



December 7, 2004

Highlights of the Conference Report to Accompany S. 2845, Intelligence Reform and Terrorism Prevention Act of 2004

The conference report (number was not available at press time) was filed on December 7, 2004.

Noteworthy

- The conference report to accompany S. 2845, the National Intelligence Reform Act, was filed on December 7, 2004. The House is expected to vote on the conference report on Tuesday, December 7.
- It is unclear whether the Senate will conduct a roll call vote on the conference report or whether it will voice-vote its passage. In either event, Senators and their staffs will benefit from a review of some of the key provisions in the legislation, including an explanation of how the conferees arrived at the final language. This examination of the conference report lists the following:
 - Key provisions as they relate to current law.
 - Key provisions as they passed the Senate (S. 2845).
 - Key provisions as they exist in the conference report language (if different from S. 2845 as it passed the Senate).
 - Alternative options offered (either in the Senate, the House, or by White House), and a description of why the conferees chose the language.
- This paper reviews provisions that were considered controversial by lawmakers and/or were significant departures from current law. The nine provisions included are:
 - Creation of Post of National Intelligence Director (NID).
 - NID Authorities.
 - NID Role in Selecting Intelligence Community Agency Heads.
 - Renaming and Redefining of National Foreign Intelligence Program.
 - Public Disclosure of Intelligence Community Annual Budget.
 - National Counterterrorism Center, National Counterproliferation Center.
 - “Preservation of Authority” (or “Chain of Command.”)
 - Privacy and Civil Liberties Oversight.
 - Immigration.

Background

The Intelligence Reform legislation was a direct result of the report issued by the 9/11 Commission in July 2004. The following are key events that occurred during the legislative process:

- From July-September 2004, dozens of congressional hearings were held to discuss the 9/11 Commission's report and to prepare legislation to reform the U.S. intelligence community.
- On August 2, President Bush called on Congress to pass legislation creating a NID.
- On August 27, President Bush issued four Executive Orders and two Homeland Security Presidential Directives initiating intelligence community and homeland security reforms.
- On September 8, the Administration submitted guidelines to Congress for intelligence community and homeland security reforms.
- On September 23, S. 2845 was introduced in the Senate by Senator Susan Collins (R-ME), Chairman of the Senate Governmental Affairs Committee.
- A total of 262 amendments were submitted to S. 2845. On October 6, the Senate passed S. 2845, 96-2, following 11 roll call votes.
- On September 24, H.R. 10 was introduced in the House by Speaker Dennis Hastert (R-IL).
- A total of 19 amendments were offered to H.R. 10. On October 8, the House passed H.R. 10, 282-134.
- On October 16, conferees were appointed: Senators Collins, Lott, DeWine, Roberts, Voinovich, Sununu, Coleman, Lieberman, Levin, Durbin, Rockefeller, Graham (FL), and Lautenberg, and Representatives Hoekstra, Dreier, Hyde, Hunter, Sensenbrenner, Harman, Menendez, and Skelton.
- On October 18, the White House sent a letter to conferees supporting enactment of the bill.
- On November 19, a bipartisan group of eight Senators sent a letter to the Senate Majority Leader and Minority Leader asking that, given the importance to U.S. national security of the reforms being considered and the fact that bill was significantly modified from the Senate-passed version, the Senate be afforded time to review the final conference report language before any procedural actions are taken.
- On November 20, conferees' negotiations halted.
- On December 6, several Members of Congress, including Representative Hunter, chairman of the House Armed Services Committee, who is a conferee, and Senate Armed Services Committee Chairman John Warner, hosted a news conference to announce that negotiators had come to an agreement on the "chain of command" language in the conference report.

Comparing Key Intelligence Reform Provisions Between Current Law, S. 2845, and Conference Report

1. Creation of Post of National Intelligence Director (NID)

Current Law:

- Director of Central Intelligence (DCI) serves as:
 - Head of Intelligence Community;
 - Head of the Central Intelligence Agency; and
 - President's principal adviser on intelligence issues.

Collins/Lieberman Bill (S. 2845):

- Creates a new presidentially appointed, Senate-confirmed position of NID who will:
 - Manage the U.S. intelligence community (which is composed of elements relating to "national" intelligence, i.e. pertaining to the interests of more than one department);
 - Serve as the President's principal intelligence adviser;
 - Head the National Intelligence Authority (NIA);
 - Direct and oversee the National Intelligence Program (NIP); and
 - Chair a cabinet-level Joint Intelligence Community Council (JICC).
- The NID is prohibited from simultaneously serving in any capacity in any other element of the intelligence community.
- NID will not be located in the Executive Office of the President, and, as of October 1, 2006, the Office of the NID may not be co-located with any other element of the intelligence community.

Conference Report Language:

- Current language keeps the Senate-passed language largely intact. Modifications include:
 - Changing the title of NID to Director of National Intelligence (DNI);
 - Designating the DNI to oversee the coordination of relationships with the intelligence or security services of foreign governments or international organizations;
 - Extending by two years the date (October 1, 2008) by which the Office of the DNI must not be co-located with any other intelligence community agency.

Alternative Options Offered and Conferees' Decision:

- During Senate floor debate, numerous Senators offered amendments (SA 3761 and 3767 to specify a term of service for the NID) to modify this provision.
- The Senate tabled SA 3761, and SA 3767 was withdrawn.
- The House bill had measures that were raised during the conference (see conference report language modifications above).
- The conferees decided to accept provisions and concepts from both bills. The conferees focused on the substance of the DNI's authorities rather than enumerating a variety of positions to serve the DNI. By focusing on a strong DNI, the conferees sought to ensure that the individuals and entities under the DNI have the authorities, either directly or by delegation, that they need to carry out their functions.

2. NID Authorities

Current Law:

- DCI has authorities to manage budget, personnel, acquisition, and collection priorities.

S. 2845:

- Shall have access to all national intelligence collected anywhere in the executive branch, to the extent approved by the President;
- Establish intelligence collection, analysis, and dissemination priorities and requirements; shall provide advisory tasking on the collection of intelligence to elements of the government not part of the intelligence community; shall establish requirements and priorities for the collection of intelligence under FISA; shall create national intelligence centers to integrate intelligence capabilities; shall have significant influence in selecting intelligence community agency heads; shall set security, personnel, and information technology standards across the intelligence community; shall establish a National Intelligence Reserve Corps; shall protect sources and methods; and shall establish and maintain an effective, open-source information collection capability.
- NID shall manage and oversee the NIP, including executing funds, reprogramming funds, and transferring funds and personnel as appropriate.

a. Budget and Appropriation

- Determine annual budget request for “national” intelligence community components;
- Receive the National Intelligence Program (NIP) appropriation;
- Manage the NIP budget and monitor intelligence community expenditures;
- Participate in the development by the Secretary of Defense of the annual budgets for the military intelligence programs and activities not included in the NIP; and
- Exercise parallel authority with the Secretary of Defense over major acquisitions funded through NIP monies.
- Has milestone acquisition decision authority for items under NIP, except the NIP programs within the Department of Defense wherein the DNI will jointly exercise milestone decision authority with the Secretary of Defense or his designee.

b. Reprogramming

- Can transfer funds within NIP to activities that are of higher intelligence priority, subject to: approval of OMB Director, appropriate notification to Congress, and after consultation with the heads of affected agencies and departments. This transfer may not exceed applicable ceilings established in law.
- NIP funds may not be reprogrammed by an element of the intelligence community without NID approval.
- A department head shall consult with the NID before reprogramming non-NIP funds of departmental entities within the intelligence community.

c. Personnel Transfer

- Can transfer personnel within the NIP, including staffing the NCTC and national intelligence centers.
- Shall consult with the heads of the departments before exercising budget and personnel authorities.

Conference Report Language:

- Authorizes but does not require the DNI to create an Inspector General in the Office of the DNI.
- Requires the DNI to identify an individual to serve as an Ombudsman for the purpose of preserving analytic integrity.

a. Budget and Appropriation

- DNI shall “develop and determine” an annual budget for the NIP based on budget proposals provided by heads of agencies and organizations of the intelligence community and their respective department heads. The heads of such agencies must provide all information the DNI requests for the purpose of determining the NIP budget.
- DNI shall “ensure the effective execution” of the annual budget for intelligence and intelligence-related activities.
- The OMB Director must apportion NIP funds at the “exclusive direction” of the DNI for allocation to the elements of the intelligence community.
- The DNI is further responsible for managing NIP appropriations by “directing the allotment or allocation” of such appropriations through the heads of departments containing agencies or organizations of the intelligence community.
- The DNI shall monitor the implementation and execution of the NIP by the heads of the elements of the intelligence community that manage NIP programs or activities.

b. Reprogramming

- NIP funds may not be transferred or reprogrammed without approval of DNI, except in accordance with procedures prescribed by the DNI.
- All transfers or reprogrammings by the DNI must be for a higher priority intelligence activity; must support an emergent need, improve program effectiveness, or increase efficiency; and may not involve funds from CIA Reserve for Contingencies or DNI Reserve for Contingencies.
- With approval from OMB and after consulting with effected department heads, the DNI may transfer or reprogram NIP funds out of any department or agency as long as the amount in a single fiscal year is less than \$150 million, is less than 5% of the department’s or agency’s NIP funds, and does not terminate an acquisition program.

c. Personnel Transfer

- In the fiscal year after the effective date of the Act, the DNI is authorized 500 new personnel billets within the Office of the DNI, and may, with the approval of the OMB Director, transfer 150 personnel funded within the NIP to the Office of the DNI for not more than two years.
- For the first 12 months after a national intelligence center is created, the DNI may transfer 100 personnel authorized for elements of the intelligence community to that center. DNI must receive OMB Director approval and notify the appropriate Congressional committees.
- Based on procedures developed between DNI and heads of departments or agencies of the intelligence community, and upon approval of the OMB Director, the DNI may transfer unlimited numbers of personnel authorized for an element of the intelligence community to another such element for a period of not more than two years. The DNI may only make such a transfer if the personnel are being transferred to an activity that

is a higher priority intelligence activity, and the transfer supports an emergent need, improves program effectiveness, or increases efficiency.

Alternative Options Offered and Conferees' Decision:

a. Budget and Appropriation

- During Senate floor debate, Senator Roberts offered an amendment (SA 3741) to permit the NID to modify NIP budgets before their approval and submittal to the President.
 - SA 3741 was withdrawn by Senator Roberts.
- Senator Roberts offered an amendment (SA 3742) to preserve a requirement in Section 504 of the National Security Act of 1947 that states funds appropriated for an intelligence activity must also be specifically authorized before being obligated or expended.
 - SA 3742 was agreed to in the Senate by a vote of 98-0.
- The House did have a similar section related to budget and appropriation.
- The issue was raised during the conference.
- The conferees decided to modify the Senate-passed provision because they agreed that NIP appropriation process should be classified, which requires continuing the current process of channeling the NIP appropriation through DoD's and other department comptrollers. The conferees agreed to have OMB apportion the NIP funds at the DNI's exclusive direction. The conferees also agreed upon a series of protections to ensure that department comptrollers allot, allocate, transfer, and reprogram funds in accordance with the DNI's direction and cannot "tax" NIP funds arbitrarily.

b. Reprogramming

- During Senate floor debate, Senator Roberts offered an amendment (SA 3744) to clarify the limitation on the transfer of funds and personnel.
 - SA 3744 was withdrawn by Senator Roberts.
- The House did have a similar section related to reprogramming.
- The issue was raised during the conference.
- The conferees decided to modify the Senate-passed provision to provide the DNI the authority to reprogram or transfer funds up to \$150 million without the affected department head's concurrence. The conferees thus removed from current law the affected department head's ability to veto the reprogramming or transfer of funds. The House conferees agreed to modify the provision in H.R. 10 that a reprogramming/transfer may not terminate any program because they recognized that this is a vague limitation that could have prevented any reprogramming or transfer. Also, the DNI may reprogram/transfer unlimited funds with the concurrence of the affected department head.

c. Personnel Transfer

- During Senate floor debate, Senator Roberts offered an amendment (SA 3744) to clarify the limitation on the transfer of funds and personnel.
 - SA 3744 was withdrawn by Senator Roberts.
- Senator Levin offered an amendment (SA 3809) to exempt military personnel from certain personnel transfer authorities.

- SA 3809 was agreed to in the Senate by voice vote.
- The House did have a similar section related to personnel transfer.
- The issue was raised during the conference.
- The conferees reached a compromise by differentiating between the DNI's initial start-up personnel needs and DNI's personnel needs after start-up. The DNI has the authority to transfer personnel to meet the DNI's most important post-start-up need, namely the establishment of new national intelligence centers. In addition, the DNI's authority to determine the NIP budget gives the DNI sufficient authority to move personnel over the long term. The conferees thus removed from current law the affected department head's ability to veto the transfer of personnel. Also, the DNI may transfer unlimited personnel in the short-term pursuant to procedures agreed upon between the DNI and affected department heads.

3. Role in Selecting Intelligence Community Agency Heads

Current Law:

- DCI “concur” for NSA, NRO, NGA; DCI “consults” for DIA and intelligence elements at State, Energy, and FBI.

S. 2845:

- NID “recommends” nominees for CIA Director and Principal Deputy NID (as well as other senior officials in the Office of the NID);
- NID “recommends with Secretary of Defense’s concurrence” for NSA, NRO, NGA. If the Defense Secretary does not concur in the recommendation, the NID may still make the recommendation, but must include with the recommendation a statement that the Secretary does not concur; and
- NID “concur” for Undersecretary of Defense for Intelligence, and intelligence elements at the Department of Homeland Security, DIA, and FBI. If the NID does not concur, the secretary or agency head may still appoint or recommend the official for appointment, but must notify the President of the lack of concurrence.
- NID may recommend any official covered by Section 117 (of S. 2845) to the President or head of the appropriate department or agency. However, the NID must seek the concurrence of the head of the affected department or agency. If there is no concurrence, the NID may still make the recommendation, but must notify the President of the lack of concurrence.

Conference Report Language:

- Current language maintains the essence of the Senate-passed language. Modifications include:
 - DNI has the right to concur in the appointment or the recommendation for nomination of heads of NSA, NRO, and NGA; the Assistant Secretary of State for INR; the Director of the Offices of Intelligence and Counterintelligence at the Department of Energy; the Assistant Secretary for Intelligence and Analysis at the Department of the Treasury; the Executive Assistant Director for Intelligence at FBI; and the Assistant Secretary of Homeland Security for Information Analysis.
 - DNI must be consulted for appointments or recommendations for the Director of DIA and the Assistant Commandant of the Coast Guard for Intelligence.

Alternative Options Offered and Conferees’ Decision:

- During Senate floor debate, Senator Warner offered an amendment (SA 3877) to S. 2845 to modify the role of the NID in the appointment of U.S. intelligence officials.
- The Senate accepted SA 3877 by voice vote.
- The House did have a similar measure (H.R. 10, sections 1014 and 1011) that Secretary of Defense shall obtain NID concurrence in appointing or recommending nominees for the director of NSA, NRO, and NGA.
- The issue was raised during the conference.
- The conferees decided to modify the Senate-passed provision to give the DNI a say over more appointments within the intelligence community. The Conferees also decided that DIA’s purpose to supply DoD’s specific intelligence needs merits the Secretary of Defense having the lead role in the selection of the DIA director.

4. Renaming National Foreign Intelligence Program (NFIP)/National Intelligence Program

Current Law:

- NFIP includes all intelligence community programs except JMIP and TIARA, which principally serve joint or tactical military needs.

S. 2845:

- The bill renames the NFIP to be the NIP.
- NIP will include at least: CIA, NSA, NGA, NRO, the FBI's Office of Intelligence, and the Department of Homeland Security's Information Analysis function, unless the NID and the head of a department agree otherwise.
- NIP will not include Defense Department intelligence assets that principally serve joint or tactical military needs, or State, Energy, and Treasury Departments' intelligence activities.

Conference Report Language:

- Current language renames the NFIP as the NIP, and preserves current law's definition of the NFIP.

Alternative Options Offered and Conferees' Decision:

- During Senate floor debate, Senator Warner offered amendments related to the provision (SA 3874 and SA 3875).
 - SA 3874 would have required all programs, projects, and activities within JMIP and TIARA to remain within JMIP and TIARA until a thorough review of the programs was completed. The Secretary of Defense and NID would have had to agree before a program could be removed from JMIP or TIARA.
 - SA 3875 clarifies that JMIP and TIARA remain DoD's responsibility.
- The Senate accepted SA 3875 by unanimous consent. SA 3874 was ruled non-germane by the Chair.
- The House did not have a similar measure.
- The issue was raised during the conference.
- The conferees contended that the current definition of the NFIP (renamed NIP) is sufficiently broad to include the relevant parts of the intelligence community. The current definition of the NFIP also allows annual adjustments in the NFIP's composition during the annual budget and appropriation process. Congressional appropriations committees have previously called for greater rationalization in order to avoid NSA and NGA being split internally between NFIP and non-NFIP budget accounts.

5. Public Disclosure of Intelligence Community Annual Budget

Current Law:

- The President *may* disclose any portion of the intelligence community's budget.

S. 2845:

- The President *must* disclose annually the top-line aggregate budget figure.

Conference Report Language:

- The mandatory public disclosure provision of the intelligence community's annual top-line aggregate budget figures was struck from current conference report language.

Alternative Options Offered and Conferees' Decision:

- During Senate floor debate, Senator Stevens offered an amendment (SA 3903) that would have required the NID to conduct a study to assess the advisability of disclosing to the public the aggregate amount of appropriations requested for the NIP.
- The Senate voted to table the amendment by a vote of 55-37.
- The House did not have a similar measure.
- The issue was raised during the conference.
- The conferees decided to reject the Senate-passed disclosure provision because the House and the White House strongly opposed declassification of the appropriation.

6. National Counterterrorism Center (NCTC) and National Counterproliferation Center (NCPC)

Current Law:

- No statutory counterterrorism center exists, but the interagency Terrorist Threat Integration Center (TTIC) and the CIA's Counterterrorism Center (CTC) perform related functions. No statutory counterproliferation center exists.

S. 2845:

- Creates a statutory national intelligence center within the NIA to coordinate U.S. intelligence operations against terrorism. The NCTC will have the following components:
 - Directorate of Intelligence (to integrate intelligence capabilities against terrorism).
 - Directorate of Planning (to develop interagency counterterrorism plans, assign agencies' responsibilities, and monitor implementation. Will concentrate on developing joint counterterrorism plans, but does not have authority to direct operations by agencies in the Executive Branch, nor is it part of the military chain of command).
- Creates a NCTC Director with the following characteristics:
 - Senate-confirmed position with the equivalency of a Deputy Secretary;
 - Reports to NID regarding activities of the Directorate of Intelligence, and to the President and NID regarding activities of the Directorate of Planning;
 - Cannot serve simultaneously in any other capacity in the intelligence community; and
 - Has concurrence authority with regard to various director-level appointments in the intelligence community with offices related to counterterrorism operations.
- Creates a statutory national intelligence center, a national counterproliferation center (NCPC), within the NIA to coordinate U.S. counter-WMD proliferation operations.
- The NCPC will develop, direct, and coordinate U.S. efforts and activities to interdict weapons of mass destruction, related materials and technologies, and their delivery systems to terrorists, terrorist organizations, other non-state/state actors of concern; and
- The NCPC will have similar functions and responsibilities (as the NCTC albeit for counterproliferation) for the NCPC Director, Directorate of Intelligence, and Directorate of Planning.

Conference Report Language:

- Report language keeps Senate-passed language regarding the NCTC largely intact. Modifications include:
 - Establishes NCTC in the Office of the DNI.
 - NCTC Director is Senate-confirmed and may not serve simultaneously as head of any other intelligence community agency.
 - NCTC Director reports to DNI on budget and intelligence matters, but to President on the planning and progress of joint counterterrorism operations (other than intelligence operations).
 - The NCTC will conduct "strategic operational planning," which is defined to include the mission, the objectives to be achieved, the tasks to be performed, interagency coordination of operational activities, and the assignment of roles and responsibilities.

- The NCTC Director shall monitor the implementation of strategic operational plans and shall obtain relevant information from departments and agencies on the progress of such entities in implementing the plans.
- Report language modifies the Senate-passed language regarding the NCPC, specifically by stating that the President shall establish a NCPC no later than 18 months after the date of enactment. However, the President may waive this requirement if the President determines (through a written notification to Congress) that it does not materially improve the government's ability to halt WMD proliferation.

Alternative Options Offered and Conferees' Decision:

- During Senate floor debate, Senator Roberts offered an amendment (SA 3750) to “clarify the responsibilities of the Directorate of Intelligence of the National Counterterrorism Center for information-sharing and intelligence analysis.”
 - SA 3750 was withdrawn by Senator Roberts.
- Senator Stevens offered an amendment (SA 3826) to “clarify the NCTC Director's role in advising the President and the National Intelligence Director.”
 - SA 3826 was passed by voice vote.
- Senator Snowe offered an amendment (SA 3912) to “require an evaluation of the effectiveness of the National Counterterrorism Center.”
 - SA 3912 was agreed to by unanimous consent.
- Senator Bingaman offered an amendment (SA 3771) to “authorize employees of Federally Funded Research and Development Centers and certain employees of the DoE national laboratories to be eligible for the staff of the NCTC and the national intelligence centers.
 - SA 3771 was agreed to by unanimous consent.
- Senator Frist offered an amendment (SA 3895) to create the National Counterproliferation Center.
 - SA 3895 was agreed to by unanimous consent.
- The House did include a measure to create the NCTC. It did not include a measure to create the NCPC.
- The issue was raised during the conference.
- The conferees decided to accept the Senate-passed provisions concerning the stature of the NCTC director (Senate-confirmed and reporting to the President concerning operational planning) and the definition of operational planning, as these two issues are most critical to the NCTC fulfilling the 9/11 Commission's vision of coordinating counterterrorism strategy and operations across the executive branch. The House conferees accepted S. 2845's provision creating an NCPC, with modifications, due to the challenge that counterproliferation poses for executive branch-wide coordination of strategy and operations.

7. “Preservation of Authority”

S. 2845:

- No provision regarding this issue existed in the Senate-passed bill.

Conference Report Language:

- “The President shall issue guidelines to ensure the effective implementation and execution within the executive branch of the authorities granted to the Director of National Intelligence by this title and the amendments made by this title, in a manner that respects and does not abrogate the statutory responsibilities of the heads of the departments of the United States Government concerning such departments, including, but not limited to” (1) the Director of the OMB and (2) the authority of the principal officers of the executive departments as heads of their respective departments, including, but not limited to, under—
 - Section 199 of the Revised Statutes (22 USC 2651);
 - Title II of the Department of Energy Organization Act (42 USC 7131 et seq.);
 - The State Department Basic Authorities Act of 1956;
 - Section 102(a) of the Homeland Security Act of 2002 (6 USC 112 (a)); and
 - Sections 301 of title 5, 113(b) and 162(b) of title 10 [U.S. Armed Forces], 503 of title 28, and 301(b) of title 31, United States Code.

Alternative Options Offered and Conferees’ Decision:

- During Senate floor debate, Senator Warner offered an amendment (SA 3876) that would have preserved the authority and accountability (i.e., chain of command) of the Director of the OMB and the principal officers of the executive departments as heads of their respective departments in the implementation of intelligence reform.
- Floor managers did not accept Senator Warner’s language and insisted on inserting a clause, “except as amended by this Act.” The amendment was withdrawn because an agreement could not be reached.
- The House did not include language on this provision.
- In an October 18 letter to conferees, the White House requested that the conferees insert “preservation of authority and accountability language” into the conference report because such language “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 language originally inserted stated that, within 120 days of the appointment of the DNI and on an ongoing basis, the President shall issue guidelines to ensure effective implementation of the authorities provided to the DNI by this title and the amendments made to this title in a manner that maintains, consistent with the provisions of this Act, the statutory responsibilities of the Director of OMB and the heads of executive branch departments.
- During the conference, Rep. Hunter raised concerns, and this provision remained one of the unresolved issues preventing final action on the conference report.
 - Chairman Hunter’s principal objection was to the phrase, “consistent with the provisions of this Act,” which he argued undermined the military chain of command by inserting the DNI between the Secretary of Defense and battlefield commanders.
 - Senate conferees contended that they built safeguards into the conference agreement to ensure that the role of the DNI did not interfere with warfighting.
- On December 6, the White House and conferees, including Rep. Hunter, agreed on compromise language to this provision (see above).

8. Privacy and Civil Liberties Oversight Provisions

Current Law:

- There is currently no statutory requirement for a privacy and civil liberties oversight board; however, in response to the recommendation of the 9/11 Commission, the President established through Executive Order on August 27 the President's Board on Safeguarding Americans' Civil Liberties.
- With regard to privacy and civil liberties officers, there also are no statutory requirements for the intelligence community or executive branch, except the Homeland Security Act of 2002 created a Privacy Officer and an Officer for Civil Rights and Civil Liberties within the Department of Homeland Security. In addition, in some other cases, such posts exist, or an Inspector General fills the role.

S. 2845:

- Establishes new oversight officers, bodies, functions, and authorities within the National Intelligence Authority, the Executive Office of the President, and the federal government, to ensure that civil liberties are protected in the conduct of the War on Terror. Specifically, this provision does the following:
 - Creates within the National Intelligence Authority an Officer for Civil Rights and Civil Liberties, a Privacy Officer, and an Inspector General (with some privacy oversight responsibilities).
 - Creates within the Executive Office of the President a Privacy and Civil Liberties Oversight Board with extensive authorities: subpoena authority (private); authority to compel Executive Branch compliance with Board requests; five members appointed by the President, by and with the advice and consent of the Senate, for fixed six-year terms (members of the Board do not serve at the pleasure of the President); requirement that the Board be politically diverse; and public reporting requirements.
 - Requires that certain federal departments and agencies designate Privacy and Civil Liberties Officers (not less than one senior officer). Included are the Departments of Justice, Defense, State, Treasury, Health and Human Services, and Homeland Security, the National Intelligence Authority, the Central Intelligence Agency, and any other department, agency, or element of the Executive Branch designated by the Privacy and Civil Liberties Oversight Board to be appropriate for coverage.

Conference Report Language:

- Conference report language modifies the Senate-passed bill. Modifications include:
 - Creates one Civil Liberties Protection Officer within the Office of the National Intelligence Director.
 - Creates a Privacy and Civil Liberties Oversight Board in the Executive Office of the President with the following characteristics:
 - Composed of five members, but only two (Chairman and Vice Chairman) are Senate confirmed.
 - No political diversity requirement for Board membership.
 - Board members serve at the pleasure of the President with no fixed terms.
 - No subpoena authority over private individuals. Instead, if an individual does not comply with a Board request, the Board is authorized to notify the Attorney General. The Attorney General shall then provide an opportunity to explain why the request has not been complied with, and the Attorney General

“may take such steps as appropriate to ensure compliance” with the Board’s requests.

- Executive Branch department heads are required to ensure compliance with Board requests for information such as testimony or documents from any agency or government employee; however, there is a national security waiver that can be exercised either by the National Intelligence Director (to protect national security) or by the Attorney General (to protect sensitive law enforcement or counterterrorism information or operations).
- Annual report to Congress required (unclassified to the greatest extent).
- Sense of Congress that each department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer.

Alternative Options Offered and Conferees’ Decision:

- During Senate floor debate, Senators Kyl, Harkin, Leahy, Durbin, Collins, and Sarbanes offered amendments:
 - SA 3801 to modify privacy and civil liberties oversight.
 - SA 3821 to modify functions of the Board.
 - SA 3916 to strengthen civil liberty protections.
 - SA 3923 to balance privacy and civil liberties.
 - SA 3957 to provide for revisions to privacy and civil liberties protections.
 - SA 3760 to provide for certain information in Board reports.
- The Senate accepted amendments SA 3923, SA 3957, and SA 3760, and accepted with modifications amendments SA 3821 and SA 3916.
- Amendment SA 3801 was withdrawn with a verbal understanding that Members’ concerns regarding overbroad privacy and civil liberties oversight of the intelligence community (contained in the Senate bill) would be addressed in conference. Specifically, the amendment would have done the following:
 - Modified the Senate bill's Privacy and Civil Liberties Oversight Board by removing subpoena authority and authority to compel Executive Branch compliance with Board requests;
 - Retained privacy and civil liberties oversight within the National Intelligence Authority through the Inspector General, but removed the two additional officers in this Authority responsible for the same task;
 - Eliminated provisions requiring privacy and civil liberties officers within individual Executive Branch departments and agencies.
- The House bill had similar, but more limited, measures related to this provision. The House bill included the following:
 - Created a Civil Liberties Protection Officer within the Office of the National Intelligence Director; and
 - Created an unspecified number of Chief Privacy Officers within “each Federal agency with law enforcement or anti-terrorism functions” but no civil liberties board.
- Since the House-passed bill did not include a Privacy and Civil Liberties Oversight Board, the Senate-passed provision was used as the basis of negotiations and the conferees created such a board within the Executive Office of the President. Conferees made a number of changes to address concerns raised by the White House, Senator Kyl, and others.
- Senator Kyl contends that the statutory mandate that department heads (e.g., CIA Director) “shall ensure” compliance with any information request of the board will jeopardize intelligence operations and personnel and create more risk aversion.

- Conferees believe the modifications to the Senate-passed language ensure that the Board would be able to provide effective advice to the President and executive branch departments and agencies, and that the Board and its Members would be under the general supervision of the President in carrying out its responsibilities.
- In addition, the House-passed bill created an unspecified number of Chief Privacy Officers within “each Federal agency with law enforcement or anti-terrorism functions” and the Senate-passed bill required the designation of civil liberties and privacy officers within a limited number of departments. The conferees decided to replace the provisions in both the House and Senate bills with a Sense of the Congress that Federal agencies with law enforcement or anti-terrorism functions should designate an officer for these purposes. While the House agreed to strike its language establishing Chief Privacy Officers throughout government, similar language was included in Section 522 of the Conference Report on H.R. 4818, the Consolidated Appropriations Act, 2005.

9. Immigration Provisions Regarding Terrorist Travel within the U.S.

S. 2845:

- The Senate-passed bill generally does not contain any immigration-related recommendations made by the 9/11 Commission that focused on terrorist travel within the United States. One notable exception was a provision in the Senate bill that would require U.S. citizens, and citizens and nationals of Western Hemisphere countries for whom passport requirements had previously been waived, to carry a passport or other documentation deemed sufficiently secure when seeking to enter the United States.

Conference Report Language:

- The conference report language primarily modifies Title V of the Senate-passed bill. The Conference report includes:
 - Increase in full-time border patrol agents by 2,000 in each of fiscal years 2006-2010;
 - Increase of Immigration and Customs Enforcement agents by 800 in each of fiscal years 2006-2010;
 - Increase in detention beds by 8,000 in each of fiscal years 2006-2010, with priority for the use of these beds to detain aliens charged with inadmissibility or deportability on security grounds;
 - A requirement that the Government Accountability Office evaluate and report on the extent to which weaknesses in the U.S. asylum system could be exploited by terrorists;
 - A provision making visa revocation a ground for placing an alien in removal proceedings;
 - Increased criminal penalties for alien smuggling and harboring;
 - A provision rendering deportable any alien who has received military training from or on behalf of an organization that, at the time of training, was a designated terrorist organization;
 - A requirement that the Department of Homeland Security (DHS), in consultation with the Department of State, develop and implement a plan to require a passport or other document, or combination of documents, sufficient to denote citizenship and identity for all travel into the U.S. by U.S. citizens and nationals from Western Hemisphere countries, including Canada and Mexico, for whom such requirements have previously been waived. This plan must seek to expedite the travel of frequent travelers, including those who reside in border communities;
 - A provision requiring DHS to promulgate minimum standards, subject to Congressional approval, for identification documents required of passengers seeking to board domestic commercial flights. If either House of Congress fails to approve these standards in accordance with the fast-track procedures set out in this section, then not later than one year after such rejection, default minimum identification standards will take effect. With the exception of children under 17 (or other age deemed appropriate by DHS), all passengers seeking to board domestic commercial flights will then be required to present:
 1. a valid, unexpired passport;
 2. domestically issued documents that the Secretary of DHS designates as secure for identification purposes;
 3. any document issued by the Attorney General or DHS under the authority of one of the immigration laws, or

4. A document issued by the country of nationality of any alien not required to possess a passport for admission to the U.S. that the Secretary of the Department of Homeland Security designates as reliable for this purpose.

This provision also requires DHS to make recommendations to Congress regarding categories of federal facilities deemed to be at risk for terrorist attack and requiring minimum identification standards to gain access, and to recommend appropriate minimum standards to gain such access;

- Provisions that would render inadmissible and deportable aliens who have committed acts of torture, extrajudicial killing, and particularly severe violations of religious freedom abroad;
- The Senate-passed provision (Kyl) requiring in-person consular interviews of most applicants for non-immigrant visas between the ages of 14 and 79, aimed at preventing aliens tied to terrorism from obtaining non-immigrant visas; and
- The Senate-passed version of the driver's license provisions (McCain) with the incorporation from the House bill of the following minimum requirements of what the driver's license must contain:
 1. the person's full legal name;
 2. the person's date of birth;
 3. the person's gender;
 4. the person's driver's license or identification number;
 5. a digital photograph;
 6. the person's address of principal residence; and
 7. the person's signature.

***On December 6, Senators Collins and Lieberman accepted two additional changes to the driver's license section: first, a clarification that during the negotiated rulemaking process to develop driver's license standards in the bill, the participation of outside groups is not required and, second, a conference provision that would have provided a cause of action to those denied a driver's license was stricken from the final measure.*

Alternative Options Offered and Conferees' Decision:

- The House had many measures in Title III related to immigration reform. The conferees dropped or significantly altered the following provisions included in the House-passed bill:
 - Alien Identification Standards. The conference report only applies the restrictions on the documents that passengers can use to prove identity when boarding airplanes. Conference report language also requires DHS to make recommendations for minimum ID required for access to at-risk federal facilities. The House-passed bill included additional documentary requirements. Among them was a requirement that would have provided that aliens in the U.S. only use a Department of Justice-issued or Department of Homeland Security-issued identification document or valid passport for the purposes of establishing identity in the U.S. As such, this provision would have prohibited federal officials from accepting the matricula consular identification cards as proof of identity. This conference agreement strikes this section.
 - Expedited Removal of Illegal Aliens.
 - Preventing Terrorist Aliens from Obtaining Asylum. The conference report eliminates this provision, replacing it with a study.
 - Judicial Review of Orders of Removal of Criminal Aliens.
 - Detention and Removal of Aliens Ordered Removed.
 - Additional Removal Authority for Deportable Aliens.

- Allowing for the Deportation of All Alien Terrorists and Their Supporters Who Are Inadmissible.
- Authorization of Interior Immigration Agents. The conference report eliminates House requirement that new agents enforce restrictions on illegal aliens in the workplace.
- Driver's License Provision, Bar on Illegal Aliens From Obtaining Drivers Licenses.
- Rep. James Sensenbrenner (R-WI) continues to assert the need for the bar on illegal aliens obtaining drivers licenses.
- Conferees believe that the immigration provisions contained in the conference report represent a significant compromise between the House and Senate bills and is responsive to many law enforcement and immigration provisions included in H.R. 10.
- The conference report includes several other provisions aimed at improving national and border security, including identification and document security and a number of law enforcement provisions found in H.R. 10.