INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1987

SECTION-BY-SECTION ANALYSIS AND EXPLANATION

TITLE I

INTELLIGENCE ACTIVITIES

Section 101 lists the departments, agencies, and other elements of the United States Government for whose intelligence and intelligence-related activities the Act authorizes appropriations for fiscal year 1987.

Section 102 makes clear that details of the amounts authorized to be appropriated for intelligence and intelligence-related activities and personnel ceilings covered under this title for fiscal year 1987 are contained in a classified Schedule of Authorizations. The Schedule of Authorizations is incorporated into the Act by this section.

Section 103 authorizes the Director of Central Intelligence in fiscal year 1987 to expand the personnel ceilings applicable to the components of the Intelligence Community under Sections 102 and 202 by an amount not to exceed 2 percent of the total of the ceilings applicable under these sections. The Director may exercise this authority only when necessary to the performance of important intelligence functions or to the maintenance of a stable personnel force, and any exercise of this authority must be reported to the two intelligence committees of the Congress.

TITLE II

INTELLIGENCE COMMUNITY STAFF

Section 201 authorizes appropriations in the amount of for the staffing and administration of the Intelligence Community Staff.

Section 202 provides details concerning the number and composition of Intelligence Community Staff personnel.

Subsection (a) authorizes full-time personnel for the Intelligence Community Staff for fiscal year 1987, and provides that personnel of the Intelligence Community Staff may be permanent employees of the Staff or detailed from various elements of the United States Government.

Subsection (b) requires that detailed employees be selected so as to provide appropriate representation from the various departments and agencies engaged in intelligence and intelligence-related activities.

Subsection (c) requires that personnel be detailed on a reimbursable basis except for temporary situations.

Section 203 provides that the Director of Central Intelligence shall utilize existing statutory authority to manage the activities and to pay the personnel of the Intelligence Community Staff. This language reaffirms the statutory authority of the Director of Central Intelligence and clarifies the legal status of the Intelligence Community Staff. In the case of detailed personnel, it is understood that the authority of the Director of Central Intelligence to discharge personnel extends only to discharge from service at the Intelligence Community Staff and not from federal employment or military service.

TITLE III

CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM

Section 301 authorizes fiscal year 1987 appropriations in the amount of for the Central Intelligence Agency Retirement and Disability Fund.

TITLE IV

ADMINISTRATIVE PROVISIONS RELATED TO INTELLIGENCE AGENCIES

Section 401 exempts the CIA and NSA from the requirement contained in §3303a of Title 44, United States Code, that the Archivist may approve records disposal requests only after publication of notice in the Federal Register and an opportunity for interested persons to submit comments thereon.

The requirement that the Archivist publish record disposal requests in the Federal Register was added by §204 of the National Archives and Records Administration Act of 1984. By requiring that the Archivist provide notice in the Federal Register, the public would be given an opportunity to obtain and comment on the the actual schedule of records proposed for destruction. While the purpose of the provision was to give the public a role in determining what records should be destroyed, the legislative history makes clear that Congress did "not intend . . . for such public notice to be a paperwork burden for any affected parties or to unreasonably delay the disposal of such records." H. Conf. Rpt. No 1124, 98th Cong., 2d Sess., 29-30, reprinted in 1984 U.S. Code Cong. & Ad. News 3904-3905.

Unfortunately, the requirement for publication in the Federal Register has become a paperwork burden for CIA and NSA that has unreasonably delayed the disposal of records. The problem arises because the CIA and NSA record control schedules submitted to the National Archives and Records Administration (NARA) are classified confidential. NARA has therefore decided that the Federal Register notice concerning classified records schedules will be limited to the following information:

a) the identity of the requesting agency;
b) the NARA job number assigned to the schedule; and
c) the reason the schedule is excluded from public disclosure.

Because the CIA and NSA record destruction schedules are classified and not accessible to the public, the statutory requirement that the Archivist publish notice of them in the Federal Register so as to provide the public an opportunity to obtain them makes absolutely no sense. Furthermore, this requirement unreasonably delays approval by the Archivist of NSA and CIA record destruction schedules since the public is given 60 days to comment on the notice in the Federal Register. Exempting the CIA and NSA from the provision requiring notice in the Federal Register of requests to destroy records would expedite the process of approval of requests to destroy records and not deprive the public of any information they would otherwise be entitled to receive.

Section 402 amends the National Security Act of 1947 to permit an interlocutory appeal by the United States from any decision of a United States court or a judge thereof on any evidentiary ruling or dispositive motion when the Director of Central Intelligence certifies that the decision being appealed will have an adverse impact on the national security. Recently, the United States has encountered significant problems in

attempting to perfect interlocutory appeals of several court decisions. The hallmark of these cases is an attempt by the plaintiffs to force the United States to submit to civil discovery and a trial on the merits, even though the Government's legal arguments would likely eliminate the need for discovery or further judicial proceedings if the issues could be litigated fully on appeal. Moreover, in those cases where the disclosure of sensitive national security information is directly at issue, the United States needs the ability to protect its information from any unnecessary risk of immediate disclosure. Under current law the United States may find that the only means of obtaining an immediate appeal to obtain a dispositive ruling is to consider a contempt of court. These problems can be resolved if the United States can obtain the right to interlocutory appeal upon a certification that the national security justifies it. It is not intended, however, that the right established by this section in any way affect the role of the Attorney General in managing the litigation caseload of the United States. Additional information regarding this provision, which cannot be provided in a public document, has been previously provided to the Committees.

Section 403 amends the Central Intelligence Agency Act of 1949 to provide an additional retirement credit in lieu of a post differential for service by non-CIARDS Agency employees at unhealthful posts. As part of the FY86 Intelligence Authorization bill, Congress approved legislation authorizing extra retirement credits for those Agency employees who participate in the Central Intelligence Agency Retirement and Disability System. Under this legislation, Agency employees who participate in CIARDS would have the option to elect to receive a retirement credit of one and a half years for each year of service at an unhealthful post in lieu of a post differential. This benefit is the same as that provided to Foreign Service Officers under Section 817 of the Foreign Service Act of 1980.

Because the provision in the FY86 Intelligence Authorization Act was limited to CIARDS participants, those employees who participate in other retirement systems do not have the opportunity to earn extra retirement credits for service at unhealthful posts. This section expands the authority to pay extra retirement credits to those Agency employees who participate in the Civil Service Retirement System or in a "new Government retirement system" as defined in Section 203(a)(4) of the Federal Physicians Comparability Allowance Amendments of 1983. These Agency employees may serve in the same unhealthful posts as Agency employees who participate in CIARDS and equity demands that these Agency employees have the same chance to elect an extra retirement credit as CIARDS participants. The amount of extra retirement that would be paid and the circumstances under which it would be paid are the same as that authorized for CIARDS participants last year.

Section 404 amends the CIA Act of 1949 and the National Security Agency Act of 1959 to make clear that CIA and NSA can continue to deal with security problems in the area of drug and alcohol abuse without regard to the provisions of any other law, rule or regulation. Recent court decisions and rulings by both the Equal Employment Opportunity Commission and the Merit Systems Protection Board have suggested that there will be increasing emphasis on treating alcoholism and alcohol abuse as a handicap protected under the provisions of the Rehabilitation Act, which outlaws handicap discrimination. By implication there will likely be a similar emphasis on treatment of drug abuse as a handicap with the same protection. This may very well result in an increased prospect of litigation whenever CIA or NSA determine that drug or alcohol abuse requires the denial or revocation of security approvals, or the denial or loss of employment. Not only is there concern about the prospects of having to litigate these decisions, but there also is a likelihood that CIA and NSA will be forced more and more to make accommodations to take into account these "handicaps," regardless of the security consequences of continuing to employ or clear such persons. In order to avoid these additional administrative and litigation problems, which could substantially impair the ability of CIA and NSA to carry out their national security missions and functions, this amendment would clearly authorize CIA and NSA to deal with the security implications of alcohol and drug abuse in the same manner as in the past. Additional information regarding this provision, which cannot be provided in a public document, has been previously given to the Committees.

Section 405 amends the National Security Act of 1947 (50 U.S.C. 401 et seq.) so that, in tort actions, including actions arising under the U.S. Constitution, the United States will be substituted for individual defendants employed by Intelligence Community agencies who are sued in their personal capacities for acts undertaken in the scope of their Government employment. In recent years, it has become commonplace for senior Intelligence Community officials to be sued in their individual (as well as official) capacities for making national security judgments which they are authorized by law to make. Intelligence Community officials live under the constant fear that their official actions may result in years of litigation, and that a judgment for monetary damages may ultimately be entered against them. Responsible officials who must make the most sensitive decisions affecting the national security cannot be placed in an environment where they constantly have to be concerned about their personal and financial well-being. This provision amends the United States Code to provide that any cause of action a person may have for tort claims, including claims arising under the Constitution, for acts taken by Intelligence Community officials during the scope of their employment, will be against the United States exclusively.

This bill further provides that the existing procedures of the Federal Tort Claims Act, shall be applied to litigation under this section. Suits against intelligence officers or employees in their individual capacities are precluded. The sole remedy would be against the United States. This provision is intended to be a waiver of sovereign immunity with respect to Constitutional torts brought against officials in their individual capacities. It is intended to retain for the United States any defenses those individuals may have had in suits brought against them. Thus, for constitutional torts the United States for the first time shall be liable to the same extent as the officer or employee would have been in any Bivens action prior to the enactment of this provision. Remedies for common law and statutory torts will remain substantially the same, except that employees no longer will be subjected to suit at all, and claims of absolute or qualified immunity will be made by the United States.

The section further provides at subsection (c) that the Attorney General shall defend any action referred to in subsections (a) and (b). Personnel are required to initiate notification of any tort action to the relevant United States attorney.

Subsection (d) provides that a certification by the Attorney General that the officer or employee was acting within the scope of employment in an authorized activity shall convert the action into a suit against the United States.

Subsection (e) provides for removal of cases brought against officers or employees in state courts to federal district court, and substitution of the United States as proper party.

Subsection (f) provides that the United States shall have available to it all the defenses that would have been available to it and to a defendant sued in his individual capacity, and would nullify a provision in the Federal Tort Claims Act which would otherwise exclude any action for claims arising in foreign countries.

Subsection (g) emphasizes that the Attorney General may compromise or settle any claims brought under this section.

TITLE V

SUPPORT FOR DEFENSE INTELLIGENCE COLLECTION ACTIVITIES

Section 501 adds a new chapter 19 to subtitle A of Title 10, United States Code, authorizing the establishment and conduct of corporations or other business entities to provide support for Department of Defense undercover intelligence collection activities.

Proposed subsection 391 states that the purpose of proposed chapter 19 is to clarify congressional intent with regard to the establishment of commercial covers to support intelligence collection activities.

Proposed subsection 392a defines a new term "intelligence collection activities". The use of a new term rather than the redefining of the term "intelligence activities" precludes the development of two definitions (E.O. 12333 & statutory) for the same term.

Proposed subsection 392b defines the term "intelligence support activities" to mean the establishment, acquisition and conduct of commercial cover systems and the acquisition of logistical support thereto as described in subsections 393 and 394.

Proposed subsection 392c defines one of the terms in subsection 392a, "foreign intelligence", as it is defined in E.O. 12333.

Proposed subsection 392d defines one of the terms used in subsection 392a, "counterintelligence", as it is defined in E.O. 12333.

Proposed subsection 392e defines a new term, "commercial cover", which is used throughout the proposed Chapter 19 of this title.

Proposed subsection 393a authorizes the Secretary of Defense or the Secretaries of the Military Departments to establish and conduct commercial covers as commercial entities. In making specific reference to consultation with the Director of Central Intelligence and the Director of the Federal Bureau of Investigation, this subsection is not intended in any way to alter or derogate from the responsibilities and authority of the Chief of Mission to a foreign country under 22 U.S.C. 3927 for direction, coordination, and supervision of all U.S. Government employees in that country (except for employees under the command of a U.S. area military commander) or from established procedures for coordination with the Secretary of State in the conduct of clandestine activities. Subsection 393a further states that the establishment of a commercial cover requires a finding in the form of a written certification by the Secretary responsible for the commercial entity that the commercial cover is necessary to the conduct of authorized intelligence collection activities.

Proposed subsection 393b requires that the establishment and operation of such commercial covers be in accordance with prevailing commercial practice. Federal statutes that regulate the establishment and operation of commercial and industrial type government activities shall not apply to the establishment and operation of commercial covers conducted pursuant to this section when there is a written certification by the Secretary concerned or his designee that compliance with such statutes would risk compromise of the commercial cover. It is not intended that the authorities contained in this section will relieve the Department of Defense from any requirements of applicable laws. Any exemptions apply only to the operations of the commercial cover. Commercial covers must of necessity conform to standard commercial practices. Compliance with statutory requirements that govern routine government procurement and financial transactions would not conform with such prevailing commercial practices and would flag a commercial cover entity as being connected with the United States Government, thus risking the security of the commercial cover and the underlying intelligence collection activities. In the past, Congress has exempted the FBI from certain procurement and financial requirements, e.g., the Anti-Deficiency Act, 31 U.S.C., 1341, and the Department of Defense is proposing that similar exemptions be authorized for intelligence support activities. It is virtually impossible to foresee and list by citation every statutory requirement that may be incompatible with intelligence support activities. Therefore, subsection 393b describes the exemptions categorically in order to capture and embody all the provisions that would risk compromising the commercial cover. Such statutes encompass laws applicable to federal appropriations, federal property management, federal acquisitions, federal employment, and government corporations. These categories of law are defined below.

"Federal acquisitions" means acquiring real estate, goods or services for the United States Government. These activities are principally governed by Titles 41 and 10 of the United States Code. Title 41 requirements that may be incompatible with intelligence support activities include:

41 U.S.C. 5 which establishes the requirement to advertise proposed purchases and proposed contracts for supplies or services.

41 U.S.C. 35 which requires the inclusion of contract provisions such as the Walsh-Healey Act representations and stipulations.

41 U.S.C. 46 and 48c which establish the requirement to purchase blind-made products.

41 U.S.C. 255 which limits advance payments to contractors.

41 U.S.C. 253 which requires full and open competition.

Title 10 requirements that may be incompatible with intelligence support activities include:

10 U.S.C. 2207 which prohibits contracting unless the contract contains specific provisions.

10 U.S.C. 2276 which makes the contractor's books subject to Government audit.

10 U.S.C. 2301 which prohibits cost-plus-a-percentage-of-cost contracts. This section also subjects a commercial cover to small business set-asides. This may conflict with prevailing commercial practice.

10 U.S.C. 2304 which limits the use of negotiated procurements. Formal advertisement (sealed bids) may not be consistent with prevailing commercial practice.

10 U.S.C. 2306 which places restrictions on the kinds of contracting that may be used. These restrictions may conflict with prevailing commercial practice. This section also creates a right to examine all books, records, etc. of the contractor or subcontractor. This may also identify the intelligence support activity as a U.S. Government entity.

10 U.S.C. 2307 which prohibits certain advance payments for property and services. This may conflict with prevailing commercial practice.

10 U.S.C. 2313 which creates a right to inspect plants and audit books of certain contractors and subcontractors. Such an inspection would identify the contracting agency as a United States Government entity.

10 U.S.C. 2360 which creates a right for students contracting with the Government to be entitled to be considered as employees which may identify the contracting agency as a United States Government entity.

10 U.S.C. 2381 which requires certain measures for non-negotiated procurements which will identify the contracting agency as a United States Government entity (surety bonds, charges, etc.).

10 U.S.C. 2384 which requires supplies furnished to a military department to be uniquely marked, which will identify the contracting agency as a United States Government entity.

10 U.S.C. 2631 which restricts transportation of supplies to U.S. Flag Vessels. This may conflict with prevailing commercial practice.

"Federal property management" means the control and use of federal real and personal property. These activities are principally governed by Titles 40 and 10 of the United States Code. Restrictions that may be incompatible with commercial covers include:

40 U.S.C. 34 which limits the leasing of space in the District of Columbia.

40 U.S.C. 33a which establishes restrictions on construction loans for office buildings by Government corporations.

40 U.S.C. 129 which establishes limits on a Government corporation's leasing of buildings in addition to the limitation on rental rates and prohibits the inclusion, in any lease, of any provision regarding the repair of real property.

10 U.S.C. 2662 which requires reporting of certain real estate transactions to Congress 30 days in advance of the transaction.

10 U.S.C. 2672 restricts agency authority to acquire an interest in land to $100,000 or less.

10 U.S.C. 2676 limits authority to acquire land unless acquisition is expressly authorized by law.

"Federal employment" means restrictions, rights, duties, and entitlements flowing from Part III of Title 5 of the United States Code. The intent of this section is to exclude from the application of Title 5, United States Code, employees of the commercial cover who are not federal employees occupying positions within the commercial cover. The restrictions, rights, duties, and entitlements that may be incompatible with prevailing commercial practices include:

5 U.S.C. 3101 et seq. which limits the authority to appoint employees.

5 U.S.C. 5101 et seq. which establishes classes of employees and prescribes levels of pay for those classes.

5 U.S.C. 4101 et seq. which establishes training programs.

5 U.S.C. 4301 et seq. which establishes a performance rating system for employees, including minimum due process.

5 U.S.C. 6101 et seq. which establishes a leave and attendance system.

5 U.S.C. 7101 et seq. which establishes a system for adverse actions, including removal.

5 U.S.C. 8101 et seq. which provides for insurance and other entitlements.

"Government Corporations" means a corporation that is owned by the Federal Government. While commercial covers are not Government corporations in the classical sense, they nonetheless meet definitions set out in 31 U.S.C. 9101(1). Government corporations are principally governed by Title 31 of the United States Code. Requirements that pertain to Government corporations that may be incompatible with commercial covers include:

31 U.S.C. 9102 which requires that each corporation established or acquired by an agency be specifically authorized by Congress.

31 U.S.C. 9103 which requires an annual budget submission to Congress.

31 U.S.C. 9107 which requires Comptroller General's approval prior to the consolidation of a corporation's cash.

31 U.S.C. 9108 which limits the obligations that may be issued by a Government corporation.

It is intended that commercial covers utilize these exemptions only to the extent that it is necessary, and that they be conducted in a manner that is generally consistent with ordinary commercial practice. Adequate safeguards are provided in the legislation and the Department's own procedures will further ensure the proper application of the exemptions and the appropriate use of funds.

Subsection 393c authorizes the deposit and withdrawal of appropriated and generated funds in banks and other financial institutions.

Subsection 393d requires that all proceeds generated by a commercial cover that are no longer necessary to offset necessary and reasonable expenses of the commercial cover, revert to the U.S. Treasury as miscellaneous receipts.

Subsection 393e requires that funds resulting from a final disposition of a commercial cover, after all obligations have been met, shall be deposited in the United States Treasury as miscellaneous receipts.

Proposed subsection 394a grants to the Secretary of Defense or the Secretaries of the Military Departments, or their designees, the authority to acquire necessary services, personalty, fixtures, and realty in order to support a commercial cover.

Proposed subsection 394b requires that acquisitions made pursuant to subsection 394a utilize procedures that are consistent with prevailing commercial practice. The subsection further provides that such acquisitions shall be exempt from laws governing federal acquisitions, federal appropriations, federal property management, and federal employment where the application of such laws would risk the compromise of the commercial cover. It is not intended that the authorities contained in this section will relieve the Department of Defense from any requirements of applicable laws. Any exemptions apply only to the operations of the commercial cover. For a discussion of these laws see the analysis above pertaining to proposed subsection 393b.

Proposed section 395 requires the establishment of a system whereby the Secretary of Defense is responsible for ensuring adequate oversight and accountability for all intelligence support activities undertaken pursuant to this chapter.

Proposed subsection 396a requires all intelligence support activities authorized pursuant to proposed sections 393 and 394 to be undertaken in accordance with regulations promulgated by the Secretary of Defense.

Proposed subsection 396b requires the Secretary of Defense, or the Secretaries of the Military Departments to ensure that an annual review and audit is conducted of each intelligence support activity. It further requires that the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence be kept fully and currently informed of all intelligence support activities.

Proposed subsection 396c makes it clear that all intelligence support activities undertaken pursuant to this chapter are to be protected from unauthorized disclosure as set forth in 50 U.S.C. 403(d)(3).

TITLE VI

ENHANCED FBI COUNTERINTELLIGENCE CAPABILITIES

Section 601 would amend the Right to Financial Privacy Act of 1978 (12 U.S.C. §3401 et. seq.) by making certain of the special procedures set forth in Section 3414 mandatory.

Section 3414 currently provides that a Government authority authorized to conduct foreign counterintelligence investigations may obtain financial records from a financial institution by submitting a certification signed by the supervisory official of a rank designated by the head of the Government authority. However, Section 3414 does not compel the financial institution to disclose the requested records. There have been instances wherein financial institutions have declined to provide records requested pursuant to Section 3414. Officials of such institutions have stated that they would produce the requested records only in response to a subpoena. Although the current number of refusals is not high, certain major banks have refused to comply with requests for financial data. Knowledge that these financial institutions will not comply with requests for financial data has in some cases deterred the FBI from making the requests. Thus, as long as Section 3414 is retained in its current form, the FBI and other government agencies may face the obstacle of a recalcitrant financial institution in a foreign counterintelligence investigation. Enactment of this section will ensure that government agencies involved in foreign counterintelligence investigations will have access to financial data relevant to the particular matter being investigated. Congress will continue to receive notice concerning use of this authority through existing reporting provisions as set forth in 12 U.S.C., Section 3421.

Section 602 would provide access by the FBI to tax return information in foreign counterintelligence investigations. Disclosure of tax information by the Internal Revenue Service (IRS) is generally proscribed by §6103(a) of Title 26, United States Code. A variety of exceptions to the prohibition on disclosure of tax information are contained in Sec. 6103. With respect to criminal investigations, tax return information may be released without a court order if the matter pertains to tax administration. Release of tax returns and return information needed in the course of a non-tax criminal investigation must be authorized by a court order. 26 U.S.C., 6103 (i)(1)(A). Release of return information other than taxpayer return information for use in non-tax criminal investigations may be authorized by the Secretary of the Treasury upon receipt of a request from the head of a federal agency involved in enforcement of federal criminal statutes. For example, the Director of the FBI may request such information.

Unfortunately, none of the aforementioned provisions provide any access to tax returns or taxpayer return information in foreign counterintelligence investigations. Access to financial information, including tax returns, is important to investigating espionage activity because recent cases (e.g., Bell, Harper, Barnett) have shown that one important

motive for espionage can be financial gain. While it is possible to obtain tax return information through a court order for use in a criminal prosecution, there are instances where access to tax information is an important investigative aid even though criminal prosecution is not possible or desirable. In many of these cases, the national security interest of the United States is better served by convincing a person engaged in espionage to work against the intelligence service of a hostile government rather than prosecuting the individual. In other instances, there may not be enough evidence developed to anticipate going forward with a criminal prosecution. Enactment of this section will enable the FBI to obtain vital information in foreign counterintelligence investigations not connected with an impending criminal prosecution.

Enactment of this section also will be of vital help to the FBI in preventing the illegal export of high technology items. The buyers and sellers of goods containing advanced technology, the export of which is prohibited, conceal their activities in a series of small shell corporations. The ability of the FBI to trace the flow of money and make comparisons of losses and earnings in order to establish the fraudulence of the transaction and identify the final recipient of goods will be facilitated with access to tax records of individuals and businesses.

Enactment of this section also will be useful in helping the FBI keep track of certain foreign students who are sponsored by foreign governments. These students are required to file with the IRS Form 2063 (US Departing Alien Income Tax Statement), upon departure. These forms are collected in Philadelphia, Pennsylvania and are important to the FBI as a quick means of verifying the exact date of departure of a student. This information is not readily available from other sources. Consultation with officials of the IRS has determined that this information falls within the definition of taxpayer's return information and, therefore, is available only pursuant to a judicial order. Enactment of this section will allow the FBI access to these records without having to obtain a court order.

In summary, enactment of this section would authorize the FBI access, under proper controls, to tax return and taxpayer information of individuals who are subjects of foreign counterintelligence investigations and would allow for the dissemination of this information to other members of the Intelligence Community. Because the FBI can only obtain an individual's return under this section upon a determination by the Attorney General that there is probable cause to believe that a taxpayer is a foreign power or agent of a foreign power, use of this investigative technique will occur only after substantial information has been gathered about the taxpayer's involvement in espionage or activities of counterintelligence interest.

Section 603 provides access by the FBI to telephone subscriber information and toll billing record information from a communications common carrier. The need for this provision has its roots in the difficulties that the FBI encounters in certain areas of the country in obtaining telephone toll record information pursuant to National Security Letters (NSL). Pursuant to an agreement reached approximately ten years ago between the Department of Justice and AT&T, NSL's are utilized in lieu of subpoenas to obtain telephone toll record information in foreign counterintelligence investigations. However, State privacy statutes, as well as court and agency decisions, are causing certain companies, particularly in California, to refuse to honor NSLs. Indeed, decisions of the California Public Utility Commission (PUC) have resulted in no companies in California honoring NSLs . This section would make it mandatory for communications common carriers to produce requested telephone subscriber information pursuant to an NSL signed by the Director of FBI or a supervisory official designated by him. The section also prohibits the disclosure of such a request and authorizes dissemination of information obtained pursuant to this section to other agencies within the Intelligence Community.

Section 604 would authorize the FBI to pay for the expenses necessary to conduct a foreign visitor exchange program. A number of United States Government agencies have foreign visitor programs wherein representatives or foreign agencies travel to the United States as guests of the United States agency to promote international cooperation between the two agencies. These visits are not training programs but rather observation programs to provide foreign visitors with an overview of the United States agency operations in certain areas in order to enhance the foreign United States agency operations in these areas and to foster greater international cooperation between the respective United States and foreign agency. Presently, there is no FBI authorized funding available to sponsor such a program. It is envisioned that this funding will be utilized to pay the expense of bringing to the United States certain Senior Executives who have counterintelligence responsibilities in foreign agencies with which the FBI maintains close contact. These foreign representatives would be invited to the United States to provide them with a thorough overview of FBI operations in areas of mutual interest. These visits also would serve as an exchange program to allow the FBI to gain expertise from that foreign representative.

Section 605 would allow access for the FBI to state and local criminal records for national security purposes similar to the relief that was granted to the CIA, DOD, and OPM in the Intelligence Authorization Act for FY 86. That Act does not include the FBI in its provisions, despite the longstanding

responsibilities of the FBI in the conduct of background investigations. However, the FBI has also faced difficulties in recent years in obtaining criminal records information from state and local agencies for purposes of conducting background investigations, primarily because of state and local legislation triggered by, and similar to, the Privacy Act.

An example of the difficulty in obtaining criminal history record information for purposes of conducting a background investigation can be found in California. The FBI's California offices have been precluded from access to the California law enforcement telecommunication criminal justice information system for the purpose of conducting background investigations because the California Department of Justice has interpreted the State's Freedom of Information/Privacy Acts, which prohibit use of information developed by law enforcement agencies for other than law enforcement purposes, to exclude background investigations from the realm of law enforcement purposes. Even with a release from the applicant, some information on an applicant has been withheld.

Other states have similar laws restricting the use of criminal record information for employment purposes. To date these laws have not been interpreted to preclude FBI access to the records for the purpose of conducting background investigations. There is no guaranty, however, that these states may not someday take a different position. Because the FBI is decentralizing its record keeping practices and state and local authorities have become increasingly responsible for the maintenance and dissemination of their criminal records, a change in position by these states to deny the FBI these records could drastically reduce the ability of the FBI obtain complete criminal record information for background investigations.

To address the current problems and potential concerns stated above, the FBI should be added to those agencies entitled under Section 9101 of Title 5, United States Code, to obtain access to state and local criminal history records. This will ensure that the FBI can adequately fulfill its responsibilities in conducting background investigations.

TITLE VII

DOD ADMINISTRATIVE AND PERSONNEL IMPROVEMENTS

Section 701(a) amends section 624(c) of title 10, United States Code, to delete the requirement for Senate confirmation for appointment to the next higher grade of certain officers on the active duty list who are involved in classified intelligence operations and approved by the President for appointment to grades below O-7 (Brigadier General or Rear Admiral (lower half)).

At present, military officers participating in classified intelligence operations who are otherwise eligible for promotion must, in order to obtain Senate confirmation for promotion to grades above captain or, in the case of the Navy, lieutenant, be identified publicly by name during the confirmation process. Because of this public scrutiny, the officers and the operations themselves may be endangered. As a result, many qualified, dedicated officers recommended for promotion have been, in the interests of national security, unable to be promoted and have lost the corresponding increases in pay and allowances and other privileges and benefits of the higher grade.

This section amends section 642(c) to empower the President to appoint such officers to grades below O-7 (Brigadier General or Rear Admiral (lower half)) after the Secretary of Defense has approved the use of a secure promotion list and the appropriate Service Secretary has determined that the procedures in section 624(c) [redesignated as section 624(c)(1)] would either endanger the officers or compromise the operations in which they are involved, or both. The Secretary of Defense would report at least annually to the Senate and House Armed Services Committees the number of officers so appointed and the grades to which they are promoted.

Section 701 (b) provides that the amendments to section 624(c) are effective on the date of its enactment, but provides for authority to apply the provisions of section 624(c)(2) to any officer recommended for promotion by a selection board convened under chapter 61 (to include a special selection board convened under section 628(a)(1)) on or after September 15, 1981, but who has not been promoted because of concerns that the public scrutiny inherent in the confirmation process would compromise a classified intelligence operation or be dangerous to the officer.

The section further provides for the establishment of retroactive effective dates of promotion for all purposes and establishment of a date of rank and position on the active duty list that such officers would have received had their names been included on the list from which the officer was excluded, and that list was approved by the President and forwarded to the Senate. It may be that a date of rank and position on the active duty list established under this section will result in a situation in which, had the officer originally been promoted under section 624(c) and received that date of rank and position on the active duty list, that officer subsequently would have been within a promotion zone established by the Secretary concerned under section 623 for promotion to the grade next above that to which the officer had been recommended but not promoted to because of security concerns. Section 701(b) provides that such officers, upon promotion under that

section, are, if otherwise eligible, further eligible for consideration by a special selection board convened under section 628(a)(1). If recommended by that selection board for promotion to a grade below brigadier general or rear admiral (lower half), the officer could again be promoted under the procedures established by section 701(a) of this Act, with a date of rank, an effective date for the pay and allowances of that grade, and a position on the active duty list determined under section 628(d)(2).

Section 701(b)(a) further provides that the officers promoted under that section shall not, during the fiscal year in which their promotion is accomplished, be counted against any strength in grade limitation established by law. This section further provides that the Secretary of Defense shall include in the report required by section 701(a) of this Act the number of officers promoted under this section.

Section 701(c) provides that in the event that the appointment of an officer under chapter 61 in the grade in which that officer is currently serving was delayed because of participation in a classified intelligence operation, the Secretary concerned may adjust the date of rank, effective date of promotion for all purposes, and position on the active-duty list of that officer in order to obviate the seniority and pay consequences of that delay. Section 701(c) further provides that in the event that the officer would have been in a promotion zone to the next higher grade established by the Secretary concerned under section 623 had that officer been promoted without such delay, the officer, if otherwise eligible, is further eligible for consideration by a special selection board convened under section 628(a)(1). If recommended by that selection board for promotion to a grade below brigadier general or rear admiral (lower half), the officer could be promoted under the procedure established by section 701(a) of this Act, with a date of rank, an effective date for the pay and allowances of that grade and a position on the active-duty list determined under section 628(d)(2).

Section 701(d) establishes a procedure whereby the Secretary concerned may, in order to effectuate actions taken pursuant to sections 701 (b) or (c), correct the records of the officers concerned without reference to a Board established under section 1552 and without application by the officers concerned. Such a correction is binding upon all officers of the United States, and, since a retroactive or adjusted effective date of promotion would entitle the officer concerned to back pay and allowances, such a correction would authorize the expenditures, from applicable current appropriations, for such pay and allowances.

Section 701(e) establishes an expiration date of September 30, 1987 for the authority provided by section 701(b) - (d) to take corrective actions in the case of officers who were not promoted or whose promotions were delayed because of security concerns. Since section 701(a) provides a permanent mechanism to effectuate the future promotion of officers engaged in classified intelligence operations whose promotions have not as of the date of this Act, been effected by security concerns. The special corrective provisions of sections 701(b)(d) are not needed on a permanent basis.

Section 702 seeks to extend by two fiscal years the termination authority of the Secretary of Defense with respect to the employment of any civilian officer or employee of the Defense Intelligence Agency (DIA). Subsection 501(a) of the Intelligence Authorization Act for FY85, P.L. 98-618, authorized the Secretary of Defense to exercise the above termination authority whenever such an action was considered by him to be in the best interests of the United States and he determined that the termination procedures otherwise authorized by law could not be "invoked in a manner consistent with the national security." As enacted, paragraph 1604(e)(1) of chapter 83 of title 10, United States Code, extended this authority to the Secretary of Defense for fiscal years 1985 and 1986. The regulations which were subsequently written to implement this authority have been finalized within DIA and they are now in the final stages of OSD coordination. The extension of authority is being requested so as to allow DIA an opportunity to have two full fiscal years of experience under the implementing regulations. Then, as the end of the extended time period draws near, a determination can be made as to whether the termination authority should be modified and/or enacted into permanent authority.

Section 703 addresses a provision included in the FY85 Intelligence Authorization Bill designed to markedly enhance Defense Intelligence Agency's (DIA) capabilities to structure attractive and flexible career opportunities for its civilian professional intelligence work force. This earlier legislation provided authorities parallel to those enjoyed by the Central Intelligence Agency and the National Security Agency, thereby eliminating a major disadvantage that had affected DIA's ability to attract top quality careerists. The operative effect of the legislation was to exempt DIA from the requirements of the Classification Act, allowing DIA to factor in the individual circumstances of the person in the job in determining grade and revise standards to reflect the changing intelligence environment of the second half of the 1980's and the 1990's. In addition, the legislation facilitated the separation of civilian employees when such separation is deemed to be in interests of the United States and consistent with the national security.

Section 703 is intended to improve the management of civilian intelligence personnel within the military departments and to correct actual personnel management system inequities and disparities existing within the Department of Defense intelligence community. Notwithstanding the fact that the military departments' intelligence collection and production requirements have become more and more demanding and the military departments exercise varying degrees of intelligence collection and production responsibilities as vital contributors to the Intelligence Community-wide intelligence effort, they continue to labor under the restrictions of the Classification Act. That Act hinders the military departments' efforts to create viable and competitive professional alternatives for their civilian intelligence officers and employees. With regard to their civilian intelligence officers and employees, the military departments simply do not have the flexibility in personnel matters enjoyed by CIA, NSA, and DIA under applicable statutes. As a consequence, the military departments have been significantly handicapped in their ability to recruit and reward outstanding analysts and other intelligence specialists and employees, and otherwise to operate an equally effective civilian personnel system. Consequently, military intelligence management of the collection, processing, analysis, and dissemination processes is at a decided disadvantage. As a functional equivalent within the defense and national intelligence communities, the need exists for equivalent intelligence management and functional authorities to be vested in and retained by the military departments. Enactment of this legislative proposal will allow the military departments to create a flexible, viable, and attractive civilian personnel management system.

Specifically, enactment of this legislative proposal would create conditions that would promote continuous modernization of military intelligence civilian position classification and qualification standards to keep pace with: intelligence consumer expectations for increased quantity and enhanced quality of intelligence products; the impact of new technologies and initiatives upon intelligence management, collection, processing, and dissemination methodologies; and, Service intelligence reorganizations that are driven by emerging intelligence collection and production imperatives. Moreover, enactment of these provisions would allow the Services to implement de facto multi-tracked career and training programs for its civilian intelligence officers and employees and invest "rank in the person" rather than in the job in which the civilian intelligence officer or employee serves as the incumbent.

All of the authority vested in the Secretary of Defense by P.L. 98-618 with regard to the Defense Intelligence Agency remains unchanged. This legislative proposal represents a straight forward extension of 10 U.S.C. 1604 authorities to the military departments.

The effect of amendments to 10 U.S.C. 1604 (a) through (e), as outlined above, would be to authorize the Secretary of Defense, delegable only to the Secretaries of the military departments, to establish a flexible personnel management system for those personnel who are not in the Senior Executive Service of the military departments. The phrase "civilian intelligence officers employees" encompasses those individuals who perform an intelligence function, i.e., the majority of the incumbent's time is spent advising, administering, supervising, performing, or supporting work in the collection, processing, analysis, production, evaluation, interpretation, dissemination or estimation of intelligence information, or in the planning, programming, and management of intelligence resources. Salaries and pay of such individuals would be fixed in relation to the General Schedule and Wage Grade (prevailing rate) system. A flexible classification system would be established which would incorporate the concept of both position classification and rank in the person. The system would be structured to permit assignment, movement, and career development without cumbersome classification and related administrative procedures.

Subsection 703(a) contains a number of amendments to U.S.C. 1604. It amends 1604(a) to authorize the Secretary of Defense to establish civilian intelligence positions in the military departments and to appoint individuals to such positions, without regard to civil service requirements.

Subsection 1604(b) is amended to authorize the Secretary of Defense to fix pay for positions established under subsection (a) in relation to the General Schedule (GS) rates.

Subsection 1604(c) is amended to authorize a prevailing rate system of basic compensation for positions in or under which the military departments may employ individuals in a trade, craft, or manual occupation.

Subsection 1604(d) is amended to authorize additional compensation for civilian intelligence officers and employees of the military departments stationed outside the continental United States or in Alaska at rates not to exceed those authorized by 5 U.S.C. 5941(a). Such allowance shall be based on living costs substantially higher than in the District of Columbia or conditions of environment which differ from those in the continental United States.

Subsection 1604(e) authorizes the Secretary of Defense to delegate the authority contained in Subsection 10 U.S.C. 1604(a) through (d) to the Secretaries of the military departments for purposes of taking appropriate civilian personnel management actions with respect to civilian intelligence officers and employees of the military departments.

Newly designated subsection (f) of section 1604 as amended by 703(a) of the bill, authorizes the Secretary of Defense, during fiscal years 1987 and 1988, to terminate employment of any civilian intelligence officer or employee of the military departments whenever he considers that action to be in the interests of the United States and he determines that the procedures prescribed in other provisions of law that authorize the termination of such employment cannot be invoked in a manner consistent with the national security. Termination authority may be delegated only to the Secretaries of the military departments. Termination action would be appealable to the Secretary of Defense whose decision would be final.

Subsection (f) is designed to facilitate, while preserving basic due process, the removal of personnel whose performance or security suitability is demonstrably unsatisfactory or unacceptable, or who are otherwise impairing the effective performance of the military departments' intelligence mission. The intelligence environment requires suitability and unusually high standards of performance to ensure the accuracy and reliability of intelligence product. Tolerance of unsatisfactory performance or security suitability is necessarily low. The flexibility granted by this provision would relieve the military departments from the external public review procedures to which preference eligible individuals would otherwise be entitled upon appeal to the Merit Systems Protection Board. The termination system instituted under subsection (f) would provide strict safeguards to assure internal appeal to the Secretary of Defense thereby ensuring equity and consistency. The Secretary of Defense is required to notify the intelligence committees of each instance in which the termination authority is exercised. The termination authority is limited in duration. It is so designed to provide an opportunity to assess the use made of the authority during a two year period in order that an informed decision can be made as to whether the authority should be made permanent.

Section 704 clarifies and makes permanent statutory authority for the Department of Defense, through the Defense Mapping Agency (DMA), to conduct mapping activities in foreign countries. Currently, DMA has 185 international executive agreements with 75 countries concerning the exchange, collection, and production of mapping data. Some of these agreements have been in existence since the early 1940's. Specifically, these agreements permit (1) the exchange of maps, charts and other geodesic information, (2) co-production and collection of mapping data, (3) loan of DMA equipment, such as gravimeters and doppler satellite tracking gear, so that foreign mapping agencies can produce raw data more efficiently and accurately, (4) training in equipment use by DMA of foreign personnel, and (5) access to foreign countries, either directly by DMA or through surrogate countries.

DMA finds it necessary to deal with foreign map agencies to the extent that overhead systems cannot provide accurate cartographic data. To fill the gap, DMA will send a team to do what is required to map that area. However, the cost of sending U.S. personnel has been prohibitive; it is far less expensive to use local foreign mapping agencies. When local mapping personnel are used, the U.S. sends them the specialized equipment and provides the necessary training as set forth in the executive agreement.

Therefore, the U.S. saves a good deal of money by the use of foreign locals rather than sending U.S. persons to do the job. In the exchange, the U.S. gets significant raw mapping data as well as access to the territory of another sovereignty. Some executive agreements even provide for the acquisition of new mapping data through surrogate countries. Over the years this has been a low cost, reliable and convenient way for DMA to fulfill its intelligence mandate. It should also be emphasized that in many instances that this is the "only" way to get mapping data from foreign countries. In addition to the substantial savings in using local foreign personnel, it is estimated that the data and other materials provieed to the United States through such agreements is valued in excess of $80 million annually.

However, the authority of DMA to engage in such executive agreements with other countries has been called into question. Technically, DMA lacks explicit statutory authority to engage in these agreements. Currently it relies exclusively on executive Constitutional authority as the basis for such agreements. But changes in statutory law have introduced an element of uncertainty in DMA's reliance on Constitutional authority. Public law (P.L. 97-113) prohibits no-cost loan of defense (DMA) equipment. In addition, both the Arms Export Control Act and the Foreign Assistance Act require foreign governments to reimburse the Defense Department for any foreign training. Neither the cost avoidance of using foreign locals over United States personnel, nor the $80 million valuation of data provided by foreign countries is calculated as reimbursement. In combination these laws render DMA's exclusive reliance on the Constitution as the legal basis for these international executive agreements somewhat uncertain.

To remedy this uncertainty, DMA seeks limited statutory authority to continue to exchange mapping data, supplies and services with foreign countries.

Section 705 provides the Defense Intelligence Agency (DIA) with authority to pay for necessary medical evacuations of DIA civilian employees stationed overseas. Section 501 of the Intelligence Authorization Act for FY84, P.L. 98-215, authorized allowances and benefits for certain employees of DIA stationed

overseas comparable to those provided to officers and employees of the Foreign Service serving overseas. However, the authority to pay the costs or expenses incurred for a medical evacuation of a civilian employee when there is no suitable person or facility in the overseas locality to provide the necessary medical care was not included in the list of benefits provided by section 501. This authority was reenacted as Section 1605 of Title 10 by subsection (a) of Section 1302 of the Department of Defense Authorization Act, 1986, P.L. 99-45, but the medical evacuation authority was again omitted. This authority is not only currently available to Foreign Service officers and employees, but also to CIA and NSA civilian employees (see section 4 of the CIA Act of 1949, 50 U.S.C. 403(e) and paragraph 9(b)(1) of the National Security Agency Act of 1959, 50 U.S.C. 402 note, respectively). While it is fortunate that there is rarely the need to have such an authority, DIA has experienced necessary medical evacuations of its civilian employees stationed overseas. Should similar circumstances arise in the future, payment for medical evacuation of DIA civilian employees should be handled on the same basis as for other civilian intelligence and diplomatic employees similarly situated.

Section 706(a) amends chapter 57 of title 10, United States Code, to authorize members of the armed forces to accept cash awards for exceptional performance of duty while engaged in the collection or reporting of sensitive foreign intelligence information. Under the Intelligence Exceptional Collector National HUMINT Award Program established by the Director of Central Intelligence Community in March 1985, each component of the Intelligence Community is authorized to nominate military or civilian personnel (a maximum of four each fiscal year) whose achievements constitute either extraordinary intelligence reporting or particularly fruitful collection activities directly affecting United States national security policy. Nominees approved by the Director of the Intelligence Community Staff and the Director of Central Intelligence may receive awards of up to $5000.

Section 5536 of title 5, United States Code, prohibits Federal civilian employees or military personnel from accepting additional pay or allowances for performing their official duties unless the disbursement is specifically authorized by law. Section 4503(2) of title 5, United States Code, provides the authority to make incentive awards to civilian employees who perform special acts or services in connection with their official employment. In contrast, cash awards to military personnel are limited to those recognizing individuals whose "suggestion, invention or scientific achievement contributes to the efficiency, economy or other improvement of operations or programs relating to the armed forces." (10 U.S.C. 1124(a)).

Thus, under existing law, civilian employees may accept cash awards under the Intelligence Community Exceptional Collector National HUMINT Award Program, but military personnel may not. Enactment of this proposal will eliminate the disparity in treatment of civilian and military personnel engaged in the collection and reporting of foreign intelligence.

Subsection 706 (b) authorizes payment of cash awards for achievements while on active duty in the armed forces even if the member dies, separates or retires before approval of the award.

TITLE VIII

RESTRICTIONS ON ASSISTANCE TO FOREIGN POWERS BY FORMER INTELLIGENCE OFFICERS OR EMPLOYEES

Section 801 would amend the National Security Act of 1947 to prohibit former officers and employees of the U.S. Intelligence Community from assisting foreign powers in certain circumstances without approval.

I. Purpose of Legislation

The purpose of this legislation is to preserve and promote the integrity of former members of the United States Intelligence Community, to maintain and enhance the confidence of the public in the Intelligence Community, to avoid real and apparent conflict of interest and to protect intelligence-related information from disclosure.

This bill would amend the National Security Act of 1947 as follows:

a. Employees within the Intelligence Community would be barred for a period of two years from directly or indirectly accepting employment, entering into any advisory, financial or other relationship with a designated foreign power without written approval to do so; or providing guidance, advice or information concerning intelligence, or information derived from or directly related to an officer's or employee's former position within the Intelligence Community to a designated foreign power without written approval to do so;

b. Heads of departments or agencies could exempt classes of employees from this prohibition;

c. Nonexempt employees would be required to seek approval from their former employing agency, and the head of the agency could in his or her discretion approve or disapprove such application;

d. Employees who had been granted approval to enter into such arrangements would have a continuing duty to inform their former agency of their status with the foreign power;

e. This title would provide for criminal penalties of not more than $10,000, or imprisonment for no greater than two years for violation of the Act's provisions;

f. This title would also provide for injunctive relief to compel former employees to comply with its provisions.

g. Each agency within the Intelligence Community would be required to promulgate regulations to carry out the provisions of the Act;

h. This title would have extraterritorial jurisdiction;

i. For the purpose of this title, a designated foreign power is defined to include all foreign countries, foreign political parties, all governments in exile and would include any quasi-governmental, international or multinational organization.

II. Need for Legislation

Existing conflict of interest statutes, post-employment restrictions, espionage statutes and contractual secrecy agreements binding members of the intelligence community fail to provide adequate safeguards to insure that former officers and employees of the intelligence community do not enter into damaging relationships with foreign powers. The post-employment restrictions found in 18 U.S.C. 207 merely prohibit a former employee from taking a representational role on behalf of another in regard to specific matters in which he, or employees under his supervision, had personal and substantial involvement as a government employee. Although the espionage statutes prohibit the unauthorized disclosure of classified information, they do not prohibit relationships which might lead to the disclosure of information, nor do they prohibit the disclosure of unclassified, yet sensitive and damaging information. Contractual secrecy agreements with former

employees require only that employees submit materials for prepublication review, and at best provide for relief under principles of contract law. As a result, former employees of the intelligence community are free to enter into employment and advisory relationships with real or potential hostile powers, and, if they are willing to risk uncertain civil penalties, share unclassified yet non-public and sensitive intelligence information with hostile powers, and trade in intelligence-related professions when it is not in the interest of the United States for them to do so.

Recent incidents evidence a need for remedial legislation:

- Former intelligence employees Edwin Wilson and Frank Terpil established consulting and commercial relationships with hostile governments shortly after their departure from the government. In both cases, they apparently gained their initial footholds on the basis of their recent employment by United States Intelligence

- A former CIA analyst served as an "expert witness" before the World Court, supporting the Nicaraguan Government's claim against the United States. His testimony was carefully crafted to exclude references to classified information and couched as "extemporaneous statements" to avoid prepublication review.

- Two former members of the Army's Delta Force were approached by representatives of a Honduran junta to provide security services. The two former officers were initially unaware that the group represented a political faction which was planning to assassinate the President of Honduras. Although in this case the former officers were entirely blameless, their apparent availability placed them in a potentially compromising position.

In each of these cases, a temporary bar on employment or advisory relationships with foreign powers could have delayed or possibly thwarted potentially damaging relationships. At the minimum, this legislation would assure the public that such relationships should not exist in the future, and thus enhance public faith in government.

a. Need for a Two-Year Ban

Intelligence information, both raw intelligence and information concerning intelligence methodologies, has both a temporary and long-term value. This bill attempts to minimize the potential harm to the United States while minimizing the intrusion into the post-employment activities of former intelligence officers by addressing the temporary component.

We believe that it is necessary to place controls on the trafficking of information and skills of immediate value for purposes of obtaining employment or financial gain with a foreign power. Accordingly, although the bill would permit former employees to eventually seek employment with or establish relationships with foreign powers, situations which present the potential for the most serious damage would be subject to approval and control.

From the viewpoint of an employee who plans to establish a benign or positive relationship with a foreign power, the bill would create only a minor intrusion into his private affairs, requiring approval for only a two-year period.

b. Need for Exemptions for Classes of Employees

The bill is intended to restrict the post-employment activities of employees whose particular skills or access to information could be exploited by hostile governments. It is likely, however, that some classes of employees of the Intelligence Community would pose no current or potential threat to the national interest. In order to avoid an unnecessary and unwarranted restriction on the post-employment activities of these employees, and to avoid clogging the approval mechanism with unnecessary paperwork, we believe that the legislation should permit exemption of classes of employees, and that a decision to waive the reporting requirements should be left to the discretion of each agency head.

c. Need for Discretionary Authority to Approve or Disapprove Requests

Absolute discretionary authority to approve or disapprove requests is an essential element of this legislation. Because of the temporal value of relationships based on former intelligence service, agencies must have the authority to bar such relationships, free from the prospect of delay arising out of administrative appeal and judicial review. Decisions as to what relationships might constitute dangers to the national security are properly left to the heads of intelligence agencies who have access to, and knowledge of, information concerning the potential threat powed by the employment under consideration, the details of the employee's duties and access to information, and an appreciation and understanding of how the two interrelate. Just as intelligence heads have the sole discretion to identify intelligence sources (see, U.S. vs Sims) it is essential that they have the non reviewable authority to identify and bar potential threats to those intelligence sources and methods.

d. Need for Continuing Duty to Report

Because a change in the specific activities of an individual, or a change in scope of his activities could affect the determination as to whether a relationship poses a threat to the Intelligence Community, former employees must have an obligation to report material changes in the circumstances surrounding their relationship with a foreign power. In order to insure timely transmittal of this information, these reports must be made promptly.

e. Need for Both Criminal Penalties and Injunctive Relief

Because relationships with foreign powers offer significant financial rewards, and because certain relationships may result in serious damage to the national security, civil damages would be ineffective and inappropriate for violations of the bill's approval and reporting requirements. However, because damage once done could not be repaired, we also see a need for injunctive relief to enjoin a former employee from entering into non-approved relationships. We also see a need for civil remedies to provide a means to both obtain information and to provide a mechanism to assure that the statute is carried out as written.

f. Need for Extraterritorial Jurisdiction

By their very nature, relationships with foreign powers are likely to have been created and maintained outside of the territory of the United States. Extraterritorial jurisdiction is necessary to reach the majority of acts which the legislation seeks to control.

II. Section-by-Section Analysis

Subsection 801(a) establishes a new requirement for employees of the Intelligence Community to obtain approvals to engage in certain activities during the first two years following their separation from an agency within the Intelligence Community. A former employee would be required to seek advance approval before directly or indirectly entering into the following:

> Employment with a foreign power, an advisory relationship with a foreign power, a financial relationship with a foreign power; or;
>
> providing aid, services or assistance to a foreign power, or;

providing guidance, assistance or information to a foreign power concerning intelligence, or information derived from or directly related to his former position within the Intelligence Community.

Under this section, former employees would be required to seek advance approval before they negotiated for employment with a foreign power, before supplying any consultative services to a foreign power, or before serving as a paid or unpaid spokesman or witness for a foreign power.

Subsection (b) exempts officers or employees of the government who act in the course of their official duties.

Subsection (c) authorizes each head of an intelligence agency to waive the provisions of subsection (a) for any particular person or class of persons. The agency head's actions are discretionary and nonreviewable.

Subsection 802(a) establishes the requirement to seek prior approval to enter into relationships or engage in activities otherwise prohibited by section 801. Section 802(a) defines the reporting requirement and sets forth the minimum information required to be included in a request for approval.

Subsection (b) establishes the criteria for approval: that an activity will not involve the unauthorized disclosure or use of classified information and that it will not be inconsistent with national security. The authority to approve is discretionary with the agency head, not reviewable, not appealable.

Subsection (c) states that approval to engage in an activity does not affect any potential civil or criminal liability. Accordingly, application of the conflict of interest statutes, 18 U.S.C 201-209 is not affected, nor are secrecy agreements between the government and its former employees.

Section 803(a) establishes a continuing duty to report for each year during which a financial relationship or activity continues. This duty to report extends only through the first two-year period following separation from the intelligence community.

Subsection (b) establishes a duty to report material changes in the circumstances affecting the relationship or activity and requires former employees to file such reports within 10 days of the occurrence of a change in circumstances. On review of the updated report, the head of the agency involved may require the former employee to reapply for approval to engage in the relationship or activity. If the head of the agency declines to approve the activity, the employee must terminate the activity within 10 days.

Subsection (c) establishes the requirement to file a termination report within 30 days of the termination of a financial relationship or activity. Subsection (d) sets forth the authority of the agency head to require employees to provide additional information to permit him to carry out the provisions of the bill.

Subsection 804(a) defines a continuing offense for failure to file reports required by section 803.

Subsection (b) defines as unlawful the making of false, or untrue statements or the omission of material facts.

Subsection (c) defines as unlawful the omission of required information.

Subsection 805(a) establishes criminal penalties for willful violations of sections 801, 802(a), 803, and 804. This subsection permits a defendant to claim as a defense that he had no actual knowledge of the bill's requirements.

Subsection (b) sets forth jurisdiction in the district courts for injunctive relief to require compliance with the bill's reporting requirements or compliance with any of the bill's other provisions. The intent of this section is to permit the district court to enjoin a former employee from entering into or continuing an unapproved activity. Proceedings under this subsection will be expedited by the court.

Section 806 requires the various agencies to issue regulations to carry out the provisions of the bill.

Section 807 establishes extraterritorial jurisdiction. Jurisdiction is conferred on the district court over citizens and permanent resident aliens.

Section 808 provides definitions. For the purpose of the bill, "intelligence agency" includes executive intelligence agencies, and the Senate Select Committee on Intelligence (SSCI) and House Permanent Select Committee on Intelligence (HPSCI). The term "designated foreign power" is defined to include foreign governments, all political subdivisions of such governments, political parties of foreign governments, governments in exile, international or multinational organizations composed of foreign governments, or an agent or representative of a foreign government.

TITLE IX

UNAUTHORIZED DISCLOSURES OF CLASSIFIED INFORMATION

Section 901 adds a new section to the National Security Act of 1947 (50 U.S.C. 401 et seq.) prohibiting certain unauthorized disclosures of classified information.

Proposed Section 901 provides criminal penalties for willful unauthorized disclosure of classified information by current or former federal employees and others, such as government contractors, who have or have had authorized access to classified information. With the narrow exceptions of unauthorized disclosures of atomic energy Restricted Data, communications intelligence and cryptography information, and the identities of covert agents, willful unauthorized disclosures of classified information by those entrusted with it by the government are not per se offenses under existing federal criminal statutes.

Subsection (a) of 901 prohibits willful disclosure or attempted disclosure of classified information, by a federal civilian or military officer or employee or other person with authorized access to such information, to any person who is neither a federal civilian or military officer or employee nor a person with authorized access to such information. The subsection provides criminal penalties of not more than five years imprisonment or a $25,000 fine, or both, for each violation.

Subsection (a) also prohibits unauthorized disclosures by persons who previously have been officers or employees of the United States, and to persons who have had authorized access to classified information. This retroactive feature is important to ensure that criminal liability under the proposed section is not evaded by an individual who begins to make unauthorized disclosures after government service or authorized access has ceased.

Subsection (b) of 901 applies to a current or former federal civilian or military officer or employee, and to any other person who has or has had authorized access to classified information, who aids or abets another such person in the unauthorized disclosure of the information, directly or indirectly such as through a chain of intermediaries, to a person who is neither a federal civilian or military officer or employee, nor a person with authorized access to the classified information. The criminal penalties for such an offense are identical to those provided for the offense defined in subsection (a).

Subsection (c) of 901 provides definitions for terms employed in subsections (a) and (b). Subparagraph (i) defines "classified information" to consist of information or material that has been determined by the United States Government to require protection against unauthorized disclosure for reasons of national security pursuant to a statute, Executive Order, or litigation. It is intended that prosecutions would be barred unless a person has clear notice or reason to believe the information disclosed was classified. Subparagraph (ii) defines the term "disclose," or "discloses," to include all forms of disclosure enumerated in the existing provisions of 18 U.S.C. 793-798 and 50 U.S.C. 426, 783. Subparagraph (iii) defines the term "authorized access" to include authority or permission to receive information within the scope of authorized government activities or pursuant to the routine security clearance processes of the Executive branch, orders of the courts of the United States, or rules of either House of Congress.

Subsection (d) of 901 assures that no criminal liability will attach under subsections (a) or (b) to otherwise lawful disclosures of classified information to the Congress or the courts.

Subsection (e) (i) assures that no criminal liability will attach when the information previously has been disclosed publicly by U.S. government officials authorized to do so. Subsection (e) (ii) further permits a defendant to assert as a defense that the information disclosed was not information that was obtained as a result of employment or to which he or she had authorized access as defined in the bill. Subsection (e) (iii) allows a defendant to assert as a defense the good faith publication based upon prior U.S. Government review of the information pursuant to a request from the defendant for prepublication or declassification review. Prosecution would be barred if the defendant has submitted the information for review, pursuant to an express agreement providing for prepublication review or otherwise, and has been notified by the Government that is has no objection to the disclosure or declassification on national security grounds, or if the U.S. objection or denial of declassification has been overturned by a federal court decision that is final.

Subsection (f) is designed to ensure that no prosecutions may occur unless the Attorney General and the head of the department or agency with responsibility for the classified information concerned have certified that the information disclosed constitutes properly classified information. Such certifications shall be final and unreviewable, and shall be conclusive indication that the information constitutes information that properly meets the criteria for a specific level of classification under statute or Executive Order.

However, a defendant may challenge the propriety of the classification by showing that the information was available and obtained from public sources prior to the defendant's disclosure. In such cases, the United States shall be provided an opportunity to establish that the information nevertheless remained properly classified despite its availability from public sources, because it had not been officially disclosed or confirmed by the United States. A defendant also may challenge the classification by making a prima facie showing, based upon personal knowledge or otherwise admissible evidence, that the information was improperly classified by the U.S. at the time of the defendant's disclosure because it did not meet the substantive criteria for classification called for by applicable statute, order, or directive. It is intended by this subsection that, upon the requisite showing by a defendant, the United States shall justify the propriety of the classification, in camera ex parte, by showing the damage that, at the time of the defendant's disclosure, reasonably could be expected from disclosure. Thus, a prosecution could not be maintained under this section if a defendant discloses certain information that is available from public sources because of a prior unauthorized disclosure, unless the United States can establish that, at the time of the disclosure, the additional disclosure of the information or confirmation by a person with authorized access reasonably could be expected to cause damage to the national security. Further, no prosecution could be maintained if, after a prima facie showing by the defendant that classification was arbitrary or otherwise improper, the court rules in defendant's favor. Finally, the provision for in camera, ex parte consideration of the propriety of the classification is intended to permit the court to determine the issue without exposing additional classified information to persons not authorized to have access to such information. It is intended that the court's examination on the matter shall be de novo in accordance with the standards for review established under the Freedom of Information Act. The court's determination on this issue is to be conclusive on the propriety of the classification, and is a matter of law.

Subsection (g) provides the United States the right to an interlocutory appeal from any adverse ruling by the court on the propriety of the classification. This provision enables the issue to be resolved before submitting the case to trial, and parallels the provision for interlocutory appeal contained in the Classified Information Procedures Act. It is intended, moreover, that the provisions of that Act also will be available to ensure the protection of classified information from unauthorized disclosure.

Subsection (h) provides that prosecutions may be commenced even if the disclosure that provides the basis for prosecution under the bill is made outside the territorial jurisdiction of the United States.

TITLE X

GENERAL PROVISIONS

Section 1001 makes clear that, with the exception of any specific legislative authorities which may be contained in the Intelligence Authorization Act for Fiscal Year 1986, the Act is intended only to authorize appropriations and does not constitute authority for the conduct of any intelligence activity prohibited by the Constitution or laws of the United States.

Section 1002 authorizes the increase of appropriations authorized by the Act for salary, pay retirement, and other benefits for federal employees as necessary for increases in such benefits authorized by law.