ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM: Legislative Counsel
6D15 HQ

EXTENSION | NO.

DATE: 2 MAR 1978

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. DDA Attn: [redacted] 7D18 HQ		3/2	BH	Attached is a copy of the charter legislation principles paper which we coordinated earlier this week. The paper was submitted to the Director.
2.				
3. EO/DDA	3/3			[redacted] STAT
4.				Assistant Legislative Counsel
5. A/DDA	3 MAR 1978			1 - all - Worth review. Jim highlighted some things of particular concern to me. SEJ.
6.				
7. DDA		3 MAR 1978		
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9. AI/DDA				
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INTELLIGENCE CHARTER LEGISLATION PRINCIPLES

1. Overall Framework

The National Security Act of 1947, as amended, has served for over thirty years as the Government's charter for intelligence activities, responsibilities and needs. The underlying premise on which the National Security Act was based and continues to operate is that the Government must have the ability to collect and provide essential intelligence to policy makers and to conduct intelligence activities pursuant to national security needs. The current charter recognizes that it is essential to have and maintain an independent intelligence collection and analytic capability. The position and duties of the Director of Central Intelligence, and the centralized and independent Central Intelligence Agency--under the National Security Council--were established to meet this need. The proposed intelligence charter of 1978, introduced in the Senate on 9 February 1978 as S. 2525, appears directed largely at ensuring oversight and accountability and at placing restrictions on foreign intelligence activities. Even with this general thrust, however, it is important that the charter retain at its core the independent intelligence collection and analytic capability.

The detail included in S. 2525 is of concern. Problems arise, for example, when efforts are made to legislate overly detailed grants of positive authority, or to mandate restrictions that by reasonable interpretation might preclude necessary and appropriate intelligence activities. Attention should be directed to consolidating all the restrictions in one place in the charter and to phrasing these provisions as clear directives.

Excessive detail in legislation clogs the machinery of Government processes and tends to bring about results not intended by:

--heightening the probability that a particular activity not proscribed either by the letter or spirit of the law will be found or believed to be unauthorized merely for want of a specific statutory authority to conduct it, or because of the complexity or vagueness of a related restriction;

--leading to an undesirably cautious mentality which would tend to freeze all action, regardless of how desirable or proper, that does not fit precisely within the dead center of a grant of authority, or is not clearly restrained by restrictions, or because of the magnitude of required attendant procedures; and

--generating innumerable technical, inadvertant violations of both administrative and substantive provisions of the charter which in themselves may lead to additional violations if the numerous procedural and reporting requirements are not met precisely.

The Government's intelligence capability, contingent in large part as it is on anticipating events largely beyond the control of the United States, must remain sufficiently flexible to respond to unforeseen or fast-breaking situations and challenges abroad. Our mandate--to gather and provide important intelligence to policy makers and to carry out intelligence activities at their direction--cannot be carried out with any degree of effectiveness if every act must be subjected to detailed examination concerning whether it falls within specific parameters, and to detailed requirements for prior and subsequent reporting and justification.

One overriding principle that must be borne in mind is that the charter must serve as a reasonable and not overly burdensome guide for intelligence officers and employees; the mandate must be workable. There should be clear general authorities and responsibilities as well as clear and reasonable limitations. Although S. 2525 represents a vast improvement over the earlier drafts, in many instances its provisions still will cause serious practical problems (e.g., determining what activities constitute "sensitive intelligence collection projects" and complying with procedures for findings and reporting on such projects and on special activities; ambiguities in some of the restriction provisions; and the criteria for and limits on collection of information on U.S. persons and the utilization of U.S. persons for intelligence activities).

Moreover, efforts to require in legislation that consideration of certain activities must be of a certain type or quality or that numerous specified factors must be taken into account before implementing an activity raise problems of interpretability and tend to be unmanageable in practice. For example, a statutory provision requiring--as does subsection 114(f)--that certain factors be "carefully considered" or "fully expressed" before carrying out an authorized activity could, without stretching the language unreasonably, raise subjective arguments that the required conditions precedent were not met, despite the fact that the activity itself was authorized.

2. Executive Order 12036

Insofar as substantive issues are addressed in both the Executive Order and in the charter, the treatment of such issues should not be in conflict. This guideline would be particularly applicable, for example, in specifying the authorities and responsibilities of the Director and of the Central Intelligence Agency, and in providing the mechanism whereby special activities and sensitive collection projects or operations are reviewed, approved and implemented.

3. Broad Responsibilities

The Director of Central Intelligence--the Director of National Intelligence under S. 2525--should be clearly identified as the principle intelligence officer of the Government. The charter should provide among its purposes that necessary intelligence shall be collected and made available to policy makers in the Executive Branch. While reference to the intelligence "needs" of the Legislative Branch would not be inappropriate, such a "responsibility" should not be implicitly co-equal with the Director's obligation to the Executive Branch (Title I is somewhat ambiguous on this point).

The statute should specify that the Director shall head the CIA. Subsection 114(d) provides that the Director "shall act as the Director" of the CIA. Section 117, however, requires a formal Presidential "transfer" of any of the DNI's duties pertaining to heading the CIA to the Deputy DNI or an Assistant DNI. This mechanism creates ambiguity as to the authority of the DNI to delegate any of his authorities to the Deputy or an Assistant. Moreover, in practice it may prove difficult to distinguish those duties and authorities of the Director that "pertain to" his role as head of the Agency and those that do not.

The authorities and responsibilities relating to all aspects of the collection, production and dissemination of intelligence should run to the Director of National Intelligence. Title I accomplishes this in large part.

Although efforts to categorize intelligence as "national," "tactical" or "departmental" tend to be artificial and temporal, it is necessary in the charter to address these distinctions to the extent necessary to provide the Director authority to review and have access to all foreign intelligence. The definitions should be carefully drawn so as to preserve departmental prerogatives while ensuring that the Director maintains the necessary authorities. It would seem that this could most clearly be accomplished by including, as does S. 2525, definitions for these terms, rather than spelling out the distinctions in each instance in the operative provisions elsewhere in the Act.

The Agency should have responsibility for the conduct and coordination of counterintelligence activities abroad. It is also important that the Director's coordination authorities run clearly to all intelligence liaison activities and to all clandestine collection of intelligence abroad (see also paragraph 11, below). The Director should be responsible for ensuring proper implementation of special activities. Collection of foreign intelligence within the United States from public or voluntary sources should also be specifically allowed. However, contrary to

the provision in paragraph 413(h)(1) that all Agency activities, including non-clandestine collection, within the United States must be conducted in coordination with the FBI and pursuant to Attorney General/DNI procedures, Agency activities in this country should be authorized as in sections 1-801 and 1-805 of the Executive Order, as presently agreed to between the Agency and the FBI (limiting coordination to clandestine collection).

The duties and responsibilities of the Director of National Intelligence should be cast as clear and broad grants of positive authority. The authorities and responsibilities of the CIA also should be drawn as positive grants, and would include many, but not all, of the authorities and responsibilities assigned to the Director. Titles I and IV are cast in this manner, although there are some specific problem areas.

4. CIA Responsibilities

The Agency should have its own statutory identity and mission. Therefore, despite the fact that the Director of National Intelligence would head the Agency and would be "assigned" enumerated authorities, the statute should include a compilation of Agency authorities and responsibilities. These would be in addition to the administrative authorities as embodied in the CIA Act of 1949, as amended. S. 2525 is deficient with regard to necessary Agency administrative authorities. Once again, Executive Order 12036 should provide the guide for the necessary authorities and responsibilities of the Agency. There would be no need to provide separately for an office or a particular individual to head the Agency, but the Director must have clear authority to delegate his authorities in order to provide for the appropriate management of the Agency (see comments on this particular point in paragraph 3, above).

The Agency's authority to conduct clandestine signals intelligence operations in support of clandestine activities should not be subject to coordination or review outside the Agency.

5. Deputies to the DNI

The statute should provide the necessary authority to allow the Director to appoint either a specified number, or up to a certain number of subordinate officers to assist him and to whom he may delegate his authorites. Title I of the Senate bill provides for a Deputy Director of National Intelligence and grants the President authority to appoint up to five "Assistant Directors," without further specification of duties or areas of responsibility. This scheme seems appropriate, although providing for such a relatively large number of political positions--up to eight (DNI, DDNI, five ADNI's and the General Counsel)--raises concerns over "politicization" of the intelligence apparatus.

6. Budget and Fiscal Responsibilities

The Director's responsibility for developing, coordinating and approving the intelligence budget should be commensurate with that contained in Presidential Directive/NSC-17 and as reflected in Executive Order 12036. The charter should specifically grant to the DNI full and exclusive authority for approval of the National Foreign Intelligence Program budget--which Title I does provide--and stipulate that the DNI should provide guidance for program and budget development to program managers and heads of component activities involved in the NFIP.

It is essential that the charter provide for, and that the Director be authorized to utilize, the CIA Contingency Reserve in order to meet unforeseen Agency expenses subject, of course, to congressional and Executive Branch guidelines. Subsection 425(c) provides for the "contingency reserve fund."

The unique mission and function of the Central Intelligence Agency necessarily means that the Agency will and must conduct certain activities which other agencies and departments would be prohibited from conducting. Those provisions in the charter legislation, particularly as regards Title IV, must be studied extremely carefully to ensure that the Agency retains the flexibility, under congressional oversight, to conduct these necessary unique activities.

The Director also must retain the authority to utilize "unvouchered funds" in the interest of national security. Subsection 122(b) provides this authority. Care must be taken, however, to ensure that the sensitive intelligence in this extremely important category of information is protected, particularly as regards external review. For example, the scope of the authority granted the Director to exempt certain activities or expenditures from GAO review (subsectioion 123(e)) should be more carefully addressed. As regards GAO generally, review of Agency and/or DNI activities should be limited to financial (as opposed to "program management") audit and review, and should be conducted only through the intelligence oversight committees. The Senate bill provides for program management audit and review, and it does not go far enough in requiring that all GAO audits be initiated and conducted through the oversight committees.

7. Special Activities and S nsitive Projects or Operations

The primary concerns in this matter should be to keep to an absolute minimum the proliferation of sensitive information, to avoid a cumbersome review and approval procedure, and to avoid ambiguous or arbitrary characterizations of activities or operations. Executive Order 12036 should be used as a guide in this regard. The

procedures in that Order are much less cumbersome than those in Title I, which also requires prior notification to the oversight committees (with a "48-hour after" exemption). These provisions in Title I are of concern also in that they require designation of categories of "sensitive intelligence collection projects" and approval/reporting procedures similar to those for special activities.

8. Restrictions and Limitations

Probably the most difficult substantive areas to address in the legislation are restrictions on intelligence activities, and the authorities to collect and utilize information on U.S. persons and to utilize U.S. persons for intelligence activities. Restrictions generally should track those in Executive Order 12036, and the charter language should avoid legislating ambiguous restrictions; subsection 135(a), for example, would prohibit the "violent overthrow" of "democratic" governments. Furthermore, care should be taken to ensure that all activities are conducted in accordance with U.S.--as opposed to foreign--laws; certain provisions in S. 2525 are not quite clear as to this important distinction. Restrictive provisions should not preclude appropriate

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Collection, use and dissemination of information on U.S. persons should be addressed as in Executive Order 12036. The charter should avoid imposition of rigid time limitations such as those now in Title II regarding collection of information on U.S. persons for certain purposes. Moreover, the Director and the Agency must be granted much clearer and broader authority than is provided in Titles I, II and IV for necessary security investigations of applicants and employees and their spouses, contractors and employees of contractors, and detailees or assignees.

There must be a more realistic and workable delineation of the role of the Attorney General and the Department of Justice in matters of collecting, utilizing, maintaining and disseminating information on U.S. persons and on foreign persons in the U.S. Title II now provides an unnecessarily pervasive role for the Attorney General in these activities.

9. Reporting to the Congress

The charter should, as S. 2525 essentially does, specify that the DNI shall be the primary adviser to the Congress (though, as noted above, not on a co-equal footing with the Executive), but should also specifically require that such information be provided under procedures which ensure protection of sources and methods.

The basic reporting responsibility should be as provided in Executive Order 12036. To the extent the charter includes additional requirements for reporting to the Congress on particular activities or categories of activities (e.g., use of the Director's termination authority or of the contingency fund), these should not be subject to precise time limitations nor should the Director have to report on a frequent basis. In short, the reporting requirements should not be so oppressive as to undermine the flexibility otherwise authorized.

10. Sources and Methods

The Administration's position on sources and methods legislation has yet to be resolved. At a minimum, however, the charter legislation should continue the sources and methods authority provided in existing law. Subsection 114(1) of Title I provides such authority, but contains caveats subjecting it to "provisions of this Act" and to "declassification" which appears to unduly limit the actual protection afforded this essential information. Although the bill does provide, in subsection 431(c), criminal penalties for the unauthorized disclosure of names of Agency employees under cover in certain instances, there is a conspicuous absence of provisions protecting other types of intelligence information from unauthorized disclosure.

11. Relationships with Foreign Government Services

The DNI should be granted the authority to establish policies regarding liaison arrangements, for implementing such arrangements and for coordinating these relationships between foreign services and entities of the Community. It is not appropriate, as required by subsection 114(j), that this authority must be carried out "in consultation with the Secretary of State."

Subsection 114(j) also provides, in paragraph (3), that the DNI must advise the oversight committees in advance of any proposed agreement between any entity of the Community and a foreign service. Other sections, such as 137(b) regarding reporting on activities undertaken by foreign persons or services, relate also to this issue. Specifically identifying the highly sensitive issue of liaison relationships in the charter would seriously impair, and in certain instances nullify, the Government's ability to deal with and benefit from such arrangements. Moreover, addressing this issue in the legislation could lead to political problems for certain foreign services in their countries, which would have a direct negative impact on such services' ability to maintain relationships with us.