THE WHITE HOUSE

WASHINGTON

October 18, 2004

The Honorable Peter Hoekstra
House of Representatives
Washington, D.C. 20515

The Honorable Susan Collins
United States Senate
Washington, D.C. 20510

Dear Representative Hoekstra and Senator Collins:

As the House-Senate conference on intelligence reform legislation (H.R. 10 / S. 2845) meets, the Administration urges the Conferees to reach agreement on an effective bill to strengthen the nation's intelligence capabilities that both Houses can pass and the President can sign into law as soon as possible to meet the nation's security needs. There are many good provisions in both bills and the President endorses the best of each as outlined in this letter to strike a reasonable compromise that will best reorganize our intelligence capabilities and will make the country safer and stronger. The Administration appreciates the significant efforts of the House and Senate to date in passing H.R. 10 and S. 2845, and looks forward to continuing to work closely with the Conferees on this historic legislation.

The Administration is pleased that a majority of the provisions of the President's legislative proposal, dated September 16, 2004, are included in either the House or Senate versions of the legislation. America is a nation at war, and the Conferees have an opportunity to contribute to the passage of a bill that takes another important step forward as we do everything in our power to defeat terrorism and protect the American people. These provisions include creating a National Intelligence Director (NID) with full budget authority, providing important statutory authorities for the newly created National Counterterrorism Center (NCTC), preventing the disclosure of highly sensitive budget information to our nation's enemies, especially during wartime, and preserving the chain of command.

This letter addresses a number of important provisions in H.R. 10 and S. 2845 that the Administration supports, as well as a number of provisions that the Administration opposes, for the reasons generally described below. This letter does not purport to address the Administration's comprehensive position on all of the provisions contained in H.R. 10 or S. 2845.

National Intelligence Director

Budget Authority. The Administration supports the strong budget authority provided to the NID in S. 2845. To be effective, the NID must have clear authority to determine the national intelligence budget, strong transfer and reprogramming authorities, explicit authority to allocate appropriations, and the ability to ensure execution of funds by national intelligence agencies consistent with the direction of the NID. S. 2845 would provide such budget authority.

The Administration is pleased that H.R. 10 would prevent disclosure of sensitive information relating to the intelligence budget. Disclosing to the nation's enemies, especially during wartime, the amounts requested by the President, and provided by the Congress, for the conduct of the nation's intelligence activities would harm the national security.

Chain of Command. The Administration again stresses the importance of section 6 ("Preservation of Authority and Accountability") of the President's proposal; the Administration strongly supports the inclusion of this provision by the Conferees. Inclusion of this section is essential to preserve in the heads of the executive departments the unity of authority over, and accountability for the performance of, those departments (including accountability for implementing the NID's statutory-based guidance). The section also recognizes that the authority of the Director of the Office of Management and Budget is unaffected. In addition, the Administration notes that many of the specific concerns with the NID provisions noted below relate to ensuring that the legislation does not interfere with clear lines of authority within the Executive Branch and does not, by excessive specification of management structures, confuse lines of authority or interfere with areas in which the Executive should retain discretion.

Management Structure. The Administration is gravely concerned about the excessive and unnecessary detail in the structure of the Office of the NID included in both the House and Senate bills. The voluminous and bureaucratic requirements create confused chains of command, diminish accountability, and foster a risk-adverse culture. Such a structure will undermine rather than promote the ability of the national security community to carry out its responsibilities. The provisions of S. 2845 would, in the aggregate, construct a cumbersome new bureaucracy in the Office of the NID with overlapping authorities and responsibilities. This legislatively mandated bureaucracy is inconsistent with the final report of The National Commission on Terrorist Attacks Upon the United States ("9/11 Commission") and will hinder, not help, in the effort to protect the national security and preserve our constitutional rights. Many of the details contained in these provisions overlap with standard authorities of an Inspector General and a privacy officer. The bill should not create additional layers of investigative offices and staffs that will harm national security and prevent these officers from carrying out their duties. The Administration opposes creation of the Ombudsman of the National Intelligence Authority and the Analytic Review Unit, and also opposes provisions that allow a subordinate officer to oversee or otherwise supervise the work of his superior. The Administration opposes the requirements in S. 2845 that the General Counsel for the NID be appointed from civilian life; this requirement interferes with the President's ability to pick the best qualified candidate. We urge the conferees to adopt the President's proposal relative to the structure of the Office of the NID.

The Administration also notes that in August the President established a civil liberties board "within the executive branch" (as called for by the 9/11 Commission) to further safeguard the rights of Americans (Executive Order 13353 of August 27, 2004). The Administration therefore opposes as unnecessary efforts to duplicate our ongoing efforts to protect civil liberties and privacy by the creation of another executive branch board. One of the most significant findings of the Commission Report is that agencies need to act more flexibly, rapidly, and together to protect national security. America needs an Intelligence Community that is focused on protecting America, while ensuring necessary protections for the rights of Americans as reflected in the President's Executive Order.

The Administration is also concerned with the conforming amendment in H.R. 10 (section 1079) that designates the existing Community Management Staff as the Office of the NID in all statutes and legislation. The duties, responsibilities, and authorities of the CMS and those granted the NID in proposed legislation are not entirely consistent. This inconsistency further complicates the NID management structure and introduces more confusion into the chain of command. Instead, the NID should be given statutory authority to provide for a transition in an orderly fashion of CMS personnel and assets into the office of the NID, as appropriate.

Responsibilities and Authorities. The Administration believes that the responsibilities and authorities of the NID should be described in a single provision that is both internally consistent and consistent with the goal of establishing a strong, effective NID. In addition, the Administration recommends that new sections 102(b)(3) and 102A(a)(1)(D) of the National Security Act as proposed in H.R. 10 be deleted. The Administration also believes that the NID should have the authorities set forth on pages 12-14 of the President's proposal in order to ensure that the NID is effectively empowered to operate the Office of the NID.

Appointments. The Administration supports giving the NID a role in the appointment of key individuals in the Intelligence Community. The Administration supports the provisions in S. 2845, which are based on the President's proposal. The Administration also notes that certain of the provisions regarding the appointment of the NID are constitutionally problematic and looks forward to working with Congress to correct these provisions.

Personnel Management. The Administration supports strong personnel management authorities for the NID similar to those set forth in sections 112(a)(8), 113(g), and 114 of S. 2845.

Collection, Analysis, and Tasking. The Administration supports intelligence collection, analysis, and tasking authorities for the NID similar to those set forth in section 102(f) of H.R. 10.

Acquisition Authority. The Administration supports the Senate's approach to granting the NID milestone decision authority, which will help ensure that the NID has full and effective budget authority. The Administration supports modifications to the language of section 162 of S. 2845 to limit the likelihood of duplicative bureaucracy.

Coordination with Foreign Governments. The Administration would support the provisions in section 113(i) and the proposed new National Security Act section 103(f) in S. 2845 that assign to the NID and CIA Director complementary responsibilities with respect to relationships with foreign intelligence and security services, subject to the addition of the phrase "or involving intelligence acquired through clandestine means" before the period in section 113(i) and section 103(f). Section 1011(a) of H.R. 10 fails to grant the NID sufficient authority to coordinate these relationships and also fails to specify a role for the CIA Director in implementing this authority by coordinating contacts with foreign services.

HUMINT Collection. The Administration supports granting responsibility for the overall direction and coordination of human intelligence operations overseas to the CIA Director. Section 301(a) of S. 2845 would ensure that overseas operations involving human sources will be coordinated and executed according to consistent standards. Section 1011(a) of H.R. 10 does not clearly establish the CIA Director as the coordinator of overseas HUMINT activity, and risks disrupting ongoing collection operations in the War on Terror.

Alternative/Competitive Analysis. The Administration opposes section 146 of S. 2845. A new bureaucracy that duplicates the work of the National Intelligence Council is both burdensome and unnecessary. The need for independent, competitive, or alternative analysis is appropriately acknowledged in section 102(c)(12) of the President's proposal of September 16, 2004, and section 1011(a) of H.R. 10.

Protect Sources and Methods. The Administration supports provisions of S. 2845 that make explicit the NID's authority to protect intelligence sources and methods. At the same time, the Administration believes that the head of each element of the Intelligence Community should be explicitly charged with carrying out this critical authority according to the NID's guidance.

Joint Intelligence Community Council. The Administration supports the establishment of a Joint Intelligence Community Council to ensure that heads of Departments containing elements of the Intelligence Community are held accountable for carrying out their statutory responsibilities to the NID and conversely, that the NID is held accountable for meeting the intelligence needs of the Council members. The Administration prefers section 1031 of H.R. 10 over section 203 of S. 2845, but believes that the Administration-proposed provisions for the Council should be adopted.

Reserve for Contingencies. The Administration believes that the NID and CIA each should have a Reserve for Contingencies. Section 118 of S. 2845 would create a Reserve for Contingencies for the NID and the CIA, but would transfer the unobligated balance in the CIA Reserve for Contingencies to the new Reserve. The House bill does not establish a Reserve for Contingencies for the NID and would preserve the CIA Reserve for Contingencies (see, e.g., section 1071(a)(5)). Creating a NID Reserve and at the same time maintaining the CIA Reserve would enhance the NID's ability to deal with exigencies, while also preserving a key source of the flexibility CIA needs to meet its unique mission requirements.

Location of Office of the NID. The Administration opposes section 121(e) of S. 2845 which would bar the Office of the NID from being co-located with any other Intelligence Community element, as of 1 October 2006. It is imperative that the NID have the ability and flexibility to begin carrying out the reorganization and any new functions and duties that would be directed by intelligence reform legislation, while ensuring that all current intelligence activities within the purview of the Director of Central Intelligence and the Intelligence Community are continued in an effective and productive manner. The NID therefore should have the opportunity and the discretion, subject to direction from the President, to determine the optimal location for the Office of the NID in light of resources, security, efficiency, and other operating and management factors.

National Counterterrorism Center

The Administration supports legislation to provide statutory authorities for the National Counterterrorism Center established by the President in Executive Order 13354 of August 27, 2004. The Administration strongly prefers Section 1021 of H.R. 10 over section 143 of the S. 2845, except that the Administration believes that the Director of the NCTC should be appointed by the President.

National Counterproliferation Center / Other Centers

The Administration favors waiting until the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction completes its study before creating additional intelligence centers. The Administration looks forward to receiving the Commission's recommendations. Mandating creation of a National Counterproliferation Center (section 144 of S. 2845) or other similar organization with insufficient study is premature and risks disrupting ongoing efforts to counter the proliferation of weapons of mass destruction.

The Administration opposes section 145 of S. 2845, which legislates the structure and authorities of other centers. Such a provision poses an unnecessary risk of interfering with the rapid organization of flexible centers to respond to new and emerging threats, limiting the flexibility to rapidly organize centers designed to respond to new and emerging threats.

Security Clearances

The Administration opposes provisions in S. 2845 and H.R. 10 that would restrict the President's ability to manage the security clearance process. The President and the NID should retain the authority to tailor standards and procedures to agencies if necessary to protect the national security. The Administration is committed to improving the security clearance process, but is concerned with unrealistic time limits that could compromise national security. The Administration supports language contained in the President's proposal requiring the NID to prescribe standards for common personnel clearance policies.

Information Sharing

The Administration commends and supports the provisions in H.R. 10 that promote the development of a secure information sharing environment under the direction of the NID, while also providing flexibility concerning its design and implementation. The Administration also supports the language in H.R. 10 that preserves the information sharing responsibilities assigned to the Department of Homeland Security under sections 892 and 893 of the Homeland Security Act and Executive Order 13311, and urges the Conferees to ensure that those responsibilities are preserved in the final legislation. In contrast, S. 2845 is overly prescriptive and contains excessive detail that will restrict the ability to adapt rapidly evolving technologies to changing circumstances. Similar flexibilities should also be provided with respect to the House provisions regarding an interoperable law enforcement and intelligence data system.

Definition of "National Intelligence"

The Administration supports the definition of "national intelligence" contained in H.R. 10. This definition will further strengthen the NID and help to promote greater information sharing inside and outside of the Intelligence Community. The Administration is very concerned, however, about sections 221 – 225 of S. 2845 that raise significant constitutional issues.

Foreign Language Skills

It is important in the War on Terror that intelligence agencies recruit and retain as many people as possible who are fully qualified in the foreign languages these agencies need. The Administration supports the provisions of the House bill that would advance foreign language education and training, and requests that those provisions be clarified to ensure that service payback obligations are enforceable.

Declassification Board

The Administration supports the extension of the Public Interest Declassification Board but opposes section 226 of S. 2845, which would rename the Board as the Independent National Security Classification Board and create a Congressional right to appeal classification decisions made by an executive agency with respect to national security information. The authority to make such decisions is clearly vested in the President and his designated subordinates under the Constitution. Moreover, this provision is not germane to the 9/11 Commission's findings or recommendations.

Congressional Oversight

The Administration is concerned that neither bill addresses the critical need to reorganize congressional oversight, including intelligence oversight and oversight of the Department of Homeland Security. The 9/11 Commission concluded that the creation of a NID and NCTC "will not work if congressional oversight does not change too." Similarly, the 9/11 Commission

recommended that "Congress should create a single, principal point of oversight and review for homeland security." Accordingly, the 9/11 Commission specifically noted that, of all their recommendations, reorganizing congressional oversight may by "among the most important." The Administration strongly urges the Conferees to address this critical omission.

The Administration is concerned not only with the omission of congressional oversight reform, but the vast expansion of oversight by additional legislative agents contained in S. 2845. This is a significant step in the wrong direction and will hinder the ability of the House and Senate Intelligence Committees to perform their oversight function. The Administration opposes these provisions, including sections 207(l) and 335 of S. 2845.

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In addition to provisions concerning the NID, the NCTC, and other core issues responsive to the Administration's proposal, both bills contain a number of additional provisions that will help ensure that the Intelligence Community and others in the War on Terror have all the necessary tools which are needed to prevent terrorist attacks. Some of the most important of these provisions are discussed below.

Terrorism Prevention, Homeland Security, and the Intelligence Community

Additional Tools for the Intelligence Community. The Administration strongly supports and looks forward to working with the Conferees to enact those provisions of Title II of H.R. 10 that seek to ensure that the Intelligence Community and others in the War on Terror have all of the necessary tools that are needed to prevent terrorist attacks, and which help address 9/11 Commission recommendations such as those concerning weapons of mass destruction, terrorism financing, and facilitators of terrorist travel and other material support for terrorists. The most critical of these include enhanced provisions to deny material support to terrorists (section 2043), including addressing military-type training by terrorists (section 2042, as well as section 3035); to ensure that communities are protected from suspected terrorists prior to trial and arrested terrorists are unable to launch attacks afterwards (section 2602, and the related post-release supervision provision in section 2603); to prevent attacks by "lone wolf" terrorists (section 2001); to prevent attacks using weapons of mass destruction (subtitle K); to further eliminate sources of terrorist financing (sections 2111-2115, and 2121-2124); and to ensure that the death penalty is available for all terrorist murders (e.g., section 2502, and the air piracy amendments in section 2503). These and other anti-terrorism tools in Title II would help keep America safer and help to address the 9/11 Commission's recommendations.

Terrorist Travel and Border Security. The Administration also supports those provisions of Titles II and III of H.R. 10 that will better protect our borders from terrorists, while maintaining our tradition as a welcoming nation, and further address the 9/11 Commission's recommendations concerning such efforts as border security, terrorist travel, and related vulnerabilities. In particular, the Administration strongly supports efforts to enhance our ability to utilize efficient, flexible tools to keep out or remove convicted criminals and suspected terrorists who cannot be charged with criminal violations and those who have had their visas

revoked (including the enhanced tools in sections 3009, 3010, and 3033), and our ability to share information about terrorist threats and crimes with foreign governments (section 2191).

The Administration supports the provisions in section 3001 of H.R. 10 designed to close a security gap by eliminating the Western Hemisphere exception for U.S. citizens. But the Administration intends to work with Congress to ensure that these new requirements are written and implemented in a way that does not create unintended, adverse consequences.

The Administration strongly opposes the overbroad expansion of expedited removal authorities in H.R. 10 (section 3007), and has concerns about the provision addressing asylum (section 3008); these sections should be modified or dropped altogether. The Administration also believes that any changes in the asylum program must include removal of the annual asylee adjustment cap. The Administration also has concerns with the overbroad alien identification standards proposed by the bill (section 3006). The Administration welcomes efforts in Congress to address the 9/11 Commission's recommendations concerning uniform standards for preventing counterfeiting of and tampering with drivers licenses and birth certificates, but believes that additional consultation with the States is necessary to address important concerns about flexibility, privacy, and unfunded mandates. The Administration generally supports sections 1026 – 1029 of S. 2845, but recommends that the responsibility for establishment of the standards be assigned to the Secretary of Homeland Security, in consultation with other officials as appropriate, and that the development and issuance process be by means other than negotiated rulemaking.

With respect to Section 3032 of H.R. 10, the Administration looks forward to working with the Congress on the detention-related paragraphs to ensure that the provision applies to the appropriate categories of dangerous aliens; that all of such aliens are provided with the appropriate procedural safeguards; and that it does not inadvertently interfere with Executive Branch efforts to find other countries to accept such people. The Administration is also opposed to the "seek assurances" provision of section 3032 as it is inconsistent with the President's constitutional authority.

Counterterrorism Assistance. The Administration opposes section 3087 of H.R. 10 because it unduly constrains the provision of counterterrorism assistance under the Foreign Assistance Act. Strengthening foreign countries' counterterrorism capabilities is an important line of defense in protecting the United States from terrorist attack. Like a number of other provisions, section 3088 raises constitutional concerns and should be made precatory.

International Cooperation and Coordination

The Administration does not support adding Title IV of H.R. 10 or Title X, Subtitle A, of S. 2845 to the final legislation as a number of its provisions are inconsistent with the President's constitutional authority with respect to foreign relations, diplomacy, and international negotiations. Furthermore, many of the provisions may adversely impact the ongoing War on Terror.

The Administration also opposes section 1014 of S. 2845, which provides legal protections to foreign prisoners to which they are not now entitled under applicable law and

policy. Section 1095 of the proposed National Defense Authorization Act for Fiscal Year 2005 (H.R. 4200) already addresses this issue.

Other Government Restructuring

The Administration opposes provisions in H.R. 10 that would encumber the Federal rulemaking process with duplicative and burdensome new requirements and significant potential litigation risks (section 5091).

Burdensome Reporting Requirements. The Administration is very concerned about the dozens of new reporting requirements contained in the bills. The Administration will continue to work with the Congress to eliminate or reduce the burden created by unnecessary or duplicative statutory reporting requirements and divert resources from critical national security tasks.

Responding to Attacks. The Administration commends the provisions of H.R. 10 that add to the Secretary of Homeland Security's flexibility in providing first responder grant funds to certain high-risk areas, but has concerns about border state funding mandates that reduce that flexibility. The Administration opposes any provision that would unduly limit the Secretary's ability to allocate funds to high-risk areas. In addition, the provision authorizing letters of intent for multi-year interoperability grants may complicate homeland-security planning efforts by creating unrealistic expectations of long-term funding.

Personnel. The Administration is concerned about a number of other provisions in Title V of H.R. 10, including, as referenced above, Subtitle F on security clearances. For instance, the Administration opposes provisions in Title V that would create inequities in personnel policy between the FBI and other law enforcement agencies, and looks forward to working with the Congress on a separate and comprehensive reform of law enforcement pay and benefits. While appreciating the intent behind it, the Administration also opposes section 5041 because of its harmful ramifications. The section would prevent officials from exercising delegated Presidential functions and from serving in agency lines of succession.

Ethics Laws. The Administration opposes section 5043 of H.R. 10, which would eliminate the level playing field established for all three branches of government by the Government-Wide Ethics Reform Act of 1989, creating a new regime of non-uniform ethics laws. The financial disclosure process should be modernized to reflect changed circumstances. The Administration strongly urges Congress to adopt the bill to modernize government-wide financial disclosure submitted by the Office of Government Ethics to the Speaker on July 16, 2003.

Market Preparedness. As currently drafted, subsection 2(E) of the proposed amendment to the Securities and Exchange Act of 1934 in section 5085 of H.R. 10 weakens the Treasury's longstanding responsibility for the orderly functioning of the market for government securities, by providing the SEC with unilateral authority to suspend or restrict the operations of clearing agencies for government securities in the event of a national emergency. Control by the Treasury over this market is critical because of both the special characteristics of the market and the independent need of the Treasury to be able to provide for effective funding of the

government of the United States at all times. The problem created by the current draft can be solved by deleting paragraph (E), which would have no effect on the remaining provisions.

Public Safety Spectrum. The Administration is dedicated to ensuring that adequate spectrum exists for public safety. The Department of Commerce has released a series of specific recommendations as part of the President's Spectrum Initiative to accomplish this goal. The Administration opposes the inclusion of the "Digital Transition Consumer Assistance Fund" under Title X, Subtitle F of S. 2845. Creating a billion dollar fund to subsidize consumer electronics such as digital converter boxes, high-definition televisions, and the installation of cable and satellite services is not necessary to achieve the 9/11 Commission's recommendations. The Administration has proposed an analog spectrum fee on broadcasters to encourage faster return of analog TV spectrum. This proposal would facilitate public safety access to spectrum in a timely fashion without generating budgetary costs.

Conclusion

The Administration also has concerns with a number of other provisions in the House and Senate versions of the legislation and notes that a number of provisions in the legislation could be applied only to the extent consistent with the President's constitutional authorities. We look forward to working closely with the Conferees as you craft a final bill to strengthen the nation's security that the President can sign as promptly as possible.

Sincerely,

Joshua B. Bolten
Director, Office of Management and Budget

Condoleezza Rice
Assistant to the President
for National Security Affairs

cc: All House and Senate Members of the Conference