

ISSUE: An Executive Order to Replace ^FE.O. 12036, "United States Intelligence Activities." *author?*

INTRODUCTION

1. The Ford and Carter administrations each had its "own" executive order governing how the U.S. Intelligence Community is organized and directed and what restrictions apply to intelligence activities. It is logical to assume that the Reagan administration will at least consider, if not actually issue, a replacement for E.O. 12036. The comments which follow treat with such a new executive order from the viewpoint of the Department of Defense. The framework is provided by the Table of Contents of E.O. 12036.

2. The contents of any new executive order on intelligence activities could be markedly affected by any White House decision to assign the senior U.S. intelligence officer a markedly different role than the Director of Central Intelligence now has. No attempt is made in this paper to anticipate the direction any such decision might take. Instead, the focus is on how E.O. 12036 could be improved.

SECTION 1. DIRECTION, DUTIES AND RESPONSIBILITIES WITH RESPECT TO THE NATIONAL INTELLIGENCE EFFORT

1-1 National Security Council.

A very general statement such as contained in 1-101 is all that need be said about the NSC role. An attempt to involve the NSC more directly, as was tried in President Ford's E.O. 11905, demonstrated this is not a fruitful approach.

1-2 NSC Policy Review Committee, and
1-3 NSC Special Coordination Committee.

It matters little how the NCS committee structure is organized so long as provision is made for dealing at a high level with functions now accomplished by the PRC and SCC. The important thing is to involve cabinet level officers or their immediate subordinates on an active basis and yet avoid burdening their time.

Functions that particularly need handling by an NSC committee include:

- Establishing national intelligence requirements and priorities;
- Reviewing the National Foreign Intelligence Program and budget proposals for responsiveness to the needs of NSC members;
- Considering and recommending action by the President on proposed special activities (covert actions);
- Approving proposals for sensitive foreign intelligence collection operations; and
- Developing national policy for the conduct of counterintelligence activities.

1-4. National Foreign Intelligence Board.

The functions assigned to the NFIB in 1-401 are appropriate to a body that serves as the senior advisory agency for the DCI.

Present membership arrangements pose problems. Considering the resources the Military Services provide to the national intelligence effort, it is incongruous that the Service intelligence chiefs are "observers" rather than members of the NFIB. It also is incongruous to delimit NFIB participation when substantive intelligence products are being reviewed, but not when the board handles any other business.

For some purposes an NFIB of the present size is clearly appropriate, e.g. for budget reviews, but consideration could be given to handling part of the NFIB business by an Executive Committee consisting of the DCI, the Deputy Under Secretary of Defense (Policy Review), the Director, NSA, Director, DIA and the head of INR/State.

1-5. National Intelligence Tasking Center.

The qualms that accompanied beginning efforts to establish the NITC have subsided and in retrospect there seems to have been little, if any, need to split the Intelligence Community Staff into a Collection Tasking Staff and Resource Management Staff. The PHOTINT, SIGINT and HUMINT Tasking Offices are continuing the work of the comparable DCI committees --COMIREX, SIGINT and Human Resources Committees on which all interested Intelligence Community components participate. The National Collection Planning Office is combining the work of the DCI Critical Collection Problems Committee (CCPC) and what the Intelligence Community Staff used to do re the DCID 1/2 requirements and priorities problem.

To date there has been only one exercise testing the passing of control of the NI

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from the DCI to the Secretary of Defense as provided at Sec. 1-504 of the order. This test had the expected "first time" problems. The order should be amended to provide that practice exercises are conducted in the Pentagon at least annually.

1-6. The Director of Central Intelligence

On the basis of experience to date, the 13 duties assigned to the DCI in ~~Sec. 1-601~~ Sec. 1-601 of E.O. 12036 pose no problems to effective intelligence activities within the DoD. This would continue to be true if the same duty assignments were divided between the Director of CIA and a senior U.S. intelligence officer who was separated from the direct management of the CIA.

1-602

1-7. National Foreign Intelligence Program Budget

Since the Defense Department provides more than three-fourths of the resources in the NFIP and this section gives the DCI "full and exclusive authority" for approval of the NFIP budget - an authority that clashes sharply with the Secretary's responsibility for his departmental budget - it should be clear why budget matters are a potential continuing source of conflict between the DCI and SECDEF. Difficulties that have required many, many hours of interstaff negotiation, with no apparent benefit to the overall intelligence program, could be eliminated by two changes in the executive order:

--Amend the definition of the National Foreign Intelligence Program at Sec. 4-210(b) to eliminate mention of "the General Defense Intelligence Program. This would recognize that DoD national cryptologic and special reconnaissance activities are properly part of the NFIP, but would leave decision as to what DoD activities now in the GDIP and under DCI budget approval authority actually are national intelligence activities up to a joint decision by the DCI and SECDEF as provided in Sec. 4-210(c).

--This change was sought by the SECDEF in the development of E.O. 12036. The DCI was opposed. Decision went to President Carter, who sided with the DCI.

--Eliminate Sec. 1-602(h), which authorizes the DCI to conduct "program and performance audits and evaluations." This authority has been used by the DCI Resource Management Staff to conduct investigations and engage in activities which go beyond budget review into highly detailed management decisions that should be left to DoD determination.

1-603. Responsibilities for National Foreign Intelligence

Unless required to coordinate national intelligence products a DCI may tend to neglect this aspect of his Community role. This section should be amended by addition of a final sentence as follows:

"The DCI shall ensure that National Intelligence Estimates and other national estimative products are fully coordinated with the heads of collection and production components represented on the National Foreign Intelligence Board."

1-604. Protection of Sources, Methods and Procedures

1-605. Responsibilities of Executive Branch Agencies

1-606. Access to CIA Intelligence

These sections pose no problems to the Defense Department.

1-7 Senior Officials of the Intelligence Community

At Sec. 1-705 and 1-709 are the first mentions of a requirements that intelligence officials report on "unlawful or improper activity." What is unlawful can be objectively determin4d, but what is "improper" is a completely undefined and subjective standard. This phrase was originally included in President Ford's E.O. 1 in an effort to take steam out of the expected recommendations from the Church Committee, then completeng its investigation of intelligence activities. What some view as "improper" may be perfectly "proper" to others. This is a standard that discourages the imagination and initiative that can be so important in effective intelligence collection activities. All references to reporting on "improper" activity should be deleted from the executive order.

1-8. The Central Intelligence Agency

The fact that Sec. 1-802 specifically authorizes CIA to produce military intelligence causes heartburn among some DoD intelligence officers, but there is no point in opposing such. The CIA role in production of military intelligence is deeply imbedded in its history, and is viewed in some parts of the government as a needed counter to "parochialism" in military intelligence produced by DoD components.

The duties and responsibilities assigned to CIA in Sec. 1-8 are appropriate to a national intelligence organization of its nature.

1-9. The Department of State

The fact that DoD intelligence activities are included in the mission activities for which overseas Chiefs of Mission are responsible for "direction and coordination" can on occasion be a matter of DoD concern, but this provision in E.O. 12036 merely reflects existing statutory authority that the State Department possesses.

1-10 The Department of the Treasury

DoD has no changes to propose for this section.

1-11. The Department of Defense

The thirteen duties and responsibilities assigned to the Secretary of Defense adequately cover the Secretary's intelligence role, and require no change, so long as the order continues to hold the DCI responsible for approval of the National Foreign Intelligence Program budget submitted to the President.

1-12 Intelligence Components Utilized by the Secretary of Defense

1-1201. The Defense Intelligence Agency

1-1202. National Security Agency (NSA)

1-1203. Offices for the Collection of Specialized Intelligence Through
Reconnaissance Programs

1-1204. The Foreign Intelligence and Counterintelligence Elements of the
Military Services

1-1205. Other Offices Within the Department of Defense

Within the limitations of an unclassified order, these sections are satisfactory.

1-13. The Department of Energy

1-14. The Federal Bureau of Investigation

1-15. The Drug Enforcement Administration

These sections pose no problems to DoD. Justice Department representatives have indicated some concern over having DEA considered part of the Intelligence Community but DoD has no reason to take a position on this.

Section 2. RESTRICTIONS ON INTELLIGENCE ACTIVITIES

This section of E.O. 12036 is a modest amplification of the restrictions written into E.O. 11905 in 1976 as part of an Executive Branch effort to anticipate - and lessen the public impact of - recommendations expected to be in the Church Committee report, then in final drafting stages. While these restrictions apply to all DoD intelligence components they were written with CIA activities primarily in mind.

As required by the order, The Defense Department has promulgated implementing procedures concerning these restrictions. Negotiations for Attorney General approval were time consuming and it was not until November 1979 that a 130-page DoD 5240.1-R, "Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons," was published. A revision of these procedures on the basis of operating experience is in the final stages of coordination.

E.O. 12036 gives the Attorney General a much stronger role in oversight of intelligence and approval of intelligence directives and regulations than had existed heretofore. In some ways, the Attorney General role usurps and overlaps responsibilities formerly exercised by General Counsels of the departments and agencies. Any revision of E.O. 12036 should include a re-examination of the role of the Attorney General.

Provisions of the order's Sec. 2-202, "Electronic Surveillance," lost much of their applicability upon passage in October 1978 of "The Foreign Intelligence Surveillance Act" (P.L. 95-511) - the "domestic wiretap bill". Review of this section should be a part of any revision of E.O. 12036.

Revision of Sec. 2-204, "Physical Searches," would be helpful to DoD if provisions were made for unconsented searches of military personnel by a Defense component. The present section stipulates that "no agency within the Intelligence Community except the FBI may conduct any unconsented searches within the United States."

The restrictions section most in need of clarification/modification is Sec. 2-207 "Undisclosed Participation in Domestic Organizations." This is a highly sensitive topic and loosening of existing restrictions will attract unfavorable attention from organizations such as the ACLU and other critics of intelligence activities.

Sec. 2-305, "Prohibition on Assassination," was included because of the Congressional investigations, but it is applicable only to federal employees and persons acting for the Government. Criminal statutes concerning murder should make any specific prohibition on assassination unnecessary in an executive order.

Section 3. OVERSIGHT OF INTELLIGENCE ORGANIZATIONS

3-1. Intelligence Oversight Board

E.O. 12036 continued the IOB that had been created under E.O. 11905, but gave the IOB the additional authority of conducting such investigations as the Board deemed necessary. In view of the role of the Attorney General in oversight of intelligence activities, the IOB serves no particularly useful purpose and could be abolished. The only reason for retaining it has to do with public relations, since its abolition could be criticized in the media as an "unleashing" of intelligence.

Even if the IOB is retained, the charge that it is to be concerned with the "propriety" as well as the legality of intelligence activities should be eliminated. The earlier discussion of this point in treatment of Sec. 1-7 applies.

3-2. Inspectors General and General Counsel

3-3. Attorney General

3-4. Congressional Intelligence Committees

If decision is made to eliminate the IOB and delete requirements to report on matters of "propriety" these sections will require revision; otherwise they pose no problems to DoD. After long negotiation, the final approved version of S.2284, the "Intelligence Oversight Act of 1980," largely reflected the introductory language of Section 3-4.

Section 4. GENERAL PROVISIONS

4-1. Implementation

Provisions generally of this nature should be included in any comprehensive executive order dealing with intelligence activities. This section poses no problems to DoD intelligence activities.

4-2 Definitions

Sec. 4-207, "Intelligence Community and Agency or Agencies Within the Intelligence Community," included the Drug Enforcement Administration as a component element of the Community. This was primarily to assure that overseas activities of the DEA would be appropriately coordinated with the CIA. Whether DEA should be considered a part of the Community should be determined between CIA and the Department of Justice. It is of no real concern to DoD whether DEA is in or out.

Sec. 4-210(b), "The National Foreign Intelligence Program," should be amended by deletion of "the General Defense Intelligence Program." This already has been discussed in consideration of Sec. 1-602.