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DDA 78-1231/1

23 March 1978

MEMORANDUM FOR: Legislative Counsel

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ATTENTION : [redacted]
Assistant Legislative Counsel

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FROM : [redacted]
Assistant for Information, DDA

SUBJECT : Intelligence Charter Legislation - Title I

REFERENCE : Multiple addressee memorandum from [redacted] Jr., dtd 17 March 1978, Subject: S. 2525 - Proposed Intelligence Charter Legislation - Title I Issues Paper (OLC 78-0399/33)

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1. We have reviewed the issues paper forwarded as an attachment to reference and find that we are in general agreement with the positions taken. We do have a few comments, some on sections of Title I which have not been covered in the issues paper and a few on items already discussed in the OLC analysis.

2. In Section 104(12) (p. 12), the term "department or agency" is defined to include any "wholly owned corporation" of the U.S. Government. We question whether this definition may be perceived to be in conflict with the definition of the term "proprietary" which appears in Title IV, Section 403(b) (p. 179). It may be that our purposes are best served by having proprietary corporations covered by the Title I definition but there may be times when such inclusion would be inappropriate. We defer to OGC on the question.

3. We understand that the definition of "intelligence method" in Section 104(17) (p. 14) is to be modified so as to cover "intelligence activities" including "special activities." Is it possible that we also need to expand this definition to include those unique support activities upon which CIA relies to carry out its foreign intelligence mission?

4. In Section 104(24)(C) (p. 18) reference is made to the "consolidated cryptologic program." Although not an uncommon term in budgetary and senior management circles, the so-called "CCP" is not widely known to the rank and file of CIA. Perhaps it should be defined.

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5. In Section 104(30) (p. 20) we support the addition of a reference to "foreign power or organization" to the paragraph on U.S. media organizations. We wondered, however, if we should take this a step further and refer as well to "control or direction by private citizens of a foreign country." This same comment applies to Section 104(31)(D) (p. 21)

6. Section 113(e) (p. 25) requires that the Director and Deputy Director be compensated from "funds appropriated to the Office of the Director" while Section 113(f) authorizes a commissioned officer serving as Director or Deputy Director to receive the difference between his regular military compensation and compensation due him as Director or Deputy Director. Is the difference payable to come from Office of the DNI funds?

7. Section 113(h) (p. 26) line 25, refers to compensation at "rates provided by subsection (e)," but subsection (e) contains no rates.

8. In Section 114(m)&(n) (p. 32), as in Section 421(j) in Title IV (p. 191), the terms "separate" and "terminate" are used. We commented on the confusion that could arise from the use of these two terms in paragraph 20 of our memorandum of 11 March covering Title IV.

9. Section 114(o) (p. 33) provides for reemployment of terminated employees. To repeat a point previously made, an employee terminated for security reasons should not be reemployed in a position which involves access to classified intelligence information. We should not give the Chairman of the Civil Service Commission authority to effectively negate a decision by the DNI to deny an individual access to information about intelligence sources and methods. (The same point applies to Section 421(j)(4) (p. 192) of Title IV.)

10. In Section 116(a) (p. 35) provision should be made for compensating Assistant Directors of national intelligence who may be commissioned officers for differences between the military and Agency entitlements.

11. In Section 121(a) (p. 38), OLC proposes the addition of a new subparagraph (5) on reprogramming. We concur in the subparagraph with one exception; we believe that the Director's reporting responsibility should be more limited, not covering "all" reprogramming. A dollar threshold should be established so as to obviate a need for reporting minor reprogramming involving only a few thousands of dollars. (See OLC Issue No. 38.)

12. On Section 122(a) (p. 40), we would like to emphasize, as we did in speaking about Section 425(a) on page 196 of Title IV, that it is cost effective to conduct CIA activities under a single annual

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appropriation. We realize that the authorizing language in Section 122(a) will not preclude a single-year appropriation.

13. In Section 122(b) (p. 40) the DNI's certification authority is not limited to any particular appropriation, leading to the possible interpretation that his certification authority extends to funds appropriated to any entity of the intelligence community. Is this the intent?

14. In Section 135(a)(8) (p. 62) the term "human rights" appears. In your Issue No. 70, you assert that "there is no commonly utilized or acceptable concept of what are 'human rights.'" We suggest that given the administration's heavy emphasis on this subject in its public pronouncements on foreign policy, it might be preferable to drop this item from our statement of issues or, at most, to limit ourselves to a request for a definition of the term.

15. Section 151(e)(1) (p. 78) calls for a quarterly report to the Oversight Board by the Inspector General and General Counsel of each entity of the intelligence community. Elsewhere in the issues paper, efforts have been made to limit reporting to semi-annual or annual reports or to reports rendered "in a timely manner." We suggest that semi-annual reports to the Oversight Board would be sufficient.

16. Section 152(c) (p. 88), in its last sentence, requires the maintenance of an index of the record of legal authorities and published regulations and instructions in the Office of the Federal Register. This would appear to be a pro forma requirement which would serve little purpose. Such an index would have to be classified (this is reflected in the provision for Director-approved security standards for storage) and would probably, therefore, only be available to the oversight committees and the Oversight Board. These organizations, when in need of such information, would turn not to the Office of the Federal Register but to CIA and the other entities of the intelligence community. The maintenance of such an index would be both burdensome and useless. This position is at odds with the one proposed in paragraph 27 of your "Technical Suggestions" for Title I.

17. Section 152(d) (p. 88) should be recast to incorporate the language which appears in the Federal Records Act, specifically Title 44 U.S.C. 3101, where Federal agencies are required to make and preserve records containing "adequate and proper documentation." The following language is recommended:

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(d) The Director shall make and preserve records containing adequate and proper documentation regarding the national intelligence activities of the United States consistent with guidelines established by the Administrator of General Services; and the head of each entity of the intelligence community shall make and preserve records containing adequate and proper documentation, consistent with GSA guidelines, regarding the intelligence activities of such entity.

18. Section 152(f) (p. 89) would have every entity of the intelligence community provide the oversight committees with "all rules, regulations, procedures, and directives issued to implement the provisions of this Act." The flood of paper which would be generated by this requirement boggles the mind. Clearly, every regulation and directive issued by this agency would qualify under the phrasing of Section 152(f). We strongly recommend that this requirement be deleted from the charter legislation. Similarly, we would propose the deletion of the requirement that every waiver of an Agency regulation or directive be reported. Such a requirement could burden the committees with a great deal of unnecessary detail.

19. The rest of the comments made in the Title I issues paper have our concurrence. Both that paper and the one on Title II were very well done, by the way, and those who participated in their preparation should be congratulated for the excellence of their staff work on these complex issues.

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OLC 78-0399/33

17 March 1978

MEMORANDUM FOR: Deputy Director for Administration
Deputy Director for Operations
Deputy Director for Science and Technology
Director, National Foreign Assessment Center
General Counsel
Comptroller
Inspector General

STAT FROM: [ ]
Assistant Legislative Counsel

SUBJECT: S. 2525 - Proposed Intelligence Charter Legislation
Title I Issues Paper

REFERENCE: NFAC-729-78, 23 February 1978, from AD/M-NFAC,
Subject: Intelligence Charter Legislation

REFERENCE

1. Attached are three papers identifying issues and positions thereon for Title I of the intelligence charter legislation: (a) the first, most important and longest paper identifies all the significant issues in Title I; (b) the second paper contains less significant issues, many of which are technical and non-substantive matters; and (c) the final, one-page paper lists a few general issues pertaining to the entire bill which came to mind in the context of reviewing Title I.

2. In compiling this material, we have endeavored to identify all significant issues in Title I taking into account our own careful review of the bill and material received already from your components. In addition, where appropriate, we have included explanatory remarks and specific amendatory language. In this way, even though it has taken a good deal of time to prepare the material, it is hoped that your coordination responsibility can be satisfied more efficiently. In reviewing this material, therefore, please comment only as to significant issues that in your opinion should be but are not included or on those issues with which you have a serious disagreement.

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3. Admiral Turner has directed that Agency comments on the legislation be submitted to the D/DCI/RM no later than 28 March 1978. We are compiling a coordinated Title IV paper based on comments received already from your components. In addition, you have been provided an issues paper on Title II. In addition to this Title I material, there are a relatively small number of issues in Titles V (FBI) and VI (NSA), on which you will be receiving short papers on Monday, 20 March. It is therefore necessary that you provide your coordination, as indicated above, on this Title I material no later than COB Thursday, 23 March 1978. Thank you.

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S. 2525 - TITLE I ISSUES

PURPOSES

1. §103(4)--The "Purposes" section should deal separately with responsibility to provide intelligence to Executive and Legislative Branches.

2. §103(4)--The qualitative phrases "accurate, relevant and timely" should be deleted.

DEFINITIONS

3. §104(1)--The term "Acting Attorney General" should be included in definition of "Attorney General" (consistent with definition in §311).

4. §104(3)--The prefix "tele-" should be deleted from "telecommunications" so as to bring audio countermeasures within the definition.

5. §104(5)--The definition of "counterintelligence" should not be limited to "foreign government" but should include "foreign persons, organizations and powers."

6. §104(9)--The definition of "cover" should be amended to include "any other person associated with the" CIA.

7. §104(10)--The last word of the definition of "departmental intelligence" should be "value" not "purpose," in order to guard against the possibility of departments deciding intelligence is not "national" merely because there is no "policy making purpose."

8. A definition for "employee" should be added between §104(12) and (13) (pick up definition from 5 U.S.C. 5921(3)).

9. §104(16)--It is recommended that subparagraphs (G) [Federal Bureau of Investigation], (I) [Treasury], (J) [Drug Enforcement Agency] and (K) [Department of Energy] be taken and combined in one subparagraph and made subject "to the extent determined by the President, as may be engaged in intelligence activities," as done in (M), to avoid problems of delineating what components are "intelligence" and which are not (i.e., to avoid bringing an entire service, such as the Secret Service or DEA, into the IC).

10. §104(17)--The definition of "intelligence method" is inadequate; the definition should include "any means by which foreign intelligence, counter-intelligence or counterterrorism intelligence is collected, retained, processed, analyzed or disseminated, whether by human, technological or other means"; the "vulnerability" or "likelihood of compromise" are not appropriate or workable criteria for defining or delimiting a "method."

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11. §104(18)--The term "intelligence-related activity" must be addressed either by definition [here] or in substantive provisions elsewhere in the Act so as to ensure that the Director has the authority to review such activities (this is the important issue); it would seem clearer to spell it out in the definitions section.

12. §104(19)--The term "intelligence source" is inadequately defined; the true sense of the term is that it "means any person, organization, document, or technical or other means which provides foreign intelligence, counterintelligence or counterterrorism intelligence"; pegging the definition to concepts such as "vulnerability" or "likelihood of compromise" are not appropriate or workable criteria for delimiting a "source."

13. §104(22)--The qualifier "primarily" should be deleted from the definition of "national intelligence" so as to avoid insofar as possible disputes concerning the "primary" or multiple purpose for which the intelligence is produced.

14. §104(30)--The definition of "United States media organization" is too broad. What is the scope of "public dissemination"? Is the phrase "any organization producing and distributing films or ... tapes" intended to cover just news media, or all film or tape companies? The latter interpretation would be unacceptable.

--The appropriate limitation should be that a "United States media organization" should not include an organization "controlled or directed by a foreign power or organization" rather than "a government of a foreign country" as the definition now reads.

15. §104(31)--There are serious problems with the definition of the term "United States Person":

--re "permanent resident aliens," the definition should be couched in terms of a presumption that such alien is not a U.S. person if the alien is residing outside the U.S., until information is obtained which establishes that the alien has resided outside the U.S. continuously for less than one year or until information is obtained which indicates an intent on the part of such alien to return to the U.S. as a permanent resident alien;

--re "unincorporated association," the definition should exclude associations not directed or controlled by a foreign power or organization (i.e., insert "and which is not directed or controlled by a foreign power or organization" between "residence" and "except"; and

--re "corporation," the limitation should be to a corporation "not controlled or directed by a foreign power or organization" vice "a government of a foreign country" as presently worded.

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GENERAL AUTHORITIES

16. §111(a)--It is recommended that the term "national intelligence activities" be changed to "intelligence activities" and end the relevant provision at that point. The present wording authorizes only national intelligence activities; "intelligence activity" includes "foreign intelligence activities," which the entities of the IC must be authorized to conduct.

17. §111(b)--The same change as recommended for §111(a), supra, (i.e., read "... intelligence activities."), should be made here so as to avoid unnecessarily delimiting authority to conduct foreign intelligence; this change assumes the definition of IC is changed as recommended in item 9, supra.

DESIGNATION OF "NATIONAL" ACTIVITIES

18. §112--This section should be amended so as to clarify the relationship between the "Intelligence Community" as defined in §104(16) and the "National Intelligence Budget" as defined in §104(24). One method woud be to add a new paragraph (G) to §104(24) to the effect that the "national intelligence budget" will also include those programs picked up in paragraph 104(16)(M); §112 then should be rewritten to include only a requirement that the determinations in §104(16)(M) and §104(24)(G) would be made annually based on recommendations by the DNI.

DNI AND DEPUTY DNI

19. §113(a)--This subsection establishes the "Office of the Director of National Intelligence" (O/DNI); the relationship of this new Office to the CIA, or indeed, to the Executive Office of the President, needs to be clarified. It should be specified that the O/DNI is an "independent establishment" (i.e., clearly separate from the CIA). Also, it should be specified that the O/DNI shall assist the Director in carrying out the Director's functions under this Act.

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20. §113(a)--The following should be added at the end of this subsection: "and shall perform such tasks as the Director may from time to time assign or delegate." This clarifies the Director's authority to delegate his duties. (This comment depends in part on the disposition of the recommended changes to §117, infra.)

21. §113(a)--It should be specified that the Deputy Director, like the Director, is in the Office of the Director; add the following to the second sentence of this subsection after the parentheses: "in the Office of the Director."

DUTIES AND AUTHORITIES OF THE DNI

22. §114(b)--It is recommended that the following responsibility of the DNI be added to paragraph (3): "[and] shall coordinate counter-terrorism activities conducted by entities of the Intelligence Community with other departments and agencies."

23. §114(d)--The Director's responsibility to head the CIA should be stated in clearer terms, i.e., "the Director shall head the" CIA instead of "shall act as the Director" of the CIA. Moreover, this responsibility should be made subject to the provisions of §412(a) in addition to §117 (as provided now in the language of §114(d)). (See separate comments on §§117 and 421, infra.) Further, the words "within the Office of the Director" should be inserted following "of such staff" to clarify the location of these persons. Finally, a comma should be inserted after the word "Agency" in order to make clear that the §117 [and §412(a) limitation applies only to heading the CIA.

24. §114(j)--It is not appropriate that the Director's responsibilities to coordinate liaison relationships and to report liaison agreements (if so required), as specified in paragraphs (2) and (3), be subject to "consultation with the Secretary of State" as provided in §114(j). The maximum extent to which the authority the Secretary of State should extend would be as to consulting on the formulation of policies (paragraph (1)).

25. §114(j)(3)--The very fact of mentioning in the statute that liaison relationships--particularly proposed relationships--be reported to the Congress will have a serious negative impact on the willingness and ability of foreign services to enter into relationships with the U.S. Government. Paragraph (3) should be deleted; the general congressional reporting requirement, in §152(a), should be kept in mind. The maximum extent to which reporting on liaison agreements should extend should be to those intelligence agreements that might fall within the purview of the Case Act (1 U.S.C. 112b); such a provision should specify that the reporting will be in lieu of reporting to other committees of Congress under the Case Act.

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26. §114(l)--The phrase ", subject to the provisions of this Act," should be deleted. Inclusion of this phrase is confusing in that it impliedly limits the Director's present sources and methods authority (which is not subject to any statutory caveats), and arguably weakens that authority in terms of any reporting under this Act, particularly vis-a-vis the Congress and even possibly as to other agencies and departments.

27. §114(l)--Take the last sentence of this subsection and make a new subsection which would read: "With due regard to the Director's responsibility to protect intelligence sources and methods, the Director shall take such steps as are necessary, consistent with applicable laws and executive orders, to ensure proper classification and declassification of intelligence information and material." This change makes clear that the extent of the Director's responsibilities to protect sources and methods and to ensure appropriate classification and declassification are compatible. Under the language proposed here, for example, unclassified information would be protected if the information would disclose a source or a method.

28. §114( )--A new subsection should be added here, similar to that in §421(g) protecting the names, organization, etc., of the CIA from disclosure, but applicable to the Office of the DNI.

29. §114(m)--The Director's authority to appoint, promote and separate personnel, for purposes of Title I, should run only to the Office of the DNI; this subsection should be amended to reflect this limitation. Insofar as the Director may head the CIA, or carry out any functions pertaining to the CIA, the Director will pick up corresponding authority for CIA personnel in Title IV (§421(j)(1)).

30. §114(m)--The following language should be inserted in this subsection after "United States Code,": "including, but not limited to provisions..." This additional language makes clear that the Office of the Director is neither subject to provisions of the competitive service nor to provisions elsewhere in Title V relating to other categories of persons. It might also be adviseable to add language making explicit that employees are in the excepted service.

31. §114(n): "Employees of contractors" should be specifically included in this subsection, relating to the Director's authority to terminate employment or security clearances.

32. §114(m) and (n): The separation/termination authorities contained in these two subsections appears to be sufficient--terminations for reasons of "national security" is absolute according to subsection (n); the separation authority for other purposes is exerciseable without regard to any provisions of Title 5, United States Code, according to subsection (n). Separation pursuant to subsection (n) arguably would be subject only to such due process as provided by law or regulation; essentially, DNI regulations providing for non-national security terminations.

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33. §114(o)--The second sentence of this subsection allows employees in the Office of the DNI to be placed in the competitive service if they are terminated, but only if they have served in the Office for one year. Since this provision grants a benefit to employees who are not in the competitive service, it should not be addressed to all those serving in the Office of the Director, but rather to all those in the excepted service who were employed in the Office of the DNI; this amendment would, for example, include employees of the CIA terminated after serving less than one year in the Office of the DNI.

ASSISTANT DIRECTORS

34. §116(a)--It is not clear that the Assistant Directors, like the Director and the Deputy (as suggested, supra) are in the Office of the DNI. The following phrase should be inserted in the first sentence of this subsection after "Intelligence": "in the Office of the Director."

35. §116(a)--Here, as in §113(a), there should be an explicit statement--to be added at the end of the first sentence of this subsection--that the Assistant Directors "[and] shall perform such functions as the Director may from time to time assign or delegate." This strengthens recognition of the Director's power to assign or delegate his functions.

ADVISORY COMMITTEES

36. §116(c)--This subsection, in conjunction with §703, revokes the Agency's exemption from provisions of the Federal Advisory Committee Act and would make exemptions contingent on a specific waiver which in turn must be reported to the oversight committees. The reasons behind the present statutory exemption from the Advisory Committee Act, based on the need for secrecy and incompatibility with public participation, have not changed since enactment of that Act, and there should continue to be an exemption from the Act for the CIA [and the Office of the Director]. Therefore, this subsection and §703 should be amended to reflect that the Agency's exemption from the Advisory Committee Act remains, and that the Office of the Director also is exempted. The amendment would necessitate also that provision be included for compensation for members of any advisory committees, since such authority is contained in the Advisory Committee Act htself and an exempted agency must therefore have independent authority to compensate.

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SPLITTING DNI FROM HEAD OF AGENCY

37. §117--This section relates to "transfer" of the Director's Agency responsibilities by the President to the Deputy or an Assistant Director. Since the President already has authority to transfer responsibilities under the Reorganization Act, and since an agency head--here the head of the CIA--has implicit or explicit (as recommended be clarified, supra) authority to delegate functions (as opposed to severing one's self completely from the responsibility for such functions), this section is confusing and unnecessary. Its inclusion raises questions as to the extent of the Director's power to delegate authority to manage the CIA.

If the provision is included, then its application as discussed in the preceding paragraph should be clarified. The section should be amended to read as follows (in order to clarify that the authority goes only to a complete severing of the roles of DNI and head of the CIA, as opposed to delegation by the DNI to a subordinate of such functions):

"Sec. 117. (a) The President is authorized to transfer responsibility of the Director to act as head of the Central Intelligence Agency to any person serving as the Deputy Director or as an Assistant Director of National Intelligence if--

(1) such person is not a commissioned officer of the Armed Forces whether in active or retired status;

(2) the President notifies the Congress in writing of the proposed transfer and specifically identifies the officer or employee to whom such responsibility is to be transferred; . . . " [continue as in S. 2525].

BUDGET AND APPROPRIATIONS

38. §121(a)--This subsection does not contain authority for the Director to review and approve the reprogramming of intelligence funds. Rather than leave this as an issue to be considered--and possibly rejected--in the context of each authorization, the authority as contained in section 1-602(f) of E.O. 12036, modified to reflect the budget terminology in S. 2525, should be added as a new paragraph (5) to this subsection as follows: OK

"(5) The Director shall have full and exclusive authority to review and approve reprogramming of national intelligence budget funds within entities of the intelligence community, in accordance with guidelines established by the Office of Management and Budget, and the head of such entity of the intelligence community shall consult with the Director before any proposed reprogramming. The Director shall inform the [oversight and appropriations] committees of all such reprogramming on a timely basis."

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This matter might also be addressed by strengthening subsection 121(c) so as to provide the Director authority to ensure that budget decisions by entities of the Intelligence Community not adversely affect the approved intelligence budget.

39. §122(a)--The requirement in this subsection that intelligence activities cannot be carried out unless funds for such activities have been authorized by the Congress allows for the possibility of multi-year authorizations up to three years. The question has been raised whether this flexibility is desirable in budgetary procedures.

41. §122(a)--This subsection reads that no funds may be appropriated to carry out any intelligence activity by any entity of the Community unless funds "for such activity" have been previously authorized. It is more appropriate, and more in keeping with the confidential nature of intelligence funds, to have the authorization relate to "such entity of the intelligence community" rather than to "such activity" (i.e., the authorization runs to the "entity" rather than the "activity").

41. §122(b)--This section contains the Director's unvouchered funds authority. Use of this authority is made contingent on three factors: (1) a determination by the Director that such action is necessary in the interest of the national security; (2) funds may be so expended only for activities authorized by law [this should be clarified to read "lawful activities" to remove any confusion that activities must be "authorized" by "law"); and (3) reporting on a quarterly basis to the oversight committees. Title IV (§425(b)) provides similar authority for the Director of the Agency. Title IV in addition provides that funds made available to the Agency may be expended "notwithstanding the provisions of any other law," and provides for a Contingency Reserve. The question for purposes of Title I is whether the Director _as_ DNI needs any additional expenditure authority?

The basic question, perhaps, is whether the Director _as_ DNI (as opposed to the situation in which the DNI may continue as _head_ of the Agency) needs such unvouchered funds authority in the first instance. In other words, is it necessary that any entity other than the CI@ be empowered to expend funds in such a manner?

Finally, if this authority remains, reporting to the Congress on this specific issue should be on an annual rather than a quarterly basis.

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AUDITS AND REVIEWS

42. §123(a)--It is inappropriate to authorize the Comptroller General of the U.S. to conduct, in addition to "financial" audits and review, "program management audits and reviews" as provided in this subsection. For reasons of security, and since there now exists a thorough congressional oversight procedure to review intelligence programs, this authority for the Comptroller General should be deleted from §123(a).

43. §123(a)--Requests for audits of intelligence funds should be only upon the request of the oversight committees. This would ensure appropriate security and would establish more clearly the proper oversight role of these committees. Therefore, the word "only" should be inserted in the last sentence of this subparagraph before ", upon."

44. §123(d)--Based on the amendment suggested in the preceding paragraph that would require all audit requests to come through the oversight committees, this subsection should be deleted. Such amendment also would make clear that the Comptroller General does not have power to audit intelligence activities independent of the congressional oversight committees.

45. §123(e)--The criteria for invoking the Director's authority to exempt certain activities from audit should be more specifically focused than this subsection presently provides. The standard should relate to protecting intelligence sources and methods. The first sentence of this subsection should be amended to read: "... (1) determines such exemption to be necessary to protect intelligence sources and methods, ..."

46. §123(e)--Reporting to the Congress of the Director's exercise of his audit exemption authority should be only, and specifically, to the two intelligence oversight committees, rather than to "appropriate committees" as this subsection provides; it should be amended accordingly. Also on the matter of reporting, the "reasons for granting it" [the exemption] should not be required to be reported; this language should be deleted from clause "(2)" in this subsection. Reporting to the Congress on "reasons" for the exercise of a specified authority would cause problems as to the degree of detail that would have to be reported.

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PROCEDURES RELATING TO SPECIAL ACTIVITIES AND CERTAIN COLLECTION OPERATIONS

47. §131--This section prescribes procedures and requirements applicable to reviewing, approving and reporting on special activities in support of national foreign policy objectives and the following two categories of clandestine collection activities: (a) clandestine collection activities of exceptional importance or sensitivity that require review by the National Security Council prior to initiation, and (b) those collection activities which, because of their extreme importance or sensitivity, require not only review by the National Security Council but the personal approval of the President prior to initiation. The President is charged with establishing standards and procedures to provide the criteria by which clandestine collection activities shall be placed in either of the two categories. Subsection 131(c) lists five criteria or considerations that the National Security Council must "carefully and systematically" consider in reviewing any special activities or clandestine collection activity. These factors include, among others, the justification for the proposed activity, the likelihood that the objective of such activity would be achieved by other means, and the legal implications of the proposed activity. The President in turn would be required to make a written finding addressing four elements prior to the initiation of any special activity or any clandestine collection activity which, according to the criteria established by the President, requires personal approval. Furthermore, the National Security Council must review annually each and every on-going special activity and each and every on-going clandestine collection activity which requires either NSC review or Presidential approval prior to initiation; no such activity could be continued after such annual review unless reapproved acccording to the same criteria applicable to the initial activity. The Director of National Intelligence would be required to report the facts and circumstances of each activity subject to the requirements of this section to the two intelligence oversight committees of the Congress prior to initiation of the activity, except that in extraordinary circumstances and upon a specific finding by the President, the reporting may be 48 hours after the initiation of the activity, but only if the President certifies that prior notification would have been harmful to the United States. The intelligence oversight committees, moreover, would be informed of any "significant change" in any activity subject to the requirements of this section and of any "significant change in the factors" that would be taken into account in deciding on and approving any such activity. The Director would also be required to submit a written semi-annual report to intelligence oversight committees on all activities subject to the requirements of this section. Section 131 also specifies that only the CIA or the armed forces of the United States during any period of war may conduct special activities; provision is made, however, for other departments and agencies to support the CIA in conducting approved special activities if the President makes a finding that such support is necessary.

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The detailed description of the provisions in section 131 is included here to suggest the problems with legislating precise and detailed requirements regarding sensitive intelligence activities. Overall, the procedures and requirements in section 131 are unacceptable because they overstep the appropriate bounds of congressional oversight of activities, carried out under the authority of the President, which are extremely sensitive in nature. Moreover, the detailed procedures would tend to be, if not completely unworkable in practice, extremely time consuming and difficult to implement. Specific recommendations are included below.

48. §131--The scope of this section should be limited to special activities in support of national foreign policy objectives. A statute that would require, as the section presently does, that the Executive in effect define or categorize clandestine collection activities in terms of degrees of sensitivity or importance would simply be unrealistic and entirely arbitrary. In effect, by their very nature all clandestine collection activities are important and are sensitive to one degree or another. It would be artificial to require that--according to a specific listing of factors--certain activities which are deemed more sensitive or very much more sensitive than others be subject to different review, approval and reporting requirements. If the intent of the legislation is to guard against characterizing activities as other than "special activities" in order to avoid the special finding and reporting requirements, when in fact such an activity might be a special activity, then the legislation presupposes an inappropriate characterization of the Executive Branch. "Special activity" is a defined term and the legislation certainly will contain provisions regarding findings for special activities and for reporting such activities to the oversight committees; it is impossible to define in a public document such as a statute, other than by euphemism, what "special activities" really are. It would not seem inappropriate to require in this section that the President establish procedures and requirements for determining what foreign intelligence activities constitute "special activities" and for providing these to the intelligence oversight committees. A procedure that would require (1) establishing criteria, (2) making the criteria available to the oversight committees, (3) requiring that the National Security Council and the President review and approve each special activity, and (4) reporting such activities to the oversight committees, would afford clearly adequate oversight of special activities and safeguards against possible abuse. Establishing additional specific and clearly defined subcategories, as it were, of other clandestine activities would seem merely to confuse an area that in the first place does not lend itself to precise definition.

49. §131(b)(2)--The requirement in this paragraph that standards or procedures (and changes thereto) established to implement the requirements of this section, be submitted to the oversight committees before their effective date, is a procedure in the nature of prior approval of Executive Branch requirements and procedures, and therefore oversteps the bounds

of acceptable congressional oversight. This paragraph should require that the standards or procedures established by the Executive to implement the requirements of this section shall be submitted to the two intelligence oversight committees either in a timely manner after their promulgation or after a particular number of days after they have become effective (e.g. 60 days). This procedure is in accord with the appropriate oversight function of congressional committees, in that it requires the Executive to provide the Congress with the standards and procedures that implement a congressional mandate, and affords the oversight committees full opportunity to object and, through the normal process of Executive-Legislative give and take, full opportunity to seek changes.

50. §131(c)--This subsection requires that the National Security Council or the President, in reviewing any activity subject to the requirements of this section, shall consider in a "careful and systematic" manner five specific factors. Mandating by legislation the manner in which certain functions are to be performed--e.g., carefully and systematically--is simply inappropriate and, in point of fact, questions as to whether or not such a charge has been met would be unverifiable. If it is necessary that such factors as those enumerated in this subsection be included in the legislation, then at a minimum consideration by the National Security Council or the President should be predicated upon a submission by the Director of National Intelligence (or the Director of the Central Intelligence Agency if different from the DNI), since the CIA is the only Federal department or agency that in peace time can conduct special activities. (Special provision could be made for a submission from the Secretary of Defense if a special activity is to be conducted during time of war by the armed forces.)

51. §131(d)--This subsection requires a written Presidential finding before any special activity may be initiated and specifies four tests which, in the opinion of the President, must be satisfied before the special activity may be approved. In the first place, requiring a written record, particularly one containing detailed information concerning the special activity, in a Presidential document, would give rise to risks that are incompatible with the very nature of special activities. Special activities, by their very definition, are sensitive U.S. Government activities conducted so as to avoid identification with the Government. Written findings detailing the President's decision-making process as to each special activity necessarily means that there will be documentary evidence--evidence therefore susceptible to disclosure--directly establishing that the activity was approved and sanctioned by the highest levels of the U.S. Government. If the Congress insists on requiring a written finding, then the degree of detailed information that must be included in that written finding should not be legislated; it would be acceptable, also, though not desirable, that the President take into account certain enumerated factors in making his finding (the Hughes-Ryan Amendment does this). As to the four specified considerations listed in this subsection,

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the first, that the activity be "essential to the national defense or ... foreign policy" is unnecessarily restrictive.. This consideration should require that the activity is "necessary to the national security of the United States." Also, the fourth consideration, that "the circumstances require the use of extraordinary means," is simply redundant and therefore unnecessary.

52. §131(e)--Consistent with the discussion regarding section 131 generally, supra, this subsection regarding findings and approval of sensitive clandestine collection activities should be deleted.

53. §131(f)--Again, consistent with the recommendations regarding §131 generally, supra, this subsection regarding annual review of activities subject to the requirements of this section by the National Security Council, should be limited to special activities.

54. §131(g)--Rather than prior notification to the oversight committees by the Director regarding special activities, as provided in this subsection, such notification should be made "in a timely manner." Requiring by statute prior notification to the Congress of activities conducted pursuant to valid Presidential authority, even though provision is made for subsequent notification in extraordinary circumstances, goes well beyond existing statutory provisions regarding such notification and infringes on the prerogatives of the Executive. Despite the fact that this subsection does contain words to the effect that it does not constitute any requirement for the prior approval of the Congress, the subsection is in the nature of a procedure that anticipates prior congressional approval. This subsection, like those immediately preceding, should be amended so as to include within its purview only special activities and not clandestine collection activities, to be consistent with the recommendations noted in the comments on section 131 generally, supra.

55. §131(h)--This subsection would require notification to the Congress in the same manner as required for the initiation of any activity subject to the requirements of this section in any case in which there is a "significant change" in the activity. Without further specification, a determination as to whether there has been a "significant" change in an activity, is elusive and ambiguous. It would perhaps be more appropriate to require that the two oversight committees be notified in any case in which there is a significant change in a special activity which, at the determination of the President, changes the nature of the special activity. This subsection should also be amended so as to include only special activities and not clandestine collection activities, consistent with the recommendations concerning the scope of this section generally, as discussed supra.

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56. §131(i)--This subsection would require reporting to the Congress in any case in which there was "significant change" in the factors that would have to be considered in making the initial determination regarding an activity subject to National Security Council and Presidential review and approval as specified in subsection 131(c). As noted in the comments to that section, supra, it would be difficult enough to determine the manner in which the listed considerations would be taken into account in making an initial determination; to require further that the activity be monitored to determine when a "significant change" in any one of the factors has occurred, is completely unrealistic. In the first place the enumerated considerations themselves are amorphous and in large part subjective determinations to begin with; evaluating the degree of change in any one of the factors and requiring constant monitoring of the factors would not only be unnecessarily burdensome but unworkable. This subsection should be deleted.

57. §131(j)--Overall, this subsection, which limits authority to conduct special activities to the CIA or to the armed forces in time of war, is acceptable. The further provision that other agencies and departments may support the conduct of a special activity, however, is made contingent on a determination by the President that such support is necessary. Support for special activities generally are in the nature of working-level considerations, and simply do not rise to the level of activities necessitating Presidential review. The determination as to whether support by other agencies and departments is necessary to the conduct of a special activity should be made by the Director of National Intelligence or by the Director of the Central Intelligence Agency if different from DNI; the subsection should be so amended. This subsection further requires "prompt" notification to the oversight committees of any such finding. Again, there seems to be no good reason why such a finding is so important that the notification to the oversight committees ought to be other than "in a timely manner," and the subsection should be so amended.

58. §131(k)--This subsection, which requires the National Security Council to maintain records of all written Presidential findings under this subsection, necessarily presupposes that there shall be written Presidential findings. As recommended in the comments to subsection 131(d), supra, there is serious question as to whether it would be appropriate to require written findings in the case of special activites. It would seem more appropriate, therefore, to amend the subsection to require that the National Security Council maintain records of NSC and Presidential determinations regarding all activities considered subject to the requirements of this section.

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59. §131(l)--This subsection, requiring the Director of National Intelligence to report semi-annually to the oversight committees on all activities subject to the requirements of this section, is completely unnecessary. Even if all the recommendations concerning other subsections of section 131, as detailed supra, were adopted, the oversight committees still would be notified in a timely manner of all activities and of all changes in any special activity which in effect changed the nature of that activity, and of any determination by the Director as to support by other departments and agencies for any special activity. Furthermore, the National Security Council would be required to review annually all ongoing special activities. The only apparent additional reporting requirement that would appear necessary or reasonable would be that the Director should report annually--as opposed to a written semi-annual report--to the oversight committees regarding the annual National Security Council review of all ongoing special activities and on those specifically approved for continuation. This subsection should be amended to reflect this consideration.

RESTRICTIONS ON USE OF CERTAIN INDIVIDUALS

60. §132(a)--Paragraph (2) should be modified so as to make clear that only programs funded by the Government which are designed to promote educational or cultural affairs "through international exchanges" are included within the scope of programs, the participation in which would preclude the paid use for intelligence purposes of an individual. Furthemore, subparagraph (2)(B), which would prohibit payment to individuals subject to this subsection for intelligence information acquired while the individual was participating in the specified program and while the individual was traveling or temporarily residing abroad, should be deleted. There appears to be no valid reason why the Government should not be able to obtain intelligence information acquired by individuals participating in certain programs, so long as any payment is made or other valuable consideration given to the individual after he or she is no longer participating in the program and traveling or temporarily residing abroad. Any restriction on use of U.S. persons participating in these programs should be limited to that period of time during which they are actually participating in the program and while they are abroad.

61. §132(a)--Subparagraph (3)(B) prohibits the paid use of any individual other than an openly acknowledged officer, employee or contractor of an entity of the Intelligence Community, who "regularly contributes" material to "United States media organizations." Even though this paragraph was changed to reflect the fact that certain employees of the Intelligence Community may themselves contribute to "United States media organizations," the paragraph still extends too broadly and could be construed to prohibit the Government from paying, for intelligence purposes, employees, officers, contractors, or employees of contractors if they are not "openly acknowledged" (i.e., if they are under cover). This subparagraph should be deleted; subparagraphs (A), (C) and (D) already include all individuals who

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would have any substantial relationship with United States media organizations. There seems to be no valid reason for including within this class of individuals--who, after all, would not be available for paid intelligence use--persons who do nothing more than contribute to periodicals or other media.

62. §132(a)(4)--Regarding the prohibition in this paragraph on distribution within the United States of media material, the term "support" should be changed to "authorize," since the former term could be construed so broadly, for example, that merely bringing a copy of a magazine into the United States without publicly acknowledging U.S. Government support would be prohibited.

63. §132(a)(6)--This paragraph prohibits the use of any U.S. religious organization or any U.S. media organization for cover purposes or related activities. The basic issue raised is why the Government should be prohibited from using United States religious or media organizations merely for the purpose of establishing, furnishing or maintaining cover for its officers, employees or agents. Use of such organizations for cover purposes for U.S. Government intelligence employees or agents is not and should not be construed as "tainting" these organizations since the purpose is to provide cover for the Government rather than use of the organizations for intelligence purposes. It is recommended, therefore, that this paragraph be amended so as to prohibit use of U.S. religious organizations or media organizations for the purposes of establishing, furnishing or maintaining cover unless the consent of appropriate officials of those organizations is obtained.

64. §132(c)--This subsection requires that no United States person may provide operational assistance in the conduct of any clandestine intelligence activity unless such person is first informed of the nature of the assistance and of any reasonably anticipated risks. The subsection further requires that the person "voluntarily consent" to providing such assistance. Given the fact that this subsection applies to all elements of the Intelligence Community and concerns all United States persons not associated with the Intelligence Community, the restriction as to obtaining the voluntary consent of such person may be unduly restrictive. As written it raises questions concerning whether or not certain persons who agree to provide operational assistance on the basis of pressure or other form of restraint may be determined not to have provided such assistance in a purely voluntary manner. It is therefore recommended that this last requirement be deleted from this subsection.

65. §132(d)--This subsection should be amended to require, in lieu of providing the intelligence oversight committees with regulations to carry out the provisions of this section 60 days before taking effect, that the reporting be made either "in a timely manner" or within a certain number of days after such regulations or amendments become effective. Such amendment would avoid problems relating to inappropriate congressional involvement in the internal workings of the Executive Branch, as discussed supra.

66. §132(e)--The scope of this subsection allowing for voluntary contacts and voluntary exchanges of information between the Intelligence Community and persons referred to in subsection (a) is too narrow. As regards relationships between the Intelligence Community and other persons, the "authorization" should not be limited to the category of persons referred to in subsection (a) of this section; at a minimum it should extend to persons referred to in both subsections (a) and (b). Since the language of this subsection, however, states that "nothing" in the entire section shall be construed to prohibit voluntary contacts or exchanges of information with entities of the Intelligence Community, then the clearest method of avoiding placing a limitation on such a "reverse authority," would be to simply drop the language "referred to in subsection (a)" and thereby state simply that nothing in this section shall prohibit the specified contacts with entities of the Intelligence Community. In addition, this subsection should specifically include, as non-prohibited activities, "[or] other overt, non-operational relationships" (this would include, for example, Agency translators who are also members of the clergy). Finally, this subsection should allow that payment of necessary expenses to persons referred to in subsections (a) and (b) are not prohibited by this section. This subsection should be amended so as to reflect these recommendations.

67. §132(f)--For reasons as discussed supra as to subsection 132(e), this subsection should be amended to remove the limitation that it extends only to persons referred to in subsections (a) or (b) of this section. Therefore, the following should be deleted from this subsection: "described in subsection (a) or (b)."

RESTRICTIONS ON COMBATANTS

68. §133--This section concerns restrictions on the use of "combatants" in foreign countries. The section includes a requirement that the intelligence oversight and the foreign relations committees of both Houses of Congress be notified in advance of the assignment of a combatant in any foreign country by any entity of the Intelligence Community other than during a period of declared war. The subsection provides that, upon a written notification by the President to the effect that extraordinary circumstances prohibited prior notification, the notification may come after the activity is initiated. However, for reasons discussed supra as to section 131 reporting requirements,

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this statutory requirement for prior notification to the Congress of activities conducted under legitimate Presidential authority is not acceptable. The reporting requirement in this section, therefore, should be amended so as to require that the four named committees shall be notified "in a timely manner" of any proposed assignment of combatants as designated by this section.

To clarify the scope of permissible assignment of combatants, the following language should be added to subsection (c) in the first sentence after "as a combatant except": "according to subsection (a) or (b) or..."

The definition of "combatant" in subsection (d) continues to be problematic. Since the appropriate limitation on assignment of combatants should be contingent on the intent or purpose behind such assignment, it is recommended that the last sentence of this subsection be amended to read as follows: "Such term does not include military or technical advisors or other persons assigned to the foreign country for purposes other than participation in hostilities."

PROHIBITION ON ASSASSINATIONS

69. §134--This section relates to prohibitions on assassination of foreign officials. So as to avoid potential problems that might arise as to the killing of a foreign official under circumstances such that the assailant did not know the victim to be a foreign official within the definition of this section, it is recommended that the following language be inserted in subsections (c) and (d) immediately before the phrase "while such official is": "knowing such person to be a foreign official... " This amendment, for example, would remove as a situation constituting an "assassination of a foreign official," a barroom brawl which a U.S. officer or employee killed another person who, unbeknownst to the U.S. person, was a "foreign official."

There appear to be other problems related to the scope of this section. For example, in subsection (e), exception is made for a killing during any period of war or in a situation covered by the war powers resolution; this exception should also include the situation covered specifically by section 133, supra, concerning non-military combatants in foreign countries. There may also be a problem in this context relating to non-combatants who kill foreign officials in the course of their duties. Whether or not this situation would present a problem, however, would seem to depend on the applicability of the particular elements of the offense enumerated in subparagraphs (c) and (d) supra (and as recommended be amended as noted supra); i.e., that the assailant knew the victim to have been a foreign official, and that the foreign official was killed because of the official's position or political views. The applicability of other defenses, such as self defense would also be relevant for these purposes.

The further limitation in paragraph (e)(2) that the exemption for war time or other combat situations be applicable only "against an official of" the country in which the combatants have been

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introduced or with which the United States is at war should be deleted, since there may very well be, in the context of such an extraordinary situation, an official of another country supporting or allied with the particular country at issue in which case it would be no less appropriate to allow the killing of such official from another country as to permit the killing of an official from the country at issue. The definition of "foreign official" in paragraph (f)(2) should be amended so as to exclude either directly or implicitly, international terrorist activities organizations.

Finally, care must be taken regarding this section to ensure that the killing of a foreign official in the extraordinary situation involving, for example, the protection of the U.S. President or other U.S. official would not constitute a Federal offense under this section; it is important to consider this particular question in the context of the scope of the elements of the offense enumerated in subsections (c) and (d), as discussed supra.

PARTICULAR PROHIBITED ACTIVITIES

70. §135--This section enumerates eight specific categories of activities which may not be conducted as "special activities." It is recommended that the language "or is likely to result in--" in the preamble to subsection (a) be deleted, as imposing an unrealistic and largely subjective condition on conducting certain activities which, although not specifically prohibited, may at some point or in some manner result in action that is specifically prohibited. Several of the terms used in this section present problems in terms of their definition and, therefore, their scope. For example: it is unclear what would constitute "mass destruction of property"; there is no commonly acceptable definition of a "democratic government"; and there is no commonly utilized or acceptable concept of what are "human rights."

Consistent with discussions supra concerning prior reporting to the Congress of regulations to implement particular sections of this legislation, subsection (b) should be amended so as to require that the regulations formulated and implemented by the Director in furtherance of this section shall be transmitted to the two intelligence oversight committees either "in a timely manner" or within a set period of time after implementation (e.g., 60 days).

PRESIDENTIAL WAIVER OF RESTRICTIONS

71. §136--The scope of this section as to Presidential waiver of otherwise applicable restrictions or prohibitions on certain activities should extend to cover all the activities enumerated in subsection 135(a) with the possible exception of item (7), "the torture of individuals." It would seem inappropriate in this bill, relating to intelligence activities, to address issues concerning restrictions on activities the President may authorize in time of war or national emergency. The reporting requirements contained in this section include provision for prior notification to the "appropriate committees of Congress," in a manner similar to other provisions of this title discussed in this paper. Based on recommendations and the reasons therefor outlined elsewhere in this

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paper, it is recommended that these reporting requirements relate to reporting to specifically named committees "on a timely basis" rather than prior to initiation of the activity.

INDIRECT ACTIONS

72. §137--The reach of this section, concerning restricting the authority of any entity of the Intelligence Community to do indirectly through a foreign government or organization that which the entity is prohibited from conducting directly, is unclear. The prohibition should extend to those activities which are prohibited by this act or any other applicable U.S. law. The language of subsection (a), therefore, should be amended to read, after the phrase "engage in any activity," as follows: "which is prohibited by this act or any other applicable U.S. law." Consistent with recommendations and discussions in this paper regarding prior notification to the oversight committees, the term "prior" before "notification to..." in this subsection should be deleted.

CONFLICTS OF INTEREST

73. §138--The first sentence of subsection (a) of this section, concerning the applicability of all laws, orders and regulations on conflicts of interest to officers and employees of the Intelligence Community, is simply unnecessary and should be deleted. This whole area of conflicts of interest regarding Federal employees currently is in a state of flux, with both Legislative and Executive Branch initiatives currently under study. In order to make section 138 consistent with the probable scope of these initiatives, subsection (a) should be amended to reflect that the concern is not so much with granting authority to exempt employees and officers from conflicts of interest requirements, but rather to allow waiver of reporting and public availability of conflicts of interest reports or information, so as to protect, for example, information concerning employees under cover. Furthermore, since the Civil Service Commission almost certainly would play a key role in any general conflicts of interest legislation or regulations, it would seem not inappropriate to add the Civil Service Commission by name at the end of the second sentence of subsection (a) after the "Attorney General," as an entity with which the Director should consult and receive policy guidance from in the formulation of regulations to implement laws and orders on conflicts of interest.

The scope of the waiver authority for the Director of National Intelligence or the head of any Intelligence Community entity could be limited as discussed supra by inserting the following language in the third sentence of subsection (a) after the phrase "deems such action necessry": "in order to maintain the cover of any such officer or employee as provided by the provisions of this Act" (specific cover authority is found in sections 421(a)(9) and 621(a)(12)). With the waiver authority so limited, there would seem to be no need for requiring, as in the third sentence of subsection (a), that the waiver authority may be exercised only with the "written approval of the Attorney General," and it is therefore recommended that this language be deleted. The final requirement in this sentence

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of subsection (a) relates to notification to the intelligence oversight committees before any waiver under this subsection is to be made; such a requirement for prior notification is not only inappropriate but would seem not to be at all necessary if the waiver authority were limited as recommended supra. It is therefore recommended that this reporting provision be amended so as to require only that the Director of National Intelligence shall report periodically to the two intelligence oversight committees on use of this waiver authority.

74. §138(b)--The final clause of this subsection relates to information concerning conflicts of interest filed with the General Counsels of entities of the Intelligence Community not being subject to the Freedom of Information Act or other laws requiring disclosure. The need for such a provision is not clear, since the waiver authority in subsection (a) would be utilized for the sole purpose of avoiding public disclosure or other requirements that would result in disclosure of cover information. Inclusion of the provision raises the question as to whether all other information would be subject to the Freedom of Information Act and other disclosure requirements.

RESTRICTIONS ON CONTRACTING

75. §139--A provision should be added to this section that would exempt from the need for obtaining special approval to contract without disclosing the sponsorship of the Intelligence Community, those transactions carried out pursuant to the terms of the Economy Act. In other words, Economy Act transactions should not require special approval pursuant to the procedures under section 139 in order to disguise the sponsorship of the Central Intelligence Agency or other entities of the Intelligence Community.

COUNTERINTELLIGENCE AND COUNTERTERRORISM

76. §141--This section provides an elaborate mechanism whereby the President is required to establish standards and procedures to categorize counterintelligence and counterterrorism activities as to degrees of sensitivity which would then be either reviewed by the National Security Council prior to implementation or reviewed by the National Security Council and approved by written finding by the President as to the "more sensitive" of these activities. The section, in terms similar to the provisions contained in section 131 supra, further provides for prior review by the intelligence oversight committees of standards and procedures established under this section, and of each counterintelligence or counterterrorism activity subject to the requirements of this section. The section, moreover, requires that "careful and systematic consideration" be given to Executive Branch review and consideration of each activity subject to the requirements of this section; that significant changes in any activity or in the facts considered in reviewing activities be reported to the intelligence oversight committees; and that the Attorney General shall submit a semi-annual report to the intelligence oversight committees on all on-going counterintelligence and counterterrorism activities subject to the requirements of this section.

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As discussed supra regarding section 131, it is recommended against requiring by statute that the Executive be required to differentiate as between the sensitivity or importance of particular categories of activities in order to determine which review and reporting requirements would be applicable. It is therefore recommended, as regards this section, that the requirements go no further than to establish that the National Security Council shall review any proposed counterintelligence or counterterrorism activity which, pursuant to standards and procedures established by the President, is of sufficient sensitivity or importance to require such review. The statute should not require additional Presidential review of such of these activities that are "most" sensitive or important. As to the reporting requirements under this section, reporting to the intelligence oversight committees should be "in a timely manner," both as to reporting on the standards and procedures (or, in the alternative, within 60 days after such standards or procedures have become effective) and as to reporting on the activities themselves. In addition, reporting on changes in activities should be required only in those instances in which there has been a change in the character or nature of the activity, and the requirement for reporting on significant changes in the "factors" to be considered in reviewing the activity should be deleted. The requirement for a semi-annual report on all on-going counterintelligence or counterterrorism activities should be amended so as to provide that the Attorney General shall report annually, based on consultation with the Director of National Intelligence as to activities conducted abroad, to the two intelligence oversight committees.

EXECUTIVE BRANCH OVERSIGHT

77. §151(f)--This section concerns the responsibilities of the Attorney General to report to the Intelligence Oversight Board, the President, the Director of National Intelligence, the heads of the appropriate entities of the Intelligence Community, the inspectors general and general counsels of entities of the Intelligence Community, and the intelligence oversight committees of the Congress. In order to avoid conflict with the role of the Attorney General as the Government's chief law enforcement officer, and so as not to infringe on the scope of the Attorney General's prosecutorial discretion, the preamble to this subsection should be amended to read as follows: "(f) with due regard to the investigative and prosecutorial responsibilities of the Attorney General, the Attorney General shall--"

78. §151(h)--It is not clear, as provided by this subsection, how heads of entities of the Intelligence Community and the inspectors general and general counsels of those entities could (or should) all have "primary" responsibility for "insuring the legality and propriety of the activities of" each entity. Since the oversight responsibilities of the heads of each entity and of the general counsels and inspector generals of each entity are specifically enumerated in other subsections in this section, subsection (h) would seem redundant and therefore unnecessary.

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79. §151(i)--The requirements in subparagraph (1)(B) relating to reporting by the heads of entities of the Intelligence Community to the intelligence oversight committees of the Congress should be amended to provide a more workable and realistic procedure. This subparagraph, therefore, should be amended so as to read: "(B) report, on a semi-annual basis, to the permament select committee... and the select committee...a summary of matters reported to the Attorney General and the Oversight Board pursuant to clause (A) of this paragraph; and..."

80. §151(i)--Paragraph ~~(i)~~(2) concerns responsibilities of the Attorney General to report to the President, the Oversight Board, the Director of National Intelligence, the heads of any entity of the Intelligence Community so concerned, and the intelligence oversight committees on matters described in paragraph (1)(A) of this subsection. In consideration of the prerogatives of the Attorney General regarding the scope of the Attorney General's investigative and prosecutorial authority, it is recommended that the language contained in subparagraph (B) of this paragraph--"with due regard to the investigative and prosecutorial responsibilities of the Attorney General"--be moved to modify the entire paragraph. So amended, the preamble to paragraph (2) of subsection (i) would read: "(2) With due regard to the investigative and prosecutorial responsibilities of the Attorney General, the Attorney General shall--"

81. §152(j)--Paragraph (1) of this subsection, regarding officers or employees reporting on possible violations of laws, orders, rules, etc., appears to be somewhat overdrawn. Employees and officers would be required to report "any evidence of any possible violation of Federal law by any officer or employee of any entity of the Intelligence Community" to "the inspector general, general counsel, or head of such entity" (emphasis added). It would seem more appropriate to couch this subsection in terms of "nothing in this section shall be construed to prohibit any employee or officer of any entity of the Intelligence Community from reporting any possible violation..." In the alternative, there must be some de minimus standard applicable to those possible violations on which officers or employees would be required to report. A requirement that officers or employees report on any possible violation of Federal law would seem appropriate. As to possible violations of Executive Orders, Presidential directives, Presidential memoranda, or any rule, regulation or policy of any entity of the Intelligence Community, requirement should properly be limited to reporting only on possible serious violations. This would remove as a statutory burden on officers or employees of the Intelligence Community the requirement that they report on even the most insignificant possible violation of any directive, rule, regulation, policy, etc. It is recommended that this paragraph be so amended.

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It seems inappropriate to include as among matters on which officers or employees would be required to report, possible violations of the "policy" of any entity of the Intelligence Community. Generally speaking, an agency's "policy" is nowhere set down in precise directive statements; policies do not lend themselves to easy determination as to whether or not in every instance an agency or indeed any officer or employee thereof is in accord with the overall policy. A requirement that each officer or employee of any entity of the Intelligence Community report whenever he or she suspects a "policy" is being or may be violated, would seem entirely unworkable and inappropriate; moreover, an agency's "policy" necessarily does and should to a certain extent change over time. It is therefore recommended that the term "policy" be deleted from this paragraph as among the enumerated items on which employees or officers would be required to report violations.

82. §151(j)--Subparagraph (3)(B) in essence requires that the Attorney General ensure that no adverse action is taken against whistle blowers on account of their whistle-blowing activity. Despite its appropriate intent, this provision seems to be drawn a bit too broadly. Take, for example, the hypothetical case involving an officer or employee of an entity of the Intelligence Community participating in a particularly sensitive intelligence activity, who uncovers "evidence" that he or she believes indicates that the activity is a possible violation of a law, a directive, an order, a memorandum or a regulation, and so reports pursuant to this subsection. The language of subparagraph (j)(3)(B) could be construed to prohibit the head of the agency or department conducting such sensitive intelligence activity from taking <u>any</u> personnel action regarding that individual if the action could be <u>in</u> any way be considered "adverse personnel action," even to the extent of not allowing the head of the entity to take that individual off of the particular project. Such a situation could be problematic in that the efficiency and indeed the chances for success of the intelligence activity could be damaged by having to retain an employee who, on the basis of whatever evidence he or she deems appropriate, has determined that the activity may possibly be unlawful or improper, despite the fact that the activity in fact was neither unlawful nor improper.

At a minimum, the provisions of this subparagraph should extend only to ensuring that officers or employees are not subject to adverse personnel action <u>solely</u> on account of their good faith reporting. It is therefore recommended that the relevant provision of this subparagraph be amended to read as follows: "shall be subject, solely on account of the reporting of such information or evidence..."

83. §151(k)--The essence of this subsection is to require the head of each entity of the Intelligence Community to transmit an annual report to the intelligence oversight committees identifying and describing any intelligence activities conducted during the preceding year which, in the view of the head of the entity, constituted a violation of any constitutional right, of any U.S. law, or which the head of the entity believes constituted a violation of any Executive Order, Presidential directive, or Presidential memorandum. Assuming that the preceding subsections in section 151 contain requirements and procedures for reporting on violations and improprieties, including responsibilities for heads of entities of the Intelligence Community, then this subsection is redundant and therefore should be deleted.

CONGRESSIONAL OVERSIGHT

84. §152(a)--This subsection establishes the general parameters within which congressional oversight of the Government's intelligence activities and organization shall be conducted. In order that this important provision be in accord fully with applicable constitutional and statutory limitations, it is recommended that the prefatory language be amended to read as follows: (a) Under such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect intelligence sources and methods, the Director of National Intelligence and the head of each entity of the Intelligence Community, with respect to the intelligence activities of that entity, shall--" This language is consistent with that contained in section 3-4 of Executive Order 12036, with technical changes designed to bring it into conformity with the language of this bill.

85. §152(b)--Rather than require, as provided in this subsection, yet another written annual report to the intelligence oversight committees--in this case a review of all intelligence activities of each entity of the Intelligence Community--it is recommended that this subsection be amended so as to require that the head of each entity "shall report at least annually to" the intelligence oversight committees. Such a report, in the nature of an annual overview, would seem to be the appropriate subject for an oral report rather than what would likely turn out to be an extremely lengthy and probably extremely sensitive written report.

86. §152(e)--This subsection should be amended to read: "The Permanent Select Committee of the House of Representatives and the Select Committee on Intelligence of the Senate shall be furnished copies of all records schedules which the entities of the Intelligence Community are required by law to furnish to the Archivist of the United States, including any modifications, amendments, or supplements thereto, and any requests for authority to dispose of records regarding national intelligence activities or the activities of such entities, at such time as these schedules and modifications, amendments, or supplements thereto, are provided to the Archivist."

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87. §153(a)--This subsection should be amended so as to require that reports by the intelligence oversight committees to their respective Houses shall be consistent with and with due regard to authorities and duties, including those by law, to protect intelligence sources and methods.

88. §153(b)--This subsection requires that no information or material provided to the intelligence oversight committees that is either classified or submitted by the Executive Branch under a request that it be kept confidential, shall be made public other than pursuant to the provisions of the resolutions establishing the intelligence oversight committees. In order to make certain that all intelligence sources and methods are so protected, it is recommended that the following language be inserted immediately following the phrase "request that such information or material be kept confidential": "or intelligence sources and methods..."

89. §153(c)--Paragraphs (1) and (2) of this subsection establish that the intelligence oversight committees shall adopt regulations governing the availability to other committees and members of information provided to the oversight committees by the Executive Branch. It is recommended that both paragraphs--paragraph (1) relating to the House committee and paragraph (2) relating to the Senate committee--be amended to require that the regulations shall be in accord with security arrangements approved by the Director of National Intelligence; the paragraphs would read in relevant part: "The ... committee shall, under such regulations as that committee shall prescribe, and in accord with security arrangements approved by the Director of National Intelligence, make any information... available..." It is further recommended that there be an additional paragraph in this subsection to the effect that the requirements and procedures established in paragraphs (1) and (2) shall, with respect to the oversight committees, supersede and be in lieu of the rules of the respective House concerning the furnishing of information described in this section to other members and committees. Such an amendment, for example, would, for purposes of access to Executive Branch information provided the House oversight committee, replace the provisions of House Rule XI, which relates to accessibility of committee records and attendance at committee meetings and hearings.

PUBLIC REPORT

90. §154--The appropriateness of requiring by statute, as in this section, that the Director of National Intelligence shall provide an annual unclassified report to the public on intelligence activities is not at all certain. In the first place, it would seem that, if intelligence information is to be appropriately protected from disclosure, there would be little substantive or relevant information that could be included in such an unclassified report. It is therefore recommended that this section be deleted. Even without the report that would be required pursuant to this section, there is more than a sufficient number of reports that will have to be prepared under this title. If the requirement in this section for an annual report remains, then the limitations on information that may be included in the report should be amended to include intelligence sources and methods specifically; the final portion of this section, therefore, would read: "of the names of individuals..., or intelligence sources or method, or classified information."

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S. 2525, TITLE I - TECHNICAL SUGGESTIONS

1. Section 104(6), (7), (14)--no need to have separate sub-paragraphs for "analysis"; rather, combine "collection, retention, processing, and dissemination" and "analysis."

2. Section 104(10), (22), (29)--these terms should include "analysis."

3. Section 104(27)--define term "special activity" vice "special activity in support of national foreign policy objectives" and include underlined provision in the definition itself, since throughout the Act, only the term "special activity" is used.

--substitute "retention" for "correlation"

--insert "foreign" before "intelligence" in penultimate line of definition

4. Section 111(a)--This subsection provides the basic authority for entities of the Intelligence Community to conduct national intelligence activities "under the direction of the" NSC. Amending this language to read, "subject to the direction of the National Security Council" would avoid creating uncertainty regarding the organizational status of the CIA and the other entities of the Community that could arise from interpretation of the term "under the control of" the NSC. (See also discussion of sections 113 [O/DNI] and 411 [CIA].)

5. Section 111(c)--add "retaining," after "collecting" and insert "analyzing" instead of "evaluating" to make this consistent with other provisions in the title.

6. Section 113(b)--Insert "additional" between "six" and "years" at the end of the third sentence, in order to clarify.

7. Section 113(g)--The last sentence is not clear as to whether an Assistant DNI would also act as Acting DDNI whenever the DDNI is serving as Acting DNI. This could be clarified by adding at the end of the sentence the following: "or while the Deputy Director is serving as Acting Director."

8. Section 113(h)--The reference to subsection (e) in the penultimate sentence should be to subchapter II of chapter 53 of title 5, U.S. Code (as specified in section 702 of this Act).

9. Section 114(e)(3)--Delete everything after the first "United States." The specific reference that follows, to "collection... utilizing human sources," is unnecessary since the Director is already granted coordination authority for all clandestine collection outside the U.S.

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10. Section 114(f)--The Director should have responsibility for producing all national intelligence. Insert "all" directly before "national intelligence." The clause "including...analyses" should be deleted since its inclusion impliedly grants the Director authority over only those specified categories of production.

11. Section 114(f)(1)--Delete the terms "accurate, relevant, and timely" as not appropriate to mandate by legislation.

12. Section 114(f)(2)--The modifiers "any" before "diverse points," "fully" after "presented," "carefully" after "considered" and "clearly" before "expressed" should be deleted. Use of such qualitative terminology only confuses the issues, tends to create issues where none exist and could lead to needless disputes over whether the precise terms of the statute have been met.

13. Section 114(g)(1)(2) and (3)--For the sake of clarity, (1) and (2) should be combined. Moreover, the addition of "establish procedures to..." at the end of the introductory clause in (g) would tighten the language further. Finally, (3) should be amended to read: "(2) insure access...national intelligence collected or produced by the intelligence community that is relevant to that entity is authorized...responsibilities."

14. Section 114(h)--Add "analyzed" after "collected" and add "retained" after "produced" in order to conform to other similar provisions.

15. Section 114(k)--Insert "the Director determines" between "which" and "can" to clarify that the Director makes such determination.

16. Section 114(q)--The authority granted the DNI in this subsection to review support activities should be clarified as follows: "In order to carry out the Director's duties under this title, the Director is authorized [vice "shall" or "may"] to review all the intelligence and intelligence-related activities of the Government and all activities in support of intelligence and intelligence related activities."

17. Section 121(a)--The phrase ", after approval of such budget," lacks clarity as to which "approval is referenced; this phrase should be amended to read ", after approval by the President of such budget."

18. Section 121(a)(1)--Delete the term "various" before "entities of the..." The term is unnecessary.

19. Section 131--Move subsection (b) down to (d) and renumber paragraphs (c) and (d) as (b) and (c) respectively.

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20. Section 134--The final clause in subsection (d) reads in part as follows: "guilty of murder in the first degree..." It should be verified whether the concept of degrees of murder according to Federal law is applicable.

21. Section 134(e)--It is recommended that the following language be deleted from the final line of this subsection since it is redundant: "as an official of the United States."

22. Section 136(f)--"(A)" should be inserted immediately following "(2)" at the beginning of that paragraph.

23. Section 141(a) and section 142(a)--For purposes of clarification, the following language should be inserted in the second sentences of both of these subsections immediately following "subsection (b) the National Security Council": "shall be defined to include a subcommittee which..." In addition, regarding the representation of the Central Intelligence Agency on these subcommittees, it is recommended that the language following "the Federal Bureau of Investigation," be amended to read as follows: "a representative of the Central Intelligence Agency,..."

24. Section 142(b)--For purposes of consistency and clarity, it is recommended that the word "international" be inserted before the word "organizations" and after the phrase "furnish to such foreign governments and" in paragraph (b)(4) of this subsection.

25. Section 151--The respective roles of the Intelligence Community general counsels and inspector generals are lumped together in this section in such a way that the appropriate responsibilities of each are not clear. In particular, paragraph (d)(5) should be amended to read as follows: "(5) review periodically the practices and procedures the inspectors general of entities of the Intelligence Community designed to discover and report on, and general counsel procedures to report to the inspectors general for investigations of intelligence activities that raise questions of legality or propriety." In addition, paragraph (e)(4) should be amended to read as follows: "(4) formulate practices and procedures as applicable to the appropriate discovery and reporting responsibilities of the respective inspectors general, general counsels concerning intelligence activities that raise questions of legality or propriety;"

26. Section 151(j)--As it appears in subparagraph (3)(A), the term "paragraph" should be changed to "subsection."

27. Section 152(c)--The final sentence of this subsection relating to maintenance of records in the Office of the Federal Register should be amended so as to make clear that the "National Archives and Records Service" and the "General Services Administration" are not intended as additional records repositories. In other words, inclusion of these two entities mean only that the Office of the Federal Register is in the National Archives and Records Service which in turn is in General Services Administration. For purposes of clarity, therefore, the final sentence of this subsection should be amended to read: "An index of each such record shall be maintained in the Office of the Federal Register under security standards approved by the Director."

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28. Section 153--The language of paragraphs (c)(1) and (2) should, insofar as possible, be identical. The following language which appears in paragraph (2) but not in paragraph (1) should be added to paragraph (1) at the same place as it appears in paragraph (2): "to protect the confidentiality of such information."

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S. 2525 GENERAL ISSUES

1. All definitions throughout S. 2525 should be consolidated in one place--Title I.

2. It must be clarified as to whether references throughout S. 2525 to "this Act" have applicability only to the particular title in which the references appear if the particular title is provided with a "short title" or whether the references apply to the entire Act (i.e., all seven titles).

3. In each and every instance in which a requirement for prior reporting to the Congress is required by this title--despite the recommendations of this Agency--the following caveat should be included: "the foregoing provision shall not constitute a condition precedent to the initiation of any such ... activity."

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