

MEMORANDUM

SUBJECT: S. 2008

I. In its present form, S. 2008 raises two problems for the Central Intelligence Agency. First, it could impinge upon the Agency's primary statutory responsibility of collecting, evaluating and disseminating foreign intelligence information. Second, it may not provide fully enough for the personnel security requirements imposed on the Agency by statute and Executive Order.

II. First Problem

The Central Intelligence Agency is not a criminal justice agency. Under S. 2008, the Agency would be confronted, as a non-criminal justice agency, with limitations which could impinge upon its essential responsibility by barring Agency access to important foreign intelligence information.

Discussion

1. The Central Intelligence Agency's scope of authority is limited to foreign intelligence matters. It is definitely not a "criminal justice agency," nor is it involved in the "administration of criminal justice" or other criminal justice activity. Section 102(d)(3) of the National Security Act of 1947 provides:

"...That the Agency shall have no police, subpoena, law enforcement powers, or internal security functions..."

2. The dissemination of foreign intelligence information is a principle statutory function of the Central Intelligence Agency. Section 102(d)(3) of the National Security Act of 1947 imposes on the Agency a duty

"...to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities..."

Moreover, Section 102(e) of that Act provides:

"...To the extent recommended by the National Security Council and approved by the President, such intelligence of the departments and agencies of the Government ... relating to the national security shall be open to the inspection of the Director of Central Intelligence, and such intelligence as relates to the national security and is possessed by such departments and other agencies of the Government ... shall be made available to the Director of Central Intelligence for correlation, evaluation, and dissemination..."

If one thing is clear from the legislative history and the statutes surrounding the creation of the Central Intelligence Agency, it is that all foreign intelligence information available to the United States Government should be made available to, and correlated by, one central foreign intelligence authority.

3. Foreign intelligence information is any information of significance concerning foreign areas, developments, or personalities. From time to time, it may include information on foreign personalities or events relating to criminal conduct, such as information on foreign terrorist organizations, international narcotics traffickers, or biographic information on foreign personalities. Such foreign intelligence information could fall within the definition of "criminal justice information," "criminal justice investigative information," or "criminal justice intelligence information," since the sections of S. 2008 which define these three categories are not limited to the domestic sphere but could be read to include information from foreign sources, concerning foreign citizens, and relating to conduct made criminal under foreign laws. By so broadly defining these categories of information and by restricting access to and use of such information to criminal justice agencies and purposes, S. 2008 cuts across the legitimate foreign intelligence interests of the Central Intelligence Agency. The restrictions of Sections 102(b), 201, and 205 could preclude the Agency from receiving or using information held by a foreign or domestic agency concerning appropriate subjects of foreign intelligence interests, or from disseminating this foreign intelligence information to appropriate recipients.

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EXAMPLE: The Agency plays a large role in monitoring the activities of foreign terrorist groups. This bill could preclude the Agency from collecting information on foreign terrorists either from domestic or foreign agencies. (Hypothetical: A Middle East liaison service confidentially offers the Agency criminal history record information pertaining to foreign individuals involved in terrorist activities.)

EXAMPLE: The Agency could be prevented from studying the dissident movement in the Soviet Union and the labor camp system because the Agency could not collect, maintain, use or disseminate facts pertaining to the arrest, detention, release, etc., of key figures in that movement.

Recommendation

The problem of impairing foreign intelligence collection, correlation and dissemination could be avoided by limiting the controls of S. 2008 to information pertaining to citizens and aliens lawfully admitted for permanent residence within the United States. It is believed this was the original intent of the bill and such a limitation would certainly preserve the objectives of the legislation, i.e. "protecting the constitutional rights and privacy" of individuals. There does not seem to be any valid legislative purpose that would be served by extending these protections to the world at large. Therefore, it is recommended that sections 102(5), (12), and (13) be amended by appropriately inserting the phrase "...pertaining to a citizen of the United States or alien lawfully admitted for permanent residence within the United States...."

III. Second Problem

The standards in sections 204(b) and (d) may not provide the Agency with sufficient access to criminal justice information to satisfy the Agency's requirements relative to (a) background security investigations and (b) special inquiries for operational purposes.

Discussion

1. The Agency conducts "background checks" on individuals pursuant to Executive Orders 10450 and 11652, Agency regulations which implement these Orders, and Section 102(d)(3) which imposes on the Director of Central Intelligence the statutory responsibility for protecting intelligence sources and methods from unauthorized disclosure. Generally speaking, the Agency conducts two kinds of "background checks": (1) "security investigations" relative to an employment application, employment retention, or approval of security clearance; and (2) "special inquiries" for operational purposes.
2. "Security investigations" (relative to employment and security clearances) are provided for in Section 204(b). The subject of such an investigation, having usually caused its initiation himself, knows he is being investigated. In any case, subsection (c) of section 204 would require the subject be advised of the investigation. The major problem that the Agency would face with respect to Section 204(b) is the limitation on access to arrest information to a time period of twelve months prior to the date of the request. This falls far short of the 15-year requirement now in effect.
3. The Agency makes "special inquiries" for operational purposes in cases where the subject cannot be made aware, at least initially, that he is being checked. These operational cases do not arise in employment application or security clearance contexts. These background checks are not undertaken for criminal justice purposes, but rather for foreign intelligence purposes and pursuant to the Director's authority to protect intelligence sources and methods. The following are examples of "special inquiries":

EXAMPLE: An American citizen with excellent connections in a foreign country is planning a visit to that country. The Agency would like to ask this individual to attempt to extract a particular item of information in the course of conversations with his foreign contacts. Before approaching this individual the Agency might check to see if he had a prior criminal history record.

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4. It is believed that section 204(d) goes far in providing for these "special inquiries" while at the same time protecting against possible abuse. However, slight modifications are recommended below.

Recommendations

1. It is recommended that it be made clearer that the access permitted under Section 204(d) is in addition to the regular security clearance access provided all Government agencies under Section 204(b). This could be accomplished by adding this phrase at the beginning of subsection (d);

"In addition to dissemination authorized under subsection (b) or this section, ..."

2. It is recommended that the phrase in subsection (d), "upon the Director's being directed by the National Security Council to make an investigation," be changed to read:

"...under the direction of the National Security Council..."

This would make it clear that the NSC has general oversight and directive responsibilities and is not required to authorize each specific background check.

3. Rather than have the Director report annually "to the Congress," require him to report "to those committees of Congress which have legislative oversight over the Central Intelligence Agency."

4. Finally, amend section 204(b) to permit access to "criminal justice information" for at least a 15-year period.