



DEFENSE INTELLIGENCE AGENCY

WASHINGTON, D.C. 20340

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SUBJECT: Intelligence Authorization Act 1991

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**DEFENSE INTELLIGENCE AGENCY**

WASHINGTON, D.C. 20340-

**29 NOV 1989**

U-532/GC

MEMORANDUM FOR:

[Redacted]  
Office of Legislative Affairs  
Central Intelligence Agency

SUBJECT: Intelligence Authorization Act 1991

1. Per your 20 October 1989 request, attached are DIA's submissions.
2. The proposals include draft language, section-by-section analysis, and cost data.
3. The proposals do not include the previously submitted provisions for DIA Foreign Language Proficiency Pay, DIA Acquisition of Critical Skills, and DIA Overseas Personnel Benefits Comparability, all of which are included in the recently enacted FY-90 Intelligence Authorization Act.
4. The submitted proposals are:
  - A. Non-official Cover Authority
  - B. Training of Certain Foreign Personnel
  - C. Acquisition of Foreign Material
  - D. Employee Tax Equalization
5. Each proposal has been previously coordinated within DoD.

1 Enclosure a/s

[Redacted]  
Assistant General Counsel

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ENCLOSURE

A. Non-Official Cover Authority:

1. Statutory Language

SEC. XXX. Chapter 21 of Title 10, United States Code is amended--

(a) by inserting after the chapter heading the following:

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(b) by adding at the end of the following:

"SUBCHAPTER II -- COMMERCIAL ACTIVITY

201. Authority to engage in commercial activity.

The Secretary of Defense, consistent with this subchapter, may engage in certain commercial activities and expend appropriated funds as may be necessary for their operation for the purpose of providing cover or security for the conduct of foreign intelligence collection or other operational activities undertaken by the Department of Defense. Such activities shall be coordinated with, and, where appropriate, be supported by, the Director of Central Intelligence, and, to the extent such activities take place within the United States, with the Director of the Federal Bureau of Investigation.

202. Definition of "commercial activities".

For purposes of this subchapter, the term "commercial activities" means activities undertaken by Department of Defense, its elements or its personnel consistent with existing commercial practice and includes the acquisition, use, sale, storage and disposal of goods and services; entering into employment and other contracts, leases, and other agreements for real and personal property; depositing funds into, and withdrawing funds from, domestic and foreign commercial businesses or financial institutions; and acquiring licenses, registrations, permits, and insurance.

203. Use and disposition of funds.

Funds generated by commercial activities authorized pursuant to this subchapter may be used to offset necessary and reasonable expenses arising from such activities, with the remainder to be deposited into the Treasury on a periodic basis as miscellaneous receipts. The disposition of such funds shall be

audited at least annually by the intelligence element concerned.

204. Relationship with other federal laws.

(a) Except in accordance with subsections (b), (c), and (d) commercial activities conducted pursuant to this subchapter shall be carried out in accordance with applicable federal law.

(b) Commercial activity undertaken pursuant to this subchapter shall not be subject to provisions of law or regulation otherwise applicable to the activity of federal agencies, as described in subsections (c), and (d) if the Secretary of Defense, or his designee (who may be of no lower rank than an Assistant Secretary of Defense or a Secretary of a Military Department) determines in writing that a commercial activity is required to enhance security, protect intelligence sources and methods or otherwise enhance cover or facilitate authorized intelligence activities of the Department of Defense.

(c) Provisions of law or regulation which shall not be applicable to the conduct of commercial activity as a result of a determination made under subsection (b) shall include but are not limited to, administrative and financial requirements pertaining to: receipt and use of nonappropriated funds; the acquisition or management of property or services; information disclosure, retention, and management; federal contract or tort liability; government employment and operations including travel, conflicts of interest and standards of conduct; the establishment of legal entities or government instrumentalities; and foreign trade or financial transaction restrictions.

(d) If the Secretary of Defense or his designee makes a determination under 204b of this Subchapter that a commercial activity is required to enhance security, protect intelligence sources and methods or otherwise enhance cover or facilitate authorized intelligence activities of the Department of Defense, such determinations, and all aspects of the commercial activity so authorized are:

(1) specifically required to be withheld from public disclosure under the provisions of 5 USC 552 (the "Freedom of Information Act");

(2) specifically exempted from the provisions 5 USC 552a. (the "Privacy Act"), and;

(3) specifically exempted from the provisions of 5 USC 552b (the "Government in the Sunshine Act").

205. Relationship to the laws of other jurisdictions.

(a) Commercial activity undertaken pursuant to this subchapter shall be carried out in accordance with applicable state and local law and the activities may comply with the fiscal,

taxation and other laws and shall submit to the court jurisdiction of a foreign nation, any of the several States, the District of Columbia or any territory, commonwealth or possession of the United States, to the extent necessary to protect intelligence sources, methods or activities from unauthorized disclosure without abrogating the immunity of the United States.

(b) (1) In order to establish and operate the commercial activities authorized by this subchapter, the Secretary of Defense, or his designee is authorized to engage or retain private attorneys and accountants authorized to practice in the jurisdiction where the commercial activity is to be established, to provide the legal and accounting services necessary to establish, operate and represent such commercial activities in the jurisdiction concerned.

(2) The Secretary of Defense or his designee shall insure that the private attorneys or accountants under the provisions of Section (b)1 have appropriate security clearances and have been informed of the nature and purpose of the commercial activity.

(3) The Secretary of Defense is authorized to compensate the attorneys and accountants thus engaged or retained consistent with prevailing commercial practice and consistent with the authorities granted by this sub-chapter. Such compensation may be authorized from appropriated funds or by funds generated by the commercial activity initiated.

#### 206. Limitations.

(a) Nothing in this subchapter authorizes the conduct of any intelligence activity which is not otherwise authorized by law or Executive order.

(b) Nothing in this subchapter authorizes any activity within the United States which would be inconsistent with existing commercial practices, or which violates any federal or state statute.

(c) Personnel conducting commercial activity authorized by this subchapter may not engage in intelligence activities within the United States other than those activities necessary to:

(1) support Department of Defense intelligence collection activities outside the United States;

(2) support counterintelligence activities within the United States, if those counterintelligence activities have been previously coordinated and authorized by the FBI, and;

(3) support intelligence or other special access programs of the Department of Defense.

(d) Commercial activity may not be undertaken within the

United States for the purpose of providing goods or services to the Department of Defense, other than to provide cover or security for the activities subject to this subchapter. This limitation specifically does not otherwise limit the authorities provided by Sec 202 of this subchapter.

(e) A citizen of the United States or an alien admitted to permanent residence in the United States may not be employed by, or assigned or detailed to perform operational, managerial, or supervisory duties for an entity engaged in commercial activity authorized by this subchapter unless that person has been informed of the purpose of such activity.

#### 207. Regulations, Oversight, and Legal Review.

The Secretary of Defense shall issue regulations to implement the authority contained in this subchapter within 180 days of its enactment. Such regulations shall require oversight and legal review in compliance with established intelligence oversight procedures. Legal review of all activities will be accomplished by the General Counsel of the Defense Department or the Defense Intelligence Agency. Copies of such regulations shall be provided to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives prior to their issuance.

#### 208. Reports.

Not later than January 15 of each year, the Secretary of Defense shall submit to the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives a report on commercial activity authorized pursuant to this subchapter undertaken during the previous fiscal year. Such report shall include a description of any exercise of the authority provided by section 204 to the Secretary of Defense, or his designee, as well as a description of any expenditure of appropriated or non-appropriated funds made pursuant to this subchapter."

### 2. Analysis

This Legislation gives the Department of Defense authority to engage in commercial activities for cover purposes. It is similar to the authorities granted the Central Intelligence Agency and the Federal Bureau of Investigation. It provides for exemption from various federal statutes, the requirements of which are inconsistent with a bona fide private commercial activity. Moreover, if the federal statutes were complied with, the operational security of the cover for the DoD activity would be compromised. The proposal provides for commercial activities that are bona fide and that can withstand the most detailed hostile intelligence service investigation as well as domestic scrutiny.

Sec 201. Provides the basic authority for the Secretary of Defense to conduct commercial activities to provide cover or security for the support of foreign intelligence collections or other DoD operational activities.

Sec 202. The definitions are self-explanatory. The intent is to be able to conduct commercial activities in the same way as a private citizen or corporation would conduct them.

Sec 203. Permits the expenditure of non-appropriated funds generated by such commercial activities as an offset to the expense of the operation. It provides for the surplus to be deposited in the Treasury and for annual auditing of the funds thus generated.

Sec 204. This section goes to the heart of the exceptions from various federal laws that govern federal government activities but are not required of private commercial activities. It further provides that only the Secretary of Defense or a limited number of designees can approve the operation of the commercial activities authorized by this legislation. The delegees can be no lower in rank than an Assistant Secretary of Defense or the Secretary of a Military Department. The high level approving official assures responsible civilian oversight.

Sec 204c is an exemplar of the general categories of federal law from which an authorized commercial activity would be exempted. The listing is purposely left broad. The specific intent of this exemption provision is to ensure that the authorized commercial activity appears in every way like private commercial activity and so that the "veil" cannot be pierced by hostile intelligent services.

Sec 204d continues the protection of the authorized activities by exempting them from the requirements of the Freedom of Information Act, the Privacy Act and the Government In Sunshine Act.

Sec 205 is intended to ensure that authorized activities are permitted to and do comply with applicable state, local and foreign law, including fiscal and taxation requirements. Again this provision is necessary so that, the authorized commercial activity looks and acts like a private commercial activity. It permits the retaining and payment of private attorneys and accountants, as may be required, to establish the commercial activities. This authorization is also necessary to preserve the operational security of the authorized commercial activities.

Sec 206 provides for the limitations on the extent of activities undertaken by the authorized commercial activities or supported by them. These limitations are consistent with present intelligence law and oversight requirements and policies.

Sec 207 and 208 provide for implementing regulations, reports to Congress and the requirements for legal review of all authorized activities.

### 3. Cost Data

The cost data is most difficult to estimate due to the vagaries of commercial activity required. Costs are not expected to be large amounts. The costs will be offset by any funds generated by the authorized commercial activity. Any appropriated fund costs will be budgeted for in the operational budget of DoD. It is expected that the Defense Intelligence Agency will implement a joint cover staff to implement an enhanced DoD cover system, including but limited to authorized commercial activities. The estimated resources necessary to implement the cover system are as follow:

<u>Requirement:</u>	FY89	FY90	FY91	FY92	FY93	FY94
DIA cover element:						
-billets (civ/mil)	0	1/0	3/0	3/0	3/0	3/0
-\$ (personnel) <sup>1</sup>	0	54	162	162	162	162
Joint Cover Staff:						
-billets (civ/mil)	0	4/0	5/2	7/4	13/6	13/7
-\$ (personnel)	0	108	331	532	890	1123
-\$ (operating)	<u>750</u>	<u>38</u>	<u>1207</u>	<u>5006</u>	<u>4648</u>	<u>4415</u>
\$ Total:	750	200	1700	5700	5700	5700

<sup>1</sup> All figures are in thousands of dollars.

#### B. Training of Certain Foreign Personnel:

##### 1. Proposed Language

To amend title 10, United States Code, to improve existing military intelligence collection, production and dissemination capabilities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Military Intelligence Enhancement Act."

Sec 101. Chapter 101 of title 10, United States Code, is amended by adding at the end and thereof the following new section:



## "2011. Training of Certain Foreign Personnel

(a) Notwithstanding any other provision of law, the Secretary of Defense may provide training in intelligence collection, analysis and dissemination to personnel of the armed forces of any other country where the Secretary determines that such training will further the collection, production or dissemination of foreign intelligence or counterintelligence by the Department of Defense.

(b) All intelligence training provided by the Secretary of Defense under subsection (a) shall be coordinated with the Director of Central Intelligence according to Director of Central Intelligence policies and procedures governing intelligence liaison with foreign officials."

### 2. Analysis

The Defense Intelligence Agency and other DoD components have had several opportunities to establish or improve intelligence collection capabilities frustrated because of the inability to offer basic intelligence training for foreign military personnel. Such training authority could enhance substantially the ability to establish or expand liaison and cooperation with foreign intelligence services. The training to be provided generally would teach basic intelligence skills to selected foreign military personnel. The intelligence benefits received would far outweigh the modest training costs anticipated. The small size of such training opportunities make the use of Foreign Assistance Act Procedures impracticable. The United States is receiving both a training opportunity for its own forces, enhancement of interoperability, and intelligence collection benefits.

### 3. Cost Data

Use of this training authority anticipates inclusion of small numbers of foreign military personnel in existing, ongoing DoD training programs or classes. Hence, this proposal will result in only a slight increase in existing training requirements. We anticipate that the cost of this added training increment will be minimal.

## C. Acquisition of Foreign Material:

### 1. Proposed Language

Sec 102. Title 10, United States Code, is amended by adding a new chapter 154 to read as follows:

"Chapter 154 - Foreign Materiel Utilization.

2590. Acquiring or Exploiting Foreign Materiel

(a) Notwithstanding any other provision of law, the

Secretary of Defense may acquire or accept foreign materiel important to the military or intelligence interests of the United States, and may exchange, accept or furnish materiel, or information concerning such materiel, pursuant to an agreement with a foreign country or international organization governing such materiel acquisition or exploitation. Transfers of foreign materiel under this chapter are subject to the provisions of section 503 of the National Security Act of 1947.

(b) All intelligence activities conducted by the Secretary of Defense under subsection (a) shall be coordinated with the Director of Central Intelligence according to Director policies and procedures governing intelligence liaison with foreign officials."

#### "2591. Funding to Acquire or Exploit Foreign Materiel

Notwithstanding any other provision of law, sums appropriated to the Department of Defense shall be available to acquire or exploit foreign materiel when such acquisition or exploitation is determined by the Secretary to be important to the military or intelligence interests of the United States."

### 2. Analysis

The Department of Defense recently has had difficulty in transferring and/or reprogramming sufficient appropriated funds quickly enough to capitalize upon the unanticipated availability of foreign materiel with significant intelligence value, or to acquire such materiel that may have significant implications for assessing the likelihood of success of possible foreign policy actions. In both cases, timely acquisition and exploitation may be vital. Improved acquisition and exploitation authority will also satisfy foreign materiel requirements crucial to other significant activities such as weapons testing and development. The present acquisition and exploitation system does not have sufficient flexibility to respond to these needs.

### 3. Cost Data

There will be no cost to this legislation, since it merely amends the foreign materiel acquisition and exploitation procedures. The cost of the acquisition and exploitation program that will utilize this authority is addressed in the appropriations process. Meaningful cost and budget data are reviewable in that context.

#### D. Employee Tax Equalization:

### 1. Proposed Language

This provision amends section 912(1) of chapter 1 of title 26, United States Code, to read as follows:

"The following items shall not be included in gross income, and shall be exempt from taxation under this subtitle:

(1) Foreign areas allowances: in the case of civilian officers and employees of the Government of the United States, amounts received as allowances, or otherwise (but not amounts received as post differentials) under--

(a) chapter 9 of title 1 of the Foreign Service Act of 1980,

(b) section 4 of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C., 403e),

(c) title 11 of the Overseas Differentials and Allowances Act, [or]

(d) subsection (e) or (f) of the first section of the Administrative expenses Act of 1946, as amended, or section 22 of such Act, [.]

(e) subsection (b) of section 9 of the National Security Agency Act of 1959, as amended (50 U.S.C. 402 note), whenever the allowance would be excluded from gross income under paragraphs (1)(A) or (1)(B) of this section, or

(f) subsection 1605(a) of title 10, United States Code, whenever the allowance would be excluded from gross income under paragraph 1(A) of this section."

## 2. Analysis

This provision would amend section 912(a) of the Internal Revenue Code of 1954 to grant tax treatment of allowances currently provided to certain Department of Defense (DoD) personnel under section 9(b)(1) of the National Security Agency Act of 1959 and section 1605 of title 10, United States Code, comparable with that provided to Foreign Service employees for similar allowances.

The Intelligence Authorization Act of 1982 (Public Law 97-89) amended the National Security Agency Act of 1959 to allow the Director of the National Security Agency to provide allowances and benefits to certain civilian employees of DoD which were comparable to those provided to the Department of State's Foreign Service and to employees of the Central Intelligence Agency. During the implementation of this statute, it was discovered that comparability of the allowances could not be achieved unless the tax exemption provided for Foreign Service and CIA employees under section 912(1)(A) and (B) of the Internal Revenue Code was also available for civilians employed and assigned to the National Security Agency.

The Intelligence Authorization Act for Fiscal Year 1984 (Public Law 98-215) amended title 10, United States Code, to provide certain allowances and benefits to personnel assigned to Defense Attache Offices (DAO) and Defense Intelligence Agency Liaison Offices (DIALO) overseas comparable to those provided by the Secretary of State to officers and employees of the Foreign Service under chapter 9 of title 1 of the Foreign Service Act of 1980 and the provisions of 5 U.S.C. 5924(4). Although section 1605 was designed to establish equivalence between DAO/DIALO civilians and Foreign Service personnel with respect to many allowances and benefits, the actual value of the allowances and benefits to DAO and DIALO personnel is less than the value of the benefits to Foreign Service personnel, since the benefits granted under the Foreign Service Act are tax-free by virtue of section 912 of the Internal Revenue Code while those granted under section 1605 are not exempt from taxation.

The current inequity in taxation has been compounded by subsection 1232(b) of the Tax Reform Act of 1986 (Public Law 99-154). This subsection provides that civilian employees of DoD stationed in Panama may exclude from gross income allowances which are comparable to allowances excludable under section 912(a) of the Internal Revenue Code by employees of the Department of State stationed in Panama. Thus, it appears that any Defense Intelligence Agency or National Security Agency personnel stationed in Panama will, in future taxable years, be able to exclude from their gross income Foreign Service equivalent allowances and benefits granted to them.

As a result of the provisions discussed above, there is now a situation where the tax laws treat identical allowances and benefits differently for NSA and DIA civilian personnel stationed overseas, from that of Foreign Service personnel. Moreover, under the Tax Reform Act of 1986, the tax laws now treat identical allowances and benefits differently for NSA and DIA civilian personnel in Panama from all other NSA and DIA civilian personnel stationed overseas. The addition of the proposed paragraphs (B) and (F) to section 912(1) of the Internal Revenue Code of 1954 will provide equal tax treatment for identical allowances and benefits received by NSA, DIA and Foreign Service civilian personnel stationed around the world.

The Congress is mindful of this problem and has indicated a willingness to assist. A provision identical to the amendment sought here was included in S. 1243, the Fiscal Year 1988 Intelligence Authorization Act as reported by the Senate Select Committee on Intelligence. During floor action on July 23, 1987, however, SSCI Chairman Boren was compelled to move to strike the provision from S. 1243 on account of a jurisdictional dispute.

He indicated, however, that the Congress would be very receptive to the provision in the future (Congressional Record, July 23, 1987, pp. S 10591-92).

The provision was resubmitted to the Congress as Section 601 of the Administration's draft Fiscal Year 1989 Intelligence Authorization bill. By letter of 26 April 1988, Chairman Stokes of the Permanent Select Committee on Intelligence wrote to Chairman Rostenkowski of the House Ways and Means Committee concerning the proposal. By letter dated 25 May 1988, the Director of Central Intelligence wrote to Chairman Rostenkowski soliciting favorable consideration of the proposal by the Committee. The 100th Congress adjourned, however, without taking action on the proposal.

### 3. Cost Data

The enactment of this provision would result in the loss to the government of income tax revenue otherwise collectible on the exempted amount. Further cost data is not available.