

April 28, 2010

INFORMATION PAPER

“DISCUSSION DRAFT” PROVISIONS FOR FY2010 INTELLIGENCE AUTHORIZATION ACT (IAA) THAT WOULD EXPAND DNI AUTHORITIES OVER LEADERSHIP AND MANAGEMENT OF DOD’S INTELLIGENCE COMPONENTS

The “discussion draft” for the FY2010 IAA dated April 7th has been described as a staff-level draft for use by the Members of the conference committee, subject to change by decisions of the Members. It contains several provisions that, if enacted, would grant authorities to the Director of National Intelligence (DNI) that would conflict with longstanding authorities of the Secretary of Defense over the management, direction, and oversight of intelligence components for which the Secretary remains responsible. These provisions in the aggregate have the potential to significantly impact the Secretary of Defense’s statutory responsibility to exercise authority, direction, and control over elements of the Defense Intelligence Enterprise and by extension, his ability to determine how elements of the Defense Intelligence Enterprise provide support to the warfighter.

Specifically, one provision would amend Title 10 and grant the DNI authority to direct one of DoD’s combat support agencies, the National Geospatial-Intelligence Agency (NGA), in the conduct of a new mission. Under 10 U.S.C. 113(b), authority, direction, and control of NGA rests with the Secretary of Defense. Assigning direction of any portion of the NGA mission to the DNI undermines the Secretary's effective management of DoD components and resource. It also creates confusion and potential conflict in implementation of this new mission. Finally, specific inclusion of the DNI in the proposed amendment to 10 U.S.C. sec. 442(a)(2)(A) is unnecessary because the DNI already has authority to task (not direct) NGA in 10 U.S.C. 441(c).

The following seventeen provisions would grant the DNI authority to make unilateral decisions on certain management issues regarding personnel, acquisition, accounting, and information technology within the Department of Defense, without a requirement for Secretary of Defense concurrence, or require DNI to report to Congress on the operations of DoDelements without a requirement for coordination with the Secretary of Defense, as described below:

Sec 103 Personnel ceiling adjustments. Empowers the DNI to convert contractor positions supporting any IC element to government employee positions. Directs the DNI to establish guidelines for each IC element to govern the treatment of students, trainees, reservists, reemployed annuitants, detailees, and persons in IC joint duty assignments.

Sec 305 Annual personnel level assessments for the intelligence community. Directs the DNI, in consultation with the head of each IC element, to conduct annual personnel assessments to be reported to Congress. The report will include the proposed cost, number, and percent changes for government personnel and contractors for each IC element, plus written justifications for requested personnel and contractor levels

Sec 307 Conflict of interest regulations for intelligence community employees. Directs the DNI to issue regulations prohibiting an officer or employee of an IC element from engaging in outside employment if such employment creates a conflict of interest or appearance thereof. Directs annual reports to the intelligence committees.

Sec 321 Vulnerability assessments of major systems. Directs the DNI to perform vulnerability assessments of major systems and items of supply that are proposed for inclusion in the NIP and to send reports of the assessments to the intelligence committees.

Sec 322 Intelligence community business system transformation. Prohibits expenditures exceeding \$3 million for any major business system modernization unless it is certified by ODNI as complying with an IC business management enterprise architecture established by a strategic management board. [These new authorities would overlay existing SECDEF's Title 10 authorities regarding the Defense Business Enterprise Architecture; authorities to be granted to the new CIO of the IC would overlay those exercised by DoD, service, and agency CIOs.]

Sec 323 Reports on the acquisition of major systems. Directs the DNI to submit to the intelligence and armed services committees detailed reports for each major system acquisition by an IC element.

Sec 324 Critical cost growth in major systems. Directs the DNI to create a program generating reports and certifications to the intelligence and armed services committees regarding major cost growth in acquisition programs for major systems within the NIP.

Sec 339 Report on foreign language proficiency in the intelligence community. Directs the DNI to submit an annual report to the intelligence and armed services committees on the foreign language proficiency of each IC element, including an estimate of the number of such positions that each element will require. [Potential for interference with SECDEF's management of personnel with foreign language skills in DoD intelligence components]

Sec 341 Report on intelligence Community contractors. Directs the DNI to submit a report to the intelligence and armed services committees on the use of personal services contracts to perform certain specified activities across the IC, including identifying contracts under which a contractor is performing substantially similar functions as a USG employee, assessing the appropriateness of using contractors to perform each activity, and identifying of best practices for oversight and accountability mechanisms. [Potential for conflict between the DNI's assessments and

recommendations and SECDEF management of acquisitions undertaken by DoD intelligence components]

Sec 342 Study on electronic waste destruction practices of the intelligence community. Directs the Inspector General of the IC (position to be created by the bill) to submit a report to the congressional intelligence committees on the security and environmental impact of the electronic waste practices of the IC, and an assessment of methods to improve them. [Potential for conflict between IG of the IC assessments and SECDEF management of electronic waste management in DoD intelligence components]

Sec 371 Intelligence community financial improvement and audit readiness. Directs the DNI to review the status of the auditability compliance of each IC element and to develop a plan to achieve a full, unqualified audit of each IC element NLT September 30, 2013. [Creates a potential for conflict between the DNI plan and SECDEF management of business systems in DoD intelligence components]

Sec 401 Accountability reviews by the Director of National Intelligence. Directs the DNI, if he determines it necessary, to conduct an accountability review of an IC element and its personnel, and would authorize him to do so if requested by an intelligence committee. Based on such reviews, the DNI may recommend corrective or punitive action, including dismissal of personnel, to the head of the IC element concerned. If the head of the IC element does not follow the DNI's recommendation, he must explain his decision to the intelligence committees. [Creates a potential for conflict between the DNI's reviews and recommendations for corrective action with SECDEF's authority, direction, and control of DoD intelligence components; and subjects SECDEF's decisions on corrective or punitive action to oversight by the intelligence committees]

Sec 402 Authorities for intelligence information sharing. Authorizes the DNI to make funds available to other departments or agencies for, and "direct the development and fielding of, systems of common concern related to the collection, processing, analysis, exploitation, and dissemination of intelligence information." [Creates potential conflict between DNI and DoD direction of information management programs in DoD intelligence components]

Sec 404 Title and appointment of Chief Information Officer of the Intelligence Community. Converts the ODNI's CIO to the CIO of the IC. [May be interpreted to grant the CIO of the IC all the authorities of CIOs created in the Paperwork Reduction Action Act and the Clinger-Cohen Act over all IC elements; creates a potential to overlay the authorities of the CIO of the IC on top of the similar authorities of the Department's CIO and the CIOs of the armed services and of certain DoD combat support agencies]

Sec 405 Inspector General of the Intelligence Community. Replaces the ODNI's IG with the IG of the IC. [For DoD intelligence components, overlays the authorities of the IG for the IC over all matters within the DNI's responsibility on top of similar authorities of the DOD IG and the IGs of the armed services and certain DoD combat support agencies]

Sec 406 Chief Financial Officer of the Intelligence Community. Establishes the CFO of the IC to "establish and oversee a comprehensive and integrated strategic process for resource management" within the IC. [For DoD's intelligence components, creates potential conflict between directions of the CFO of the IC, DoD's CFO, and CFOs of the armed services and certain DoD combat support agencies]

Sec 415 Plan to implement recommendations of the data center energy efficiency reports. Directs the DNI to develop a plan to implement across the IC the recommendations of a report previously submitted to Congress. [Creates a potential for conflict between the DNI plan and SECDEF's directions to manage information technology and infrastructure programs in DoD intelligence components]

In the aggregate, these provisions in the discussion draft would infringe upon the Secretary's statutory responsibilities and authorities in certain management issues within the Department of Defense to the extent that the provisions give the DNI authority over personnel, acquisition, and other management functions of DoD intelligence components. Without modification to require concurrence from the Secretary for the exercise of functions inherent to head-of-department authority, such provisions will undermine the cooperative relationship between the ODNI and the departments that contribute the vast majority of the IC's personnel and technical assets, and they will create confusion and conflict with the statutory authorities of the department and agency heads. These grants of unilateral authority to DNI (typically articulated without a requirement for concurrence by the heads of departments and agencies where an IC element resides) is inappropriate especially for personnel and acquisition functions in which the heads of departments and agencies must ensure are consistent throughout their respective departments and agencies, as well as being interoperable with the IC. In addition, a natural result of such provisions is expansion of bureaucracies and duplication of functions that are already being performed by the departments.