: A Globally Networked and Integrated Intelligence Enterprise*, [2008], p. 5.

well known threats from terrorist groups and hostile regional powers, the intelligence community also confronts “a growing array of emerging missions that expands the list of national security (and hence, intelligence) concerns to include infectious diseases, science and technology surprises, financial contagions, economic compensation, environmental issues, energy interdependence and security, cyber attacks, threats to global commerce and transnational crime.”<sup>56</sup> Such a configuration of the intelligence community, if achieved, will involve systems and capabilities that extend well beyond DOD.

A major challenge for Congress, not just in oversight of the intelligence community but of many other agencies, is the synergism (or lack thereof) that results from the collaborative efforts of various agencies. Congressional oversight and funding responsibilities are divided agency-by-agency and committee-by-committee. Oversight and appropriations committees are challenged to assess the interagency efforts; making tradeoffs and adjustments to Administration plans and proposals can be very difficult. The intelligence committees, however, have been long established with well defined jurisdictions and sizable professional staffs. Intelligence authorization legislation does not, of course, guarantee effective interagency intelligence efforts, but proponents maintain that authorization acts are the best lever that Congress has in addressing the interagency effort.

If Congress has an important role in the oversight of this altered intelligence environment, the annual authorization process appears to represent one of the most important opportunities to exercise this role. The two intelligence committees are positioned to have the most comprehensive information on intelligence activities broadly defined, including those conducted by agencies wholly independent of DOD. In the absence of intelligence authorization legislation, critics maintain that Congress does not exercise its option to adjust funding in accordance with a comprehensive assessment of the interrelationships of intelligence agencies. Some observers argue that this practice results in imbalances and weakens the overall intelligence effort; others maintain that the executive branch can efficiently adjust appropriated funds without unnecessary congressional micromanagement. In the 112<sup>th</sup> Congress, two intelligence authorization bills have been passed and enacted for FY2011 and FY2012; there appears to be a consensus that the need continues for intelligence authorization legislation.

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<sup>56</sup> Ibid., p. 4.