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INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2011

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Mrs. FEINSTEIN, from the Committee on Intelligence, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 719]

The Select Committee on Intelligence, having considered an original bill (S. 719) to authorize appropriations for fiscal year 2011 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes, reports favorably thereon and recommends that the bill do pass.

CLASSIFIED ANNEX TO THE COMMITTEE REPORT

The classified nature of United States intelligence activities precludes disclosure by the Committee of details of its budgetary recommendations. The Committee has prepared a classified annex to this report that contains a classified Schedule of Authorizations. The Schedule of Authorizations is incorporated by reference in the Act and has the legal status of public law. The classified annex is made available to the Committees of Appropriations of the Senate and the House of Representatives and to the President. It is also available for review by any Member of the Senate subject to the provisions of Senate Resolution 400 of the 94th Congress (1976).

99–010

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

The following is a section-by-section analysis and explanation of the Intelligence Authorization Act for Fiscal Year 2011 that is being reported by the Committee.

Title I—Budget and Personnel Authorizations

Section 101. Authorization of appropriations

Section 101 lists the United States Government departments, agencies, and other elements for which the Act authorizes appropriations for intelligence and intelligence-related activities for fiscal year 2011.

Section 102. Classified schedule of authorizations

Section 102 provides that the details of the amounts authorized to be appropriated for intelligence and intelligence-related activities and the applicable personnel levels (expressed as full-time equivalent positions) for fiscal year 2011 are contained in the classified Schedule of Authorizations and that the classified Schedule of Authorizations shall be made available to the Committees on Appropriations of the Senate and House of Representatives and to the President.

Section 103. Intelligence Community Management Account

Section 103 authorizes appropriations for the Intelligence Community Management Account (ICMA) of the DNI and sets the authorized full-time equivalent personnel levels for the elements within the ICMA for fiscal year 2011.

Subsection (a) authorizes appropriations of $649,732,000 for fiscal year 2011 for the activities of the ICMA. Subsection (b) authorizes 648 full-time equivalent personnel for elements within the ICMA for fiscal year 2011 and provides that such personnel may be permanent employees of the Office of the Director of National Intelligence (ODNI) or detailed from other elements of the United States Government.

Subsection (c) authorizes additional appropriations and full-time equivalent personnel for the classified Community Management Account as specified in the classified Schedule of Authorizations and permits the funding for advanced research and development to remain available through September 30, 2012.

Title II—Central Intelligence Agency Retirement and Disability System

Section 201. Authorization of appropriations

Section 201 authorizes appropriations in the amount of $292,000,000 for fiscal year 2011 for the Central Intelligence Agency (CIA) Retirement and Disability Fund.

Title III—General Intelligence Community Matters

Section 301. Restriction on conduct of intelligence activities

Section 301 provides that the authorization of appropriations by the Act shall not be deemed to constitute authority for the conduct

of any intelligence activity that is not otherwise authorized by the Constitution or laws of the United States.

Section 302. Increase in employee compensation and benefits authorized by law

Section 302 provides that funds authorized to be appropriated by this Act for salary, pay, retirement, and other benefits for federal employees may be increased by such additional or supplemental amounts as may be necessary for increases in compensation or benefits authorized by law.

Section 303. Non-reimbursable detail of other personnel

Section 303 makes a correction to Section 113A of the National Security Act of 1947 (50 U.S.C. 404h–1), which was amended by Section 302 of the Intelligence Authorization Act for Fiscal Year 2010 (Pub. L. No. 111–259, October 7, 2010). As enacted, this section limited to two years the length of time that United States Government personnel may be detailed to the staff of an element of the Intelligence Community funded through the National Intelligence Program from another element of the Intelligence Community or from another element of the United States Government on a reimbursable basis or a non-reimbursable basis. It was intended to extend the period of time an employee could be detailed on a non-reimbursable detail from one year to two years. The provision was not intended to limit the time period for reimbursable details, which had not been previously time-limited. Section 303 restates Section 113A of the National Security Act without the limitation on reimbursable details and clarifies that the section does not limit any other source of authority for reimbursable or non-reimbursable details.

Title IV—Matters Relating to Elements of the Intelligence Community

SUBTITLE A—OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

Section 401. Schedule and requirements for the National Counterintelligence Strategy

Section 401 amends Section 904(d)(2) of the Counterintelligence Enhancement Act of 2002 (50 U.S.C. 402c(d)(2)) to require that the National Counterintelligence Strategy be revised or updated at least every three years and that it align with the strategy and policies of the Director of National Intelligence.

The Committee does not consider the current requirement to produce this multi-year strategy on an annual basis to be an efficient or effective use of limited resources. Section 401 will enable, whenever possible, the Strategy to be produced in tandem with strategic planning documents such as the National Intelligence Strategy.

Section 402. Insider Threat Detection Program

Section 402 requires the Director of National Intelligence, not later than October 1, 2012, to establish an initial operating capability for an effective automated insider threat detection program for the information resources in each element of the Intelligence Community in order to detect unauthorized access to, or use or

transmission of, classified information. Section 402 requires that the program be at full operating capability by October 1, 2013.

Not later than December 1, 2011, the Director of National Intelligence shall submit to the congressional intelligence committees a report on the resources required to implement the program and any other issues the Director considers appropriate to include in the report.

Section 403. Unauthorized disclosure of classified information

The Committee has had long-standing concerns about unauthorized disclosures of classified information. A particular source of frustration has been that leakers are rarely seen to suffer consequences for leaking classified information. In order to better supplement criminal prosecution remedies for unlawful disclosures, the Committee has urged the Executive Branch to make fuller use of administrative sanctions. Up to now, those sanctions have consisted of security clearance revocation, suspension, or termination as a means of deterring and punishing leakers. Unfortunately, these sanctions are not generally available for use against a key source of leaks, former Intelligence Community employees.

The purpose of Section 403 is to provide an additional administrative option for the Intelligence Community to deter leakers who violate the prepublication review requirements of their non-disclosure agreements. This option may require individuals to surrender their current and future federal government pension benefits if they knowingly violate the prepublication review requirements in their non-disclosure agreements in a manner that discloses classified information to an unauthorized person or entity.

Section 403 authorizes the DNI to publish regulations, in coordination with the head of each element of the Intelligence Community, that require each Intelligence Community employee to sign a written non-disclosure agreement and set forth the administrative procedures applicable when an employee violates his non-disclosure agreement. The provision is designed to be flexible and allow the DNI and agency heads to tailor regulations and procedures that will work best for their respective agencies, while providing due process for an employee who has violated the terms of the non-disclosure agreement. In order to ensure that the Government's procedures governing classified information are administered in an integrated manner, regulations published under Section 403 shall be consistent with any procedures established by Executive order or regulation under section 801of the National Security Act.

Under this provision, non-disclosure agreements will: (1) prohibit an employee from disclosing classified information without authorization; (2) require the employee to comply with all prepublication review requirements; (3) specify appropriate disciplinary action, including the surrender of any current or future federal government pension plan, to be taken against the employee if the DNI or the head of the employee's element of the Intelligence Community determines that the employee knowingly violated the prepublication review requirements contained in the non-disclosure agreement in a manner that disclosed classified information to an unauthorized person or entity; and (4) describe procedures for making and reviewing disciplinary determinations in a manner consistent with the due process and appeal rights otherwise available to an em-

ployee who is subject to the same or similar disciplinary action under existing law. These non-disclosure agreement requirements are consistent with and do not supersede, conflict with, or otherwise alter Intelligence Community employee obligations, rights, or liabilities established by federal law, statute, or regulation. In particular, the Committee notes that this provision has no impact on any laws relating to whistleblowers. Unauthorized disclosure of classified information to the media or the public is not permissible under any existing whistleblower protection laws, and would therefore not be covered under this provision.

Section 403 provides a mechanism for the Director of National Intelligence to enforce the contractual obligations contained in a nondisclosure agreement with respect to prepublication review requirements, for both current and future Intelligence Community employees. Such agreement may be enforced either during or subsequent to employment. The use of the term ''surrender'' is crucial to this contractual concept. Section 403 is not intended to give the DNI the authority to revoke or take pension benefits on his own and without reference to the agreement between the employee and the Intelligence Community element. Rather, each individual employee may now be held to the promise to surrender current and future federal government pension benefits if it is determined, in accordance with the applicable administrative procedures required by subsection (a), that the individual knowingly violated the prepublication review requirements in a manner that disclosed classified information to an unauthorized person or entity. It is important to note that there is no requirement that the disclosure of classified information also be done knowingly. The Committee believes that imposing such a requirement would allow those who purposely bypass the prepublication review procedures to claim that they did not reasonably know that their published information was classified—a fact about which they would have been informed had they complied with their prepublication requirements in the first place.

For the purposes of Section 403, the term ''federal government pension plan'' does not include any Social Security benefits, Thrift Savings Plan benefits or contributions, or any contribution by a person to a federal government pension plan, in their fair market value. These limitations ensure that the only part of the individual's pension that is subject to surrender under the authorities of this provision is that portion funded by U.S. taxpayers.

SUBTITLE B—OTHER ELEMENTS

Section 411. Defense Intelligence Agency counterintelligence and expenditures

Section 411 amends Section 105 of the National Security Act of 1947, on the responsibilities of Intelligence Community elements in the Department of Defense, to make clear that the responsibilities of the DIA include counterintelligence as well as human intelligence activities. This confirms the existing responsibilities of the agency.

Section 411 also provides authority for the Director of the DIA to account for expenditures for human intelligence and counterintelligence activities of a confidential, extraordinary, or emergency

nature, in a manner similar to that available to the CIA, which does not reveal sensitive information. Section 411 limits this authority to no more than five percent of the amounts available to the DIA Director for human intelligence and counterintelligence activities unless the Director notifies the congressional intelligence committees thirty days in advance of the intent to exceed this limit. In addition, the Director must report annually to the congressional intelligence committees on the use of this expenditure authority. It is the intention of the Committee that the DIA Director shall carefully monitor the use of this authority to ensure that the flexibility it permits is used only in furtherance of the counterintelligence and human intelligence responsibilities of the DIA.

A similar provision, without the five percent limitation, was included in S. 1494, the Intelligence Authorization Act for Fiscal Year 2010, reported by the Committee on July 22, 2009. S. 1494 passed the Senate by unanimous consent on September 16, 2009.

Section 412. Accounts and transfer authority for appropriations and other amounts for the intelligence elements of the Department of Defense

Section 412 authorizes the Secretary of Defense to transfer defense appropriations into an account or accounts established by the Secretary of the Treasury for receipt of such funds. These accounts may receive transfers and reimbursement from transactions between the defense intelligence elements and other entities, and the Director of National Intelligence may also transfer funds into these accounts. Appropriations transferred pursuant to this section shall remain available for the same time period, and for the same purposes, as the appropriations from which transferred. This should improve auditing of defense intelligence appropriations.

Section 413. Confirmation of appointment of the Director of the National Security Agency

Section 413 amends the National Security Agency Act of 1959 to provide that the Director of the National Security Agency (NSA) shall be appointed by the President by and with the advice and consent of the Senate. Under present law and practice, the President appoints the Director of the NSA. The appointment has been indirectly subject to confirmation through Senate confirmation of the military officers who have been promoted into the position. Section 413 will make explicit that the filling of this key position in the Intelligence Community should be subject to confirmation.

The Committee has had a long-standing interest in ensuring Senate confirmation of the heads of the NSA, the National Reconnaissance Office, and the National Geospatial-Intelligence Agency. The Committee moves forward on the requirement for Senate confirmation of the Director of NSA in this Act in light of NSA's critical role in the national intelligence mission, particularly with respect to activities which may raise privacy concerns.

Through advice and consent, the Senate can enable the Congress to fulfill more completely its responsibility for providing oversight to the intelligence activities of the United States Government and ensure the responsibilities and foreign intelligence activities of the NSA receive appropriate attention.

The requirement for confirmation of the Director of NSA will not increase the number of Senate-confirmed officials. The Director of the NSA is now also the Commander of the U.S. Cyber Command and therefore subject to confirmation. Accordingly, Section 413 does not alter the role of the Committee on Armed Services in reviewing and approving the promotion or assignment of military officers. Through a sequential referral the Armed Services and Intelligence Committees will assure that all aspects of the appointment, both with respect to the Cyber Command and intelligence collection, will be considered.

Section 413(c) makes clear that the requirement for Senate confirmation applies prospectively. Therefore, the Director of the NSA on the date of enactment will not be affected by this section, which will apply initially to the appointment and confirmation of his successor.

COMMITTEE ACTION

Vote to report the committee bill

On March 15, 2011, a quorum for reporting being present, the Committee voted to report the bill, by a vote of 12 ayes and 3 noes. The votes in person or by proxy were as follows: Chairman Feinstein—aye; Senator Rockefeller—aye; Senator Wyden—no; Senator Mikulski—aye; Senator Nelson—aye; Senator Conrad—no; Senator Udall—no; Senator Warner—aye; Vice Chairman Chambliss—aye; Senator Snowe—aye; Senator Burr—aye; Senator Risch—aye; Senator Coats—aye; Senator Blunt—aye; Senator Rubio—aye.

On March 18, 2011, acting on the basis of discussion during the mark-up, Chairman Feinstein and Vice Chairman Chambliss sent a letter to the Director of National Intelligence to request his views on Section 403 of the bill. The Committee has not received a formal response to that letter as of the filing of this report.

COMPLIANCE WITH RULE XLIV

Rule XLIV of the Standing Rules of the Senate requires publication of a list of any "congressionally directed spending item, limited tax benefit, and limited tariff benefit" that is included in the bill or the committee report accompanying the bill. Consistent with the determination of the Committee not to create any congressionally directed spending items or earmarks, none have been included in the bill, the report to accompany it, or the classified schedule of authorizations. The bill, report, and classified schedule also contain no limited tax benefits or limited tariff benefits.

ESTIMATE OF COSTS

Pursuant to section 11 of rule XXVI of the Standing Rules of the Senate, the Committee transmitted this bill to the Congressional Budget Office (CBO) on March 15, 2011, and requested it to conduct an estimate of the costs incurred in carrying out its provisions. On March 31, 2011, the CBO provided a cost estimate on the unclassified portions of the bill (posted on its website at *http://cbo.gov/ftpdocs/121xx/doc12123/Senate%20Intelligence.doc.pdf*) and concluded that, while the bill contains direct spending that makes the pay-as-you-go procedures applicable, the effects of that

spending would not be significant. The CBO also noted that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

EVALUATION OF REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds that no substantial regulatory impact will be incurred by implementing the provisions of this legislation.

CHANGES IN EXISTING LAWS

In the opinion of the Committee, it is necessary to dispense with the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

ADDITIONAL VIEWS OF SENATOR MARK R. WARNER

As a new member of the Senate Select Committee on Intelligence I am proud to represent thousands of current and former members of the intelligence agencies who live, work, or retire in Virginia. Because they are not able to discuss their very important work with friends and even family members, I will be a strong advocate for them in Congress.

I am also committed to providing robust oversight of the United States Intelligence Community, which is charged with gathering, analyzing, and acting upon intelligence that keeps our nation safe. There is perhaps no more important function of the U.S. government than providing policymakers with unbiased facts and assessments that guide their decisions in matters of war and peace.

The fact that this important mission must be done in secret makes it all the more important that the people of the United States have the confidence that it is being carried out—always—in keeping with this nation's laws, and in line with the principles and expectations of Americans. Passing an annual authorization bill that informs the intelligence agencies how they may spend appropriated funds is an important way for the Senate Intelligence Committee to play a key role in this necessary oversight. I am honored to have been named to this position of responsibility.

MARK R. WARNER.

MINORITY VIEWS OF SENATOR WYDEN

This intelligence authorization bill is the product of substantial labor by both Chairman Feinstein and Vice Chairman Chambliss, as well as their respective staff, and I commend them both for their efforts and for the bipartisan manner in which they have worked to put it together. It has now been almost seven years since an intelligence authorization bill was signed into law during the fiscal year it was intended to cover, and although the 2011 fiscal year is now approximately halfway over, Congress still has an opportunity to provide useful guidance and direction regarding intelligence spending for this fiscal year.

This bill also contains several worthwhile legislative provisions, including one that would make the Director of the National Security Agency a Senate-confirmed position. I support much of what these provisions are intended to achieve, but I have very significant concerns about one provision in this bill, and that is why I voted against it.

Section 403 of this bill would authorize the Director of National Intelligence (DNI) to establish an administrative process under which the DNI and the heads of the various intelligence agencies would have the authority to take away the pension benefits of an intelligence agency employee (or a former employee) if they "determine" that the employee has knowingly violated his or her nondisclosure agreement and disclosed classified information.

I share my colleagues' frustration regarding unauthorized disclosures, or "leaks," of classified information. Leaks are a problem that has plagued intelligence agencies throughout modern history—they can undermine intelligence operations, jeopardize intelligence sources and methods, and have a terrible impact on the lives of covert agents who are publicly exposed. Every member of Congress, myself included, wants to find new ways to identify and appropriately punish individuals who illegally disclose classified information. I personally spent four years working on legislation to increase the criminal penalty for people who are convicted of deliberately exposing covert agents. And I am proud to say that with help from a number of my Republican and Democratic colleagues, this legislation was finally signed into law last year.

I agree that increasing penalties for particular offenses can sometimes have a deterrent effect on those who might otherwise be tempted to leak, so I support the creation of new consequences for individuals who have been convicted of illegally divulging classified information. But when it comes to leakers, the biggest challenge is not determining how to punish them as much as it is identifying who they are.

Given these challenges, my concern is that giving intelligence agency heads the authority to take away the pensions of individuals who haven't been formally convicted of any wrongdoing could

pose serious problems for the due process rights of intelligence professionals, and particularly the rights of whistleblowers who report waste, fraud and abuse to Congress or Inspectors General.

Section 403—as approved by the Select Committee on Intelligence—gives the intelligence agency heads the power to take pension benefits away from any employee that an agency head "determines" has knowingly violated their nondisclosure agreement. But as I noted in the committee markup of this bill, neither the DNI nor any of the intelligence agency heads have asked Congress for this authority. Moreover, as of this writing none of the intelligence agencies have officially told Congress how they would interpret this language.

It is entirely unclear to me which standard agency heads would use to "determine" that a particular employee was guilty of disclosing information. It seems clear that section 403 gives agency heads the power to make this determination themselves, without going to a court of law, but the language of the provision provides virtually no guidance about what standard should be used, or even whether this standard could vary from one agency to the next. No agency heads have yet told Congress what standard they believe they would be inclined or required to use. This means that if an agency head "determines" that a particular individual is responsible for a particular anonymous publication, he or she could conceivably take action to revoke that individual's pension benefits even if the agency does not have enough proof to convict the employee in court.

Section 403 states that agency heads must act "in a manner consistent with the due process and appeal rights otherwise available to an individual who is subject to the same or similar disciplinary action under other law." But federal agencies do not normally take away the pension benefits of former employees unless they are convicted of a crime or begin openly working for a foreign government. I do not believe that this "otherwise available" language is intended to require the government to get a criminal conviction; beyond that I am not at all sure what impact this language is supposed to have and I am not sure that the various intelligence agency heads will know what it means either. This only increases my concern that this provision could be used to undermine or violate the due process rights of intelligence agency employees, with a corresponding impact on their family members and dependents.

I am also especially troubled that section 403 is silent regarding disclosures to Congress and Inspectors General. Everyone hopes that intelligence agency managers and supervisors will act honorably and protect whistleblowers who come forward and go through proper channels to report waste, fraud and abuse in national security agencies, but this is unfortunately not always the reality. There are existing laws in place that are intended to protect whistleblowers who provide information to Congress and Inspectors General—and I believe that these laws should be strengthened—but section 403 does not specify whether it would supersede these existing statutes or not. I know that none of my colleagues would deliberately do anything to undermine protections for legitimate whistleblowers, but I think it was a mistake for the Intelligence Committee to report this bill without hearing the intelligence agen-

cies' views on whether or not they believe that section 403 would impact existing whistleblower protections.

It is unfortunately entirely plausible to me that a given intelligence agency could conclude that a written submission to the congressional intelligence committees or an agency Inspector General is an "unauthorized publication," and that the whistleblower who submitted it is thereby subject to punishment under section 403, especially since there is no explicit language in the bill that contradicts this conclusion. Withholding pension benefits from a legitimate whistleblower would be highly inappropriate, but overzealous and even unscrupulous individuals have served in senior government positions in the past, and will undoubtedly do so again in the future. This is why it is essential to have strong protections for whistleblowers enshrined in law, and this is particularly true for intelligence whistleblowers, since, given the covert nature of intelligence operations and activities, there are limited opportunities for public oversight. But reporting fraud and abuse by one's own colleagues takes courage, and no whistleblowers will come forward if they do not believe that they will be protected from retaliation.

Finally, I am somewhat perplexed by the fact that section 403 creates a special avenue of punishment that only applies to accused leakers who have worked directly for an intelligence agency at some point in their careers. There are literally thousands of employees at the Departments of Defense, State and Justice, as well as the White House, who have access to sensitive information. Some of the most serious leaks of the past few decades have undoubtedly been made by individuals working for these organizations. I do not see an obvious justification for singling out intelligence community employees, particularly in the absence of evidence that these employees are responsible for a disproportionate number of leaks. And I am concerned that it will be harder to attract qualified individuals to work for intelligence agencies if Congress creates the perception that intelligence officers have fewer due process rights than other government employees.

Withholding pension benefits from individuals who are convicted of disclosing classified information will often be an appropriate punishment. This punishment is already established in existing laws, and I would be inclined to support efforts to clarify or strengthen these laws. But I am not inclined to give agency heads broad authority to take away the pensions of individuals who have not been convicted of wrongdoing, particularly when the agency heads themselves have not even told Congress how they would interpret and implement this authority. This is why I voted against this authorization bill. I look forward to working with my colleagues to amend this bill on the Senate floor and I do not intend to support it unless significant reforms are made. All of my colleagues and I agree that illegal leaks are a serious problem, but this does not mean that anything at all that is done in the name of stopping leaks is necessarily wise policy.

RON WYDEN.