

INTELLIGENCE COMMUNITY WHISTLEBLOWER
PROTECTION ACT OF 1998

SEPTEMBER 25, 1998.—Ordered to be printed

Mr. GOSS, from the Permanent Select Committee on Intelligence,
submitted the following

R E P O R T

[To accompany H.R. 3829]

[Including cost estimate of the Congressional Budget Office]

The Permanent Select Committee on Intelligence, to whom was referred the bill (H.R. 3829) to amend the Central Intelligence Agency Act of 1949 to provide a process for agency employees to submit urgent concerns to Congress, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE; FINDINGS.

(a) **SHORT TITLE.**—This Act may be cited as the “Intelligence Community Whistleblower Protection Act of 1998”.

(b) **FINDINGS.**—The Congress finds that—

(1) national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President;

(2) the principles of comity between the Branches apply to the handling of national security information;

(3) Congress, as a co-equal Branch of Government, is empowered by the Constitution to serve as a check on the Executive Branch; in that capacity, it has a “need to know” of allegations of wrongdoing within the Executive Branch, including allegations of wrongdoing in the Intelligence Community;

(4) no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the Executive Branch of classified information about wrongdoing within the Intelligence Community;

(5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and

(6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting.

SEC. 2. PROTECTION OF INTELLIGENCE COMMUNITY EMPLOYEES WHO REPORT URGENT CONCERNS TO CONGRESS.

(a) INSPECTOR GENERAL OF THE CENTRAL INTELLIGENCE AGENCY.—

(1) IN GENERAL.—Subsection (d) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q) is amended by adding at the end the following new paragraph:

“(5)(A) An employee of the Agency, or of a contractor to the Agency, who intends to report to Congress a complaint or information with respect to an urgent concern may report to the Inspector General.

“(B) Within the 60-calendar day period beginning on the day of receipt from an employee of a complaint or information under subparagraph (A), the Inspector General shall determine whether the complaint or information appears credible. If the Inspector General determines that the complaint or information appears credible, the Inspector General within such period shall transmit the complaint or information to the Director.

“(C) The Director shall, within 7 calendar days after receipt of the transmittal from the Inspector General under subparagraph (B), forward such transmittal to the intelligence committees together with any comments the Director considers appropriate.

“(D) If the Inspector General does not transmit, or does not transmit in an accurate form, the complaint or information described in subparagraph (B), the employee may contact the intelligence committees directly to submit the complaint or information, if the employee—

“(i) furnishes to the Director, through the Inspector General, a statement of the employee’s complaint or information and notice of the employee’s intent to contact the intelligence committees directly; and

“(ii) obtains and follows direction from the Director, through the Inspector General, on how to contact the intelligence committees in accordance with appropriate security practices.

“(E) The Inspector General shall notify the employee of each action taken under this paragraph with respect to the employee’s complaint or information not later than three days after any such action is taken.

“(F) In this paragraph:

“(i) The term ‘urgent concern’ means any of the following:

“(I) A serious or flagrant problem, abuse, violation of law or executive order, or deficiency relating to the administration or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.

“(II) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the administration or operation of an intelligence activity.

“(III) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under subsection (e)(3)(B) in response to the employee’s reporting an urgent concern pursuant to the terms of this act.

“(ii) The term ‘intelligence committees’ means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

“(G) An action taken by the Director or the Inspector General under this paragraph shall not be subject to judicial review.”.

(2) CLERICAL AMENDMENT.—The heading to subsection (d) of section 17 of such Act is amended by inserting “; REPORTS TO CONGRESS ON URGENT CONCERNS” before the period.

(b) ADDITIONAL PROVISIONS WITH RESPECT TO INSPECTORS GENERAL OF THE INTELLIGENCE COMMUNITY.—

(1) IN GENERAL.—The Inspector General Act of 1978 (5 U.S.C. App.) is amended by redesignating section 8H as section 8I and by inserting after section 8G the following new section:

“SEC. 8H. (a)(1)(A) Employees of the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office, and the National Security Agency, and of contractors to those Agencies, who intend to report to Congress a complaint or information with respect to an urgent concern may report to the Inspector General of the Department of Defense (or designee).

“(B) Employees of the Federal Bureau of Investigation, and of contractors to the Bureau, who intend to report to Congress a complaint or information with respect to an urgent concern may report to the Inspector General of the Department of Justice (or designee).

“(C) Any other employee of, or contractor to, an executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities, who intends to report to Congress a complaint or information with respect to an urgent concern may report to the appropriate Inspector General (or designee) under this Act, or section 17 of the Central Intelligence Agency Act of 1949.

“(2) The designee of an Inspector General under this section shall report such employee complaints or information to the Inspector General within 7 calendar days of receipt.

“(b) Within the 60-calendar day period beginning on the day of receipt of an employee complaint or information under subsection (a), the Inspector General shall determine whether the complaint or information appears credible. If the Inspector General determines that the complaint or information appears to be credible, the Inspector General within such period shall transmit the complaint or information to the head of the establishment.

“(c) The head of the establishment shall, within 7 calendar days after receipt of the transmittal from the Inspector General pursuant to subsection (b), forward such transmittal to the intelligence committees, together with any comments the head of the establishment considers appropriate.

“(d) If the Inspector General does not transmit, or does not transmit in an accurate form, the complaint or information pursuant to subsection (b), the employee may contact the intelligence committees directly to submit the complaint or information, if the employee—

“(1) furnishes to the head of the establishment, through the Inspector General, a statement of the employee’s complaint or information and notice of the employee’s intent to contact the intelligence committees directly; and

“(2) obtains and follows direction from the head of the establishment, through the Inspector General, on how to contact the intelligence committees in accordance with appropriate security practices.

“(e) The Inspector General shall notify the employee of each action taken under this section with respect to the employee’s complaint or information not later than three days after any such action is taken.

“(f) In this paragraph:

“(1) The term ‘urgent concern’ means any of the following:

“(A) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the administration or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.

“(B) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the administration or operation of an intelligence activity.

“(C) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under section 7(c) in response to the employee’s reporting an urgent concern pursuant to the terms of this Act.

“(2) The term ‘intelligence committees’ means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

“(g) An action taken by the head of an establishment or an Inspector General under this section shall not be subject to judicial review.”

(2) CONFORMING AMENDMENT.—Section 8I of such Act (as redesignated by paragraph (1) of this subsection) is amended by striking “or 8E” and inserting “8E, or 8H”.

PURPOSE OF THE BILL

H.R. 3829, “Intelligence Community Whistleblower Protection Act of 1998” (ICWPA), establishes a new and additional means by which employees of the Intelligence Community (IC) may report to the intelligence committees classified information about wrongdoing. This bill is intended to protect employees from reprisal and

to ensure the proper handling of classified documents and information in the process of reporting wrongdoing. By establishing this additional and protected process, H.R. 3829 is intended to promote the reporting of information to the intelligence committees, which the committees need to perform effectively their oversight role.

SUMMARY

SECTION-BY-SECTION

Section 1. Short title; findings

Subsection (a) establishes the title of the bill as the "Intelligence Community Whistleblower Protection Act of 1998".

Subsection (b) contains two groups of Findings. The first is drawn from legislative history and testimony further described in "Background and Need for Legislation." These Findings set forth the principles of the Constitution and of comity that apply to the issues involved in this legislation:

(1) national security is a shared responsibility, requiring joint efforts and mutual respect by Congress and the President;

(2) the principles of comity between the Branches apply to the handling of national security information;

(3) Congress, as a co-equal Branch of Government, is empowered by the Constitution to serve as a check on the Executive Branch; in that capacity, it has a "need to know" of allegations of wrongdoing within the Executive Branch, including allegations of wrongdoing in the Intelligence Community;

(4) no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by employees of the Executive Branch of classified information about wrongdoing within the Intelligence Community; * * *

These Findings expand upon section 306 of the "Intelligence Authorization Act for Fiscal Year 1998," (P.L. 105-107). They are consistent with the position taken by the committee as early as 1980 in response to assertions of a presidential prerogative under the Constitution to withhold information from Congress:

The Congress has never recognized the existence of such Presidential authority; no President has stated the lack of such authority; and the courts have never definitively resolved the matter.

House Permanent Select Committee on Intelligence, Report on the Intelligence Oversight Act of 1980, H. Rpt. No. 96-1153, at 22 (1980). Finally, these Findings set forth an appropriate and measured rejoinder to the position of the executive branch, which was taken in a memorandum of law issued by the Office of Legal Counsel of the Department of Justice on November 26, 1996, and to the testimony of executive branch witnesses before the committees.

The second group of Findings sets forth the specific problems addressed by this legislation:

(5) the risk of reprisal perceived by employees and contractors of the Intelligence Community for reporting serious or flagrant problems to Congress may have impaired the flow of information needed by the intelligence committees to carry out oversight responsibilities; and

(6) to encourage such reporting, an additional procedure should be established that provides a means for such employees and contractors to report to Congress while safeguarding the classified information involved in such reporting. These problems are also discussed in more detail in “Background and Need for Legislation.”

Section 2. Protection of Intelligence Community employees who report urgent concerns to Congress

Subsection (a) of this section amends subsection (d) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q). Subsection (b) of this section adds new section 8H to the Inspector General Act of 1978 and redesignates present section 8I.

Subsection (a) Inspector General of the Central Intelligence Agency

This subsection adds new paragraph (5) to subsection (d) of section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q) to establish an additional procedure by which employees of the Central Intelligence Agency (CIA), or of contractors to that Agency, may report certain matters to Congress. The committee was concerned that other avenues for reporting to Congress—through, for example, the Director of Central Intelligence (DCI or Director) or the CIA’s Office of Congressional Affairs—did not provide ample protection to an employee who wished to bring information about wrongdoing to the attention of the intelligence committees.

Subparagraph (5)(A)

This subparagraph states that an employee of the Agency, or its contractors, who wishes to report an “urgent concern,” which is defined in subparagraph 5(F), to Congress may report his “complaint or information” to the Agency Inspector General (IG).

Subparagraph (5)(B)

This subparagraph requires the IG, within 60 days of receipt of the complaint or information, to determine whether that complaint or information “appears” credible. If so, the IG must, within that time frame, transmit that complaint or information to the Director. This section is intended to impose only a limited ability by the IG to determine the credibility of the allegations of the employee as the employee actually reports them. This ability is further checked by the right of the employee, as provided in subparagraph (5)(D), to reject the IG’s determination and proceed to Congress directly.

Subparagraph (5)(C)

This subparagraph requires the Director, within seven days of receipt of the employee’s complaint or information, to forward it, together with any comments the Director considers appropriate, to the intelligence committees.

Subparagraph (5)(D)

This subparagraph provides that the employee, if the complaint or information is either not transmitted to Congress, or is not

transmitted in a factually accurate manner, may report the complaint or information to the intelligence committees directly. This subparagraph creates no right in the employee to have access either to the IG report in the matter, or to all information provided by the IG to Congress. It does, however, require that the IG demonstrate to the employee, in some way, that the complaint or information was transmitted to Congress and was transmitted accurately. The accuracy of the transmittal to Congress is to be determined by the employee, alone.

The employee who utilizes the procedure set forth in this Act may, if dissatisfied with the absence, or with the accuracy, of the transmittal to Congress, report the complaint or information directly to the intelligence committees. To do so, however, the employee must first furnish the Director with a statement of the employee's complaint or information, and notice of the employee's intent to contact the intelligence committees, directly. The employee must then obtain and follow appropriate security practices in bringing the information to the committees. In keeping with the statutory protections afforded to employees who bring a complaint or information to the IG, the employee may provide the statement and notice to the DCI, and obtain guidance, anonymously.

Subparagraph 5(E)

This subparagraph requires that the IG inform the employee of each action taken under this paragraph with respect to the employee's complaint or information within three days of that action.

Subparagraph (5)(F)

This subparagraph defines "urgent concern" in three parts. Subclause (5)(F)(i)(I) includes "serious or flagrant" problems in intelligence programs and activities involving classified information, and reflects the jurisdiction of the oversight committees. "Urgent concerns" do not include differences of opinions concerning public policy matters. This, once again, reflects the jurisdiction of the intelligence committees.

Subclause (5)(F)(i)(II) includes a false statement to Congress, or willful withholding from Congress, on an issue of material fact about any such program or activity as an "urgent concern." Full, accurate, and wholly truthful information is absolutely necessary to the oversight process.

Subclause (5)(F)(i)(III) makes an act or threat of reprisal, as defined for other federal employees in section 2302(a)(2)(A) of the Whistleblower Protection Act of 1989, 5 U.S.C. §1201, et seq., against an employee who reports an "urgent concern" as an "urgent concern" through this process. Inclusion of reprisal threats and actions in the definition of "urgent concern" not only elevates their gravity to the level of a "serious or flagrant" problem, but invokes a nondelegable duty on the part of the Director to transmit reports of reprisal to Congress. The committee will not and cannot tolerate acts of reprisal against any employee who reports in good faith what the employee believes to be a serious or flagrant problem, abuse, violation of law or executive order, mismanagement, or deficiency to the intelligence committees.

Subparagraph (5)(G)

Subparagraph (5)(G) precludes judicial review of decisions taken by the Director or IG made under this subparagraph.

Subsection (b) Additional provisions with respect to Inspectors General of the Intelligence Community

This subsection adds new section 8H to the Inspector General Act of 1978 (5 U.S.C. App. 3), and redesignates present section 8H as 8I, to establish an additional procedure by which employees of Intelligence Community agencies and units outside of CIA, and of contractors to those agencies and units, may report certain matters to Congress.

Section 8H(a)(1)(A)

This subparagraph states that employees of the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office, and the National Security Agency, or of its contractors, who wish to report an “urgent concern,” which is defined in subsection (f), to Congress may report their “complaint or information” to the IG of the Department of Defense (or designee).

Section 8H(a)(1)(B)

This subparagraph states that all employees of the Federal Bureau of Investigation, and of contractors to the Bureau, who wish to report an “urgent concern” to Congress may report their “complaint or information” to the IG of the Department of Justice (or designee).

Section 8H(a)(1)(C)

This subparagraph applies to employees of, or contractors to, an agency or unit having a foreign intelligence or counterintelligence activity as its principal function. It states that those employees in those agencies or units who wish to report an “urgent concern” to Congress may report their “complaint or information” to the appropriate IG, or IG designee, under the Inspector General Act of 1978 or under the Central Intelligence Agency Act of 1949. This subparagraph is intended to extend coverage to all employees of intelligence agencies and units excluded from the protections of the Whistleblower Protection Act of 1989, 5 U.S.C. §1201, et seq. Under section 2302(a)(2)(C) of that Act, the President is to determine which agencies and units, in addition to those specifically named, have a foreign intelligence or counterintelligence activity as their principal function. Upon a presidential determination under that Act, those agencies and units are excluded from the protection of the Whistleblower Protection Act of 1989. To date, the President has made no such determinations.

Section 8H(a)(2)

This paragraph requires designees of the IGs to report a complaint or information on an “urgent concern” to the IG within seven days of their receipt of that complaint or information.

Section 8H(b)

This subsection requires the IG, within 60 days of receipt of a complaint or information, to determine whether that complaint or information “appears” credible. If so, the IG must, within that time frame, transmit that complaint or information to the head of establishment. This section is intended to impose only a limited ability by the IG to determine credibility of the allegations of the employee as the employee actually reports them. This ability is checked by the right of the employee, as provided in subparagraph 8H(d), to reject the IG’s determination and proceed to Congress directly.

Section 8H(c)

This subsection requires the head of the establishment, within seven days of receipt of the employee’s complaint or information, to forward it, together with any comments the head of establishment may have, to the intelligence committees.

Section 8H(d)

This subsection provides that the employee, if the complaint or information is either not transmitted to Congress or is not transmitted in a factually accurate manner, to report the complaint or information to the intelligence committees directly. This subsection creates no right in the employee to have access either to the IG report in the matter or to all the information provided by the IG to Congress. It does, however, require that the IG demonstrate to the employee in some way that the complaint or information was actually transmitted to Congress and was transmitted accurately. The accuracy of the transmittal to Congress is to be determined by the employee, alone.

The employee who utilizes the procedure set forth in this Act may, if dissatisfied with the absence, or with the accuracy, of the transmittal to Congress, report the complaint or information directly to the intelligence committees. To do so, however, the employee must first furnish the head of establishment with a statement of the employee’s complaint or information, and notice of the employee’s intent to contact the intelligence committees, directly. The employee must obtain and follow appropriate security practices in bringing the information to the committees. In keeping with the statutory protections afforded to employees who bring a complaint or information to the IG, the employee may provide the statement and notice to the head of establishment, and obtain guidance, anonymously.

Subsection (e)

This subsection requires that the IG inform the employee of each action taken under this section within three days of that action.

Section 8H(f)

This subsection defines “urgent concern” in three parts. Subparagraph 8H(f)(1)(A) includes “serious or flagrant” problems in intelligence programs and activities involving classified information, and reflects the jurisdiction of the oversight committees. “Urgent concerns” do not include differences of opinions concerning public

policy matters. This, once again, reflects the jurisdiction of the intelligence committees.

Subparagraph 8H(f)(1)(B) includes a false statement to Congress, or willful withholding from Congress, on an issue of material fact about any such program or activity as an “urgent concern.” Full, accurate, and wholly truthful information is absolutely necessary to the oversight process.

Subparagraph 8H(f)(1)(C) include any act or threat of reprisal, as defined for other federal employees in section 2302(a)(2)(A) of the Whistleblower Protection Act of 1989, 5 U.S.C. §1201 et seq., against an employee who reports an “urgent concern” as an “urgent concern” through this process. Inclusion of reprisal threats and actions in the definition of “urgent concern” not only elevates their gravity to the level of a “serious or flagrant” problem, but invokes a nondelegable duty on the part of the head of establishment to transmit reports of reprisals to Congress. The committee will not tolerate acts of reprisal against any employee who finds it necessary to report in good faith what the employee believes to be a serious or flagrant problem, abuse, violation of law or executive order, mismanagement, or deficiency to the intelligence committees.

Subsection 8H(g)

Subsection 8H(g) precludes judicial review of decisions taken by the head of establishment or IG under this section.

BACKGROUND AND NEED FOR LEGISLATION

THE PROBLEM

Employees of the IC do not have a clear idea how to make disclosures to Congress of classified information about wrongdoing within the IC. IC employees choose either to obtain prior authorization from their management for disclosures to the intelligence committees, or to come directly to the intelligence committees without such authorization. Some employees, the committee learned, fear they will suffer reprisals for making either type of disclosure to Congress.

Not surprisingly, few employees are willing to engage in either option. According to inquiries of some junior and mid-level officers of the IC made by committee Members and staff, and discussions with IC psychologists, employees of the IC are not only reluctant to take the risk of contacting the Congress, but are also disinclined to “break ranks” by making disclosures outside their agencies. The employees of the IC will not come forward, the committee was told, until they have a mechanism that (1) allows them to make disclosures through recognized channels in their own agencies; (2) protects them from unofficial, as well as official, professional harm, and (3) protects the classified information they seek to report.

In November 1997, with that in mind, Chairman Goss and Mr. Dicks, the Ranking Democrat of the committee, solicited the views of the statutory IGs of the IC on regulations that would enable employees to make disclosures to the intelligence committees through the protections of the IGs within their own agencies. In January 1998, the Chairman proposed the promulgation of such regulations

in letters to the heads of agency within the IC. In April 1998, the White House rejected this regulatory proposal. On July 9, 1998, notwithstanding the administration's earlier rejection, the CIA issued a new regulation governing employee disclosures to Congress that was based in large measure upon the procedures outlined in the Chairman's January proposal.

The committee welcomed CIA's willingness to respond to the dilemma faced by its employees who wish to report problems to the oversight committees. At present, however, that regulation covers only employees of CIA. Even as a Director of Central Intelligence Directive (DCID), which the committee understands is in process, it will not have the reach to cover all those employees excluded from the protections afforded to other federal employees under the Whistleblower Protection Act. See 5 U.S.C. §1201, et seq.

The new regulation, or DCID, moreover, would not comport in one important respect with H.R. 3829, as reported from the committee. That regulation, or DCID, would enable the DCI to block an employee's information from reaching Congress in a manner that does not, in the view of the committee, reflect an appropriate accommodation between the executive and legislative branches in this area of oversight. Whether and in what circumstance the DCI or head of agency may block disclosures by agency employees of classified information to Congress are a weave of constitutional and comity issues that have, of late, become points of contention between the branches.

"MISCHIEF OF POLARIZATION"

There is, as noted, nothing new in the idea of employees of the IC taking the risk of approaching the intelligence committees directly. In such cases, IC employees run the risk of official sanction from their management for violating security or other regulations, as well as an unofficial sanction from their fellow officers who might not condone their "breaking ranks." Those employees who have come to the committee directly have, in the main, been prudent with their disclosures. The information they bring to the committee serves both as a safety valve for employees of the IC and as a check on official disclosures by the IC. For these reasons, the committee has been protective—informally though sometimes explicitly—of employees who approach it directly.

The result, until recently, was an implicit understanding and accommodation between the IC and the intelligence committees over the handling of employees who approached Congress directly. Under that arrangement, IC managers might discourage their employees from making a direct approach to the intelligence committees, but did not, so far as we are aware, punish those who actually made such direct approaches. This arrangement was, in effect, a part of the larger case-by-case accommodation. It was reliant upon comity and mutual understanding of the prerogatives of the executive and legislative branches of government, in dealing with the problems over the control and handling of sensitive national security, law enforcement, and foreign policy information that periodically arise between the branches.

In 1996, however, the accommodation over direct approaches began to break down. In November of that year, the Office of Legal

Counsel (OLC) of the Department of Justice issued a sweeping memorandum addressing the issues of classified disclosures to Congress and congressional authority to legislate in this realm. In its memorandum (hereinafter, OLC Memo), OLC asserted that, as a constitutional matter, neither the Lloyd La Follette Act (5 U.S.C. §7211), nor any other Act of Congress, may “divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a ‘right’ to furnish such information to a Member of Congress without receiving official authorization to do so.” OLC Memo at 3.¹ OLC based its conclusion upon the constitutional principle of separation of powers:

(T)he President’s roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members.

Id. at 4 (quoting Brief for Appellees at 42, *American Foreign Serv. Assoc. v. Garfinkel*, 488 U.S. 923 (1988) (No. 87–2127)).²

In response to the OLC memo, the Senate Select Committee on Intelligence (SSCI) included a provision (section 306) in the Senate-passed “Intelligence Authorization Act for Fiscal Year 1998,” S. 858, that directed the President to inform all executive branch employees that their disclosure of classified information about wrongdoing to an appropriate oversight committee, or to their congressional representatives, was not prohibited by any law, executive order, or regulation, and was not contrary to public policy.

In response to the Senate action, the administration issued a Statement of Administration Policy (SAP) that asserted that section 306 was unconstitutional. The President threatened to veto any bill containing that provision.

In the committee of conference on the fiscal year 1998 intelligence authorization bill, the conferees agreed to postpone action on this issue to enable the House of Representatives to hold hearings on the legislative matter raised by section 306. Mindful of the need to preserve congressional prerogatives, however, conferees replaced the veto-threatened provision with the following:

SEC. 306. SENSE OF CONGRESS ON RECEIPT OF CLASSIFIED INFORMATION. It is the sense of Congress that Members of Congress have equal standing with officials of the

¹The OLC opinion was issued in response to a request for a legal opinion from a panel appointed by the DCI reviewing a matter involving a State Department official, who was alleged to have made unauthorized disclosures to a Member of HPSCI.

²In essence the Department of Justice contended that this is an area of federal authority that the Constitution gives solely to the President, and the federal legislature is deprived of any authority under which it can act. Similarly, the opinion argued that the Constitution empowers the President to withhold certain categories of information from Members of Congress without exception. Unfortunately, the opinion failed to recognize, even while basing its arguments on separation of powers grounds, that Congress is a co-equal branch of government and often circumscribes, relegates, or proscribes the President’s actions in the areas of intelligence, national security, and foreign policy. The committee rejects, out of hand, the legal analysis put forth by OLC. See “Constitutional Considerations,” *infra*.

Executive Branch to receive classified information so that Congress may carry out its oversight responsibilities under the Constitution.

The “Intelligence Authorization Act for Fiscal Year 1998” became law November 20, 1997 (P.L. 105–107).

In February 1998, after hearings limited solely to constitutional issues, the SSCI reported S. 1668, a modified version of the original section 306 of S. 858. In March, the Senate passed S. 1668 by a vote of 93 to one. In response, the administration issued a SAP asserting that S. 1668, like section 306 of S. 858, was unconstitutional and therefore subject to a veto. Once again, SSCI, despite the threat of a veto, included S. 1668 in its version of the “Intelligence Authorization Act for Fiscal Year 1999,” S. 2052, which passed the Senate in late June.

Our predecessors on this committee have warned against the “mischief of polarization” that can occur in disputes between the executive and legislative branches in the oversight of intelligence. Here, the executive branch has asserted that it has unimpeded control over decisions about access to classified information. In response, the legislative branch has asserted that it needs unimpeded access to classified information in order to discharge its oversight responsibilities. The focus of both branches is whether, and on what basis, the executive branch may authorize all disclosures of classified information to the intelligence committees. Accordingly, in its review of legislation offered by Chairman Goss on this issue, the committee examined the conflicting constitutional claims of the two branches, the principles and practices of comity that may apply, and a “dynamic compromise” achieved in earlier legislation on these issues.

H.R. 3829 AS INTRODUCED

On May 12, 1998, Chairman Goss introduced the “Intelligence Community Whistleblower Protection Act of 1998,” a measure that would utilize the offices of the IGs to facilitate a secure and protective channel for employees of the IC who wish to report serious problems, or “urgent concerns,” to the intelligence committees. The intent of H.R. 3829 is to ensure disclosure to Congress of the classified information necessary for oversight and to establish a procedure that will promote and protect the secure provision of classified information to facilitate oversight.

In substance, Chairman Goss based his bill upon the answers of junior and mid-level officers of the IC to his question, “What can Congress do to encourage you to report serious problems in your buildings?” Their answers uniformly cited the need for a protected path, through the IGs, in their own agencies for reporting such problems. These answers were reinforced by opinions of IC psychologists. In establishing statutory IGs, in fact, Congress presumed and encouraged a preference among employees of the executive branch to report problems through channels within their own agencies.

In structure, Chairman Goss based this bill upon the reporting mechanism for “particularly flagrant or serious” problems that currently exists in IG statutes for the IC. Under H.R. 3829, the allega-

tions of a whistleblower, either in writing or in person, are sent by the IG through the head of agency to the intelligence committees.

HEARINGS ON H.R. 3829

On May 20, 1998, the committee held a hearing on potential constitutional and administrative issues involved in the handling of so-called whistleblowers from the IC pursuant to the provisions in H.R. 3829. Deputy Assistant Attorney General Randolph Moss testified for the Department of Justice that, unlike S. 1668, H.R. 3829 was, as introduced, constitutional. Dr. Louis Fisher, Senior Specialist for the Congressional Research Service (CRS), Library of Congress, testified that both S. 1668 and H.R. 3829 were constitutional. CIA General Counsel Robert McNamara, Deputy Assistant Attorney General Mark Richard, and the Deputy Legal Advisor for the Department of State, James Thessin, each testified that there were compelling administrative reasons why the administration should, in the exceptional case, have the opportunity to delay or modify certain disclosures to Congress.

On June 10, 1998, the committee held a second hearing on IG-related issues and heard from government and outside commentators on the merits of the bill. Eleanor Hill, Department of Defense IG; Michael Bromwich, Department of Justice IG; and Fred Hitz, former CIA IG, testified that H.R. 3829 was an appropriate and workable structure for handling whistleblowers from the IC. Mr. Hitz also appeared as an outside commentator³ and testified more broadly in support of H.R. 3829 and against S. 1668. Frederick Kaiser, Specialist in American National Government, CRS, provided historic context for oversight and for IG legislation. Director for the Center for National Security Studies Kate Martin supported certain amendments to H.R. 3829 that were proposed at the second hearing by the Chairman. In addition, Ms. Martin urged the committee to add a provision affirming its right to receive classified information from executive branch employees without prior authorization from their supervisors.

H.R. 3829 AS AMENDED

Arising from these two hearings was the need to consider changes to two provisions of H.R. 3829, as introduced. First, the consensus among the committee's witnesses was that, for a variety of reasons, the mechanism established for whistleblowers in H.R. 3829 should not be the "sole process" by which employees within the IC may report wrongdoing to Congress. Witnesses from the administration testified that employees should be able to report such matters through their management or through their offices of legislative affairs, if they so chose. Other witnesses testified that the committee should not, as a statutory matter, preclude the continuation of direct approaches by employees frustrated by, or distrustful of, other processes. On the basis of this testimony, Chairman Goss proposed to amend H.R. 3829 to make its procedures an additional, rather than the sole, means for reporting problems to Congress.

³Mr. Hitz retired as CIA IG on April 30, 1998.

A second, and more complicated, issue was the “holdback” provision of H.R. 3829 that acknowledged an authority in a head of agency, in the exceptional circumstance, to block disclosures by agency employees to Congress. Administration witnesses described such a provision as a constitutional and administrative imperative. Other witnesses condemned such a provision as an unprecedented and inappropriate surrender of congressional prerogative.

In his opening statement at the first hearing, Chairman Goss noted the controversial nature of the holdback provision and asked witnesses to consider various alternatives. In opening the second hearing, the Chairman proposed to amend H.R. 3829 by removing the holdback provision outright. Based upon testimony from the first hearing and the concerns and comments of committee Members, the Chairman concluded that a statutory acknowledgment of such holdback authority was unwarranted and could undermine important congressional prerogatives. Instead, Chairman Goss believed that, under H.R. 3829, agency heads should address their concerns about the disclosure to Congress of extremely sensitive information in the same way as they do at present: through personal communication and accommodation with the committee. With the removal from H.R. 3829 of the “holdback” provision, the Chairman also proposed a Sense of Congress that described the basis for that change and for the terms of H.R. 3829 as a whole.

The committee is aware that the inclusion, or exclusion, of the “holdback” provision in H.R. 3829 implicates fundamental constitutional and comity issues in the oversight of intelligence. For that reason, the following sets forth at some length the constitutional considerations, the need for comity, and an applicable “dynamic compromise” on the issues raised by this legislation in general and, in particular, by the presence or absence of a “holdback” provision.

CONSTITUTIONAL CONSIDERATIONS

The administration has, as noted above, asserted that the President, as Commander in Chief and “sole organ” for foreign affairs, must as a constitutional matter be free to determine the treatment of national security or classified information. Further, it asserted that, as Chief Executive, the President must, again as a constitutional matter, control the activities of executive branch employees. According to the testimony of Deputy Assistant Attorney General Randolph Moss,

the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The Constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information—even to Members of Congress. Such a law would squarely conflict with the Framers’ considered judgment, embodied in Article II of the Constitution, that, within the executive branch, all authority over matters of national defense and

foreign affairs is vested in the President as Chief Executive and Commander in Chief.

Statement of Randolph Moss at 16–17.

In response, CRS Senior Specialist Louis Fisher asserted that, under the Constitution, national security is a responsibility shared between the President and Congress:

The debates at the Philadelphia Convention make clear that the Commander in Chief Clause did not grant the President unilateral, independent power other than the power to “repel sudden attacks.” 2 Farrand 318–19. The Commander in Chief Clause was also intended to preserve civilian supremacy. 10 Op. Att’y Gen. 74, 79 (1861). The historical record is replete with examples of Congress relying on the regular legislative process to control the President’s actions in military affairs. There is no evidence from these sources that the framers intended the Commander in Chief Clause to deny to Members of Congress information needed to supervise the executive branch and learn of agency wrongdoing.

Statement of Louis Fisher at 8. Dr. Fisher also disputed the administration’s contention that the Constitution required the President, as Chief Executive, to review and approve any contact by executive branch employees with Congress:

(P)lacing the President at the head of the executive branch did not remove from Congress the power to direct certain executive activities and to gain access to information needed for the performance of legislative duties. At the Convention, Roger Sherman considered the executive “nothing more than an institution for carrying the will of the Legislature into effect.” 1 Farrand 65. It was never the purpose to make the President personally responsible for executing all the laws. Rather he was to take care that the laws be faithfully executed, including laws that excluded him from operations in the executive branch.

Statement of Louis Fisher at 9.

Like the Senate, the committee rejects the administration’s assertion that, as Commander in Chief, the President has ultimate and unimpeded constitutional authority over national security, or classified, information. Rather, national security is a constitutional responsibility shared by the executive and legislative branches that proceeds according to the principles and practices of comity.

Nor does the Committee accept that the President, as Chief Executive, has a constitutional right to authorize all contact between executive branch employees and Congress. Stripped of the more complicated issues involved in classified information, which we address above, the issue of whether an employee must “ask the boss” before approaching the intelligence committees with unclassified information about wrongdoing seems well below any constitutional threshold. Indeed, information available to the committee indicates that, at least until recently, the IC made little effort to monitor or regulate contact with the oversight committees over matters that were clearly unclassified. In the nondisclosure agreement that CIA

employees must sign, for example, the Agency focuses upon the type of information—i.e., classified information—that requires “secure handling”:

I understand that nothing contained in this agreement prohibits me from reporting intelligence activities that I consider to be unlawful or improper directly to * * * the Select Committee on Intelligence of the House of Representatives or the Senate. * * * In making any report referred to in this paragraph, I will observe all applicable rules or procedures for ensuring the secure handling of any information or material that may be involved.

The committee, in sum, finds no basis in the Constitution for a requirement that the President, either as Commander-in-Chief or as Chief Executive, approve any disclosure to Congress of information about wrongdoing within the executive branch. Accordingly, as reflected in Section 306 of the Intelligence Authorization Act for Fiscal Year 1998, the committee recognizes no limitation based upon separation of powers on the right of Members of Congress to gain access to classified information in the pursuit of their oversight responsibilities. H.R. 3829(1)(b)(4), as reported, therefore finds that, among other things, “no basis in law exists for requiring prior authorization of disclosures to the intelligence committees of Congress by Employees of the Executive Branch of classified information about wrongdoing with the Intelligence Community * * *”

THE NEED FOR COMITY

What the administration now claims as a constitutional prerogative has existed, to some degree, as a matter of comity and accommodation between the branches over the handling of national security information. Testimony adduced during the first committee hearing on H.R. 3829 demonstrated the need for continued comity in the handling of disclosures to Congress of classified information in general and, in particular, of disclosures to Congress by whistleblowers from the IC.

In that first hearing, administration lawyers testified that, quite apart from constitutional considerations, there were compelling reasons why, in exceptional circumstances, disclosures of classified information to Congress might have to be delayed or modified by heads of agency. CIA General Counsel Robert McNamara testified that certain disclosures could imperil intelligence and counterintelligence operations. Where the President has, under Section 503 of the National Security Act, limited notification of sensitive covert actions to certain House and Senate leaders, for example, the DCI might wish to prevent a whistleblower’s disclosure of that action to other Members, or to uncleared staff, of the intelligence committees. Similarly, if a CIA employee was under investigation by the FBI for espionage, the DCI may desire to limit disclosure to intelligence oversight committees to reduce the possibility of inadvertent disclosures that could alert the suspect and thus undermine any chance for successful prosecution. Further, in a whistleblower’s disclosure of wrongdoing by a case officer, the DCI may want to avoid the unnecessary disclosure of the names of any potential

clandestine assets that could have been handled by that case officer.

The Department of State's Deputy Legal Advisor James Thessin testified that disclosures by whistleblowers could lead to leaks that could imperil vital foreign affairs interests. Any leak, for example, of Secretary of State Henry Kissinger's secret negotiations with China could have had a disastrous consequence for the talks that led to President Nixon's historic visit to that country. Similarly, any leak of the Carter administration's secret negotiations in Algiers could have disrupted talks that eventually led to the release of our hostages in Iran.

Deputy Assistant Attorney General Mark Richard testified that disclosures by whistleblowers could compromise the confidentiality, integrity, and independence of ongoing criminal investigations and prosecutions. Disclosures to Congress of information from open enforcement files, for example, would violate a long-standing policy, long-respected by Congress, against granting access to information from open files. Disclosures to Congress by targets of, for example, espionage investigations, who believe that they are being treated unfairly, could complicate prosecution. Disclosures by a whistleblower who misinterprets the conduct of a legitimate espionage investigation as wrongdoing, for another example, could prompt congressional queries and actions that imperil the investigation. Finally, disclosures by whistleblowers of claimed wrongdoing could cause queries and demands from Congress that could change the investigatory priorities and resources of the agency involved.

The committee finds these points to be compelling examples of the need to treat the whistleblower issue with care. This testimony required the committee to find a way to assert and sustain the prerogatives of Congress on these issues in a manner that would not lead to the disruption of legitimate clandestine operations, diplomatic negotiations, or law enforcement efforts.

AN APPLICABLE "DYNAMIC COMPROMISE"

The committee has consistently urged the executive branch, in disputes over the control and handling of classified information, to join in a spirit of "dynamic compromise."

The framers, rather than attempting to define and allocate all governmental power in minute details, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient functioning of our governmental system.

House Permanent Select Committee on Intelligence, Report on the Intelligence Oversight Act of 1980, H. Rpt. 96-1153, at 14 (1980) (quoting *United States v. AT&T*, 567 F.2d 121, 126 (D.C. Cir. 1977)). This type of compromise lay beneath the enactment of the oversight sections of Title V of the National Security Act of 1947 (50 U.S.C. sec. 413) and the case-by-case accommodations made between the IC and the committees in the conduct of oversight. Such compromise effectively preserves prerogatives and avoids the sturm

und drang of absolutes that impedes resolution of these complex issues.

Fortunately, there exists such a compromise on the issues faced in the handling of whistleblowers. The question of whether, and on what basis, the President or his designees may screen and require prior authorization for contact by executive branch employees with Congress has been examined previously. The committee finds that the issue was carefully addressed in legislation leading up to the enactment of the reporting requirements of IGs to Congress in section 5 of the Inspector General Act of 1978 (5 U.S.C. App.) and, again in 1989, section 17(d) of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q).

In its version of the Inspector General Act of 1978, the House provided that, for “particularly serious or flagrant” and other problems, the IGs were to report first to the agency heads and thereafter directly, and without clearance or approval from agency heads, to the appropriate committees of Congress. The Department of Justice argued then, as well, that the provision raised a “serious constitutional problem,” because it violated the President’s constitutional authority to withhold information from Congress on the basis of executive privilege.

The Senate ultimately changed the provisions to meet the administration’s objections and provided that, for “particularly serious or flagrant” and other problems, the IGs were to report to the agency heads, who were then to pass those reports to Congress. Because the Senate examined some of the same issues and balanced similar equities that are involved in the handling of contact from IC whistleblowers, we cite the Senate report at some length:

* * * [N]othing in this section authorizes or permits an Inspector and Auditor General to disregard the obligations of law which fall upon all citizens and with special force upon Government officials. The Justice Department has expressed concern that since an Inspector and Auditor General is to report on matters involving possible violations of criminal law, his report might contain information relating to the identity of informants, the privacy interest of people under investigations, or other matters which would impede law enforcement investigations. * * * [T]he committee does not envision that a report by the Inspector and Auditor General would contain this degree of specificity. In any event, however, the intent of the legislation is that the Inspector and Auditor General in preparing his reports, must observe the requirements of law which exist today under common law, statutes, and the Constitution, with respect to law enforcement investigations. Similarly the Inspector and Auditor General must adhere to statutes such as 26 U.S.C. sec. 6013, dealing with tax returns, or Federal Rule of Criminal Procedure 6(e), dealing with grand jury information, which prohibit disclosure even to Congress. The inclusion of such information in an Inspector and Auditor General report could subject the Inspector and Auditor General to legal sanction.

The committee recognizes, however, that in rare circumstances the Inspector and Auditor General, through in-

advertence or design, may include in his report materials of this sort which should not be disclosed even to Congress. The inclusion of such materials in an Inspector and Auditor General's report may put a conscientious agency head in a serious bind. The obligation of an agency head is to help the President "faithfully execute the laws." Faithful execution of this legislation entails the timely transmittal, without alteration or deletion, of an Inspector General's report to Congress. However, a conflict of responsibilities may arise when the agency head concludes that the Inspector and Auditor General's report contains material, disclosure of which is improper under the law. In this kind of rare case, [section 5] is not intended to prohibit the agency head from deleting the materials in question.

In addition, the committee is aware that the Supreme Court has, in certain contexts, recognized the President's constitutional privilege for confidential communications or for information related to the national security, diplomatic affairs, and military secrets (*Nixon v. General Services Administration*, 433 U.S. 425, [sic] (1977) * * *; *United States v. Nixon*, 418 U.S. 683 (1974) * * *). Insofar as this privilege is constitutionally based, the committee recognizes that [section 5] cannot override it. In view of the uncertain nature of the law in this area, the committee intends that [section 5] will neither accept nor reject any particular view of Presidential privilege but only preserve for the President the opportunity to assert privilege where he deems it necessary. The committee intends that these questions should be left for resolution on a case-by-case basis as they arise in the course of implementing this legislation.

In the rare cases in which alterations or deletions have been made, the committee envisions that an agency head's comments on an Inspector and Auditor General's report would indicate to the Congress that alterations or deletions had been made, give a description of the materials altered or deleted, and the reasons therefore. In this manner, the appropriate subcommittees and committees could pursue the matter in whichever way would best serve the responsibilities of Congress.

The bill, as amended by the Senate, was passed by Congress and signed into law (P.L. 95-452). The provision for the reporting by the IG of "particularly serious or flagrant" and other problems through the DCI, rather than directly to Congress, was adopted in the establishment in 1989 of a statutory IG at CIA and added to section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q). This earlier legislation, and the careful consideration by Congress of matters of disclosures, form the basis of the "dynamic compromise" that we now seek to achieve through H.R. 3829.

EFFECT OF H.R. 3829 ON "END RUNS"

Because H.R. 3829, as amended, establishes an additional, rather than the sole, means by which employees of the IC may report

problems to our committees, it leaves open a matter of concern to Members of this committee: What happens to employees who, for whatever reason, choose not to report a problem either through the process outlined in H.R. 3829 or through another process authorized by their management, but instead approach the committee directly?

The committee believes that the procedure outlined in H.R. 3829, and the Findings that underlie those provisions, address such unauthorized "end runs" in two ways. First, and based upon our survey of IC employees and IC psychologists, H.R. 3829 provides a protected means for reporting to the intelligence committees that fits the needs and preferences of those employees. As such, the protections of H.R. 3829 reduce, if not eliminate, the fears of reprisal that often rationalize, in our experience, the use of unauthorized "end runs" at present.

Second, H.R. 3829 is a balanced and practical system for handling whistleblowers that should resolve the impasse created by the OLC memo and the Senate's legislative response. We expect that enactment of this bill will restore the informal accommodation by the executive, with regard to employees who bring information directly to the intelligence committees, that existed before the OLC opinion of 1996.

CONCLUSION

The committee believes that it must have access to those employees of the IC who are aware of information, classified or otherwise, exposing corruption, mismanagement, or waste within their agencies or elements. The committee's statutorily established oversight responsibilities cannot be effectively carried out if employees are required to obtain the approval of the heads of their agency before exposing wrongdoing, mismanagement, or waste. H.R. 3829 as reported is an effort to accommodate the critical interests of national security, law enforcement, and foreign affairs and still accomplish that legislative mandate.

COMMITTEE PROCEEDINGS

On May 20, 1998, the Committee held a hearing on the constitutional and administrative aspects of whistleblowers and H.R. 3829 and heard testimony from Dr. Louis Fisher, Senior Specialist at CRS; Randolph Moss, Deputy Assistant Attorney General at OLC; Robert McNamara, General Counsel, CIA; James Thessin, Deputy Legal Advisor, Department of State; and Mark Richard, Deputy Assistant Attorney General, Department of Justice.

On June 10, 1998, the Committee held a hearing on the workability of H.R. 3829 and heard testimony from Eleanor Hill, IG at Department of Defense; Michael Bromwich, IG at Department of Justice; Frederick Hitz, former IG at CIA; Frederick Kaiser, Specialist in American National Government at CRS; and Kate Martin, Director of the Center for National Security Studies.

On July 23, 1998, the committee was briefed by DCI George Tenet on CIA's new whistleblower regulation.

In addition, committee staff was briefed on the feasibility of using IG statutes for whistleblowers on December 15, 1997 by Mi-

chael Bromwich; Eleanor Hill; then-CIA IG Fred Hitz and IG counsel George Clarke; Michael Conley, Office of the IG at Department of Energy; and Jacquelyn Williams-Bridgers, IG at Department of State. Committee staff interviewed CIA officers in various field stations during the first half of 1998, and interviewed CIA and DIA psychologists on February 10 and May 12, 1998. Staff also attended a conference entitled "The Future of Whistleblower Protection," on March 30, 1998 at Washington College of Law, American University, Washington, D.C.

The committee reviewed reports and commentary on the enactment of the oversight provisions of Title V of the National Security Act of 1947 (50 U.S.C. sec. 413), the Inspector General Act of 1978 (5 U.S.C. App.), and the provisions for a CIA IG in section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q). Among those reports are Committee on Government Operations, Report on the Establishment of Offices of Inspector General in Certain Executive Departments and Agencies, H.R. Rep. No. 95-584 (1977); Committee on Governmental Affairs, Report on the Inspector General Act of 1978, S. Rep. No. 95-1071 (1978); Statement of Representative Brooks, Congressional Record (April 18, 1978). Daily ed. H10404; Statement of Senator Eagleton, Congressional Record (September 22, 1978). Daily ed. S30953; Senate Select Committee on Intelligence, Report on the Intelligence Oversight Act of 1980, S. Rep. No. 96-730 (1980); House Permanent Select Committee on Intelligence, Report on the Intelligence Oversight Act of 1980, H.R. Rep. No. 96-1153 (1980); Committee of Conference, Conference Report on the Intelligence Authorization Act for Fiscal Year 1981, H.R. Rep. No. 102-166 (1980); Senate Select Committee on Intelligence, Report on Authorizing Appropriations for Fiscal Years 1990 and 1991, S. Rep. No. 101-174 (1989); President's Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990, 25 Weekly Comp. Pres. Doc. 1851 (November 30, 1989); Senate Select Committee on Intelligence, Report on Authorizing Appropriations for Fiscal Year 1991, S. Rep. No. 102-85 (1991); and Senate Select Committee on Intelligence, Report on Legislative Oversight of Intelligence Activities: The U.S. Experience, (Comm. Print 1984). Among the commentary are Washington College of Law, *The Future of Whistleblower Protection* (Continuing Legal Ed. and Conf. Material, March 30, 1998); Michael Schmerling and L. Paige Whitaker, *Whistleblower Protections for Federal Employees* (Cong. Res. Serv. Rep. for Cong., 1997); and Frederick M. Kaiser, *Inspector General in the CIA Compared to Other Statutory Inspectors General* (Cong. Res. Serv. Rep. for Cong., 1989).

COMMITTEE CONSIDERATION

The Committee met on July 23, 1998, to consider H.R. 3829, the "Intelligence Community Whistleblower Protection Act of 1998." Amendments were offered by Chairman Goss, Mr. Dicks, and Mr. Skaggs.

The amendment by Chairman Goss was adopted by unanimous consent and made the base text for purposes of amendment. In open session, the amendment offered by Mr. Dicks was not adopted. The amendment offered by Mr. Skaggs was accepted. The Com-

mittee, then, by voice vote ordered H.R. 3829, as amended, reported favorably to the House, a quorum being present.

VOTE OF THE COMMITTEE

During its consideration of H.R. 3829, the Committee took one rollcall vote, which occurred on the amendment in the nature of a substitute offered by Mr. Dicks. On that vote, the Members present recorded their votes as follows:

Mr. Goss (Chairman)—no; Mr. Shuster—no; Mr. McCollum—no; Mr. Castle—no; Mr. Boehlert—no; Mr. Bass—no; Mr. Gibbons—no; Mr. Dicks—aye; Mr. Dixon—aye; Mr. Skaggs—aye; Ms. Pelosi—aye; Ms. Harman—aye; Mr. Skelton—aye; Mr. Bishop—aye.

FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

With respect to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has not received a report from the Committee on Government Reform and Oversight pertaining to the subject of the bill.

OVERSIGHT FINDINGS

In compliance with clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(1)(3)(B) of House rule XI does not apply because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 27, 1998.

Hon. PORTER J. GOSS,
Chairman, Permanent Select Committee on Intelligence, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN. The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3829, the Intelligence Community Whistleblower Protection Act of 1998.

If you wish further details on this estimate we will be pleased to provide them. The CBO staff contact is Dawn Sauter.

Sincerely,

JUNE O'NEILL, *Director.*

Enclosure.

H.R. 3829—Intelligence Community Whistleblower Protection Act of 1998

H.R. 3829 would establish a procedure for certain federal employees and contract employees to report wrongdoing regarding intelligence activities to the Congressional intelligence committees. The bill would amend the Central Intelligence Agency Act of 1949 and the Inspector General Act of 1978 to require that employees who want to disclose such information to the Congress first report it to the appropriate inspector general. If the inspector general determined that the complaint or information appeared credible, the inspector general would report it to the agency head, who, in turn, would transmit it to the intelligence committees.

CBO estimates that the bill would not have a significant budgetary impact. Although H.R. 3829 would increase the number of complaints that are processed and reviewed by the inspectors general, CBO estimates that the increase in complaints would be slight and that any increase in administrative costs of federal agencies would be insignificant. Also, the costs of informing employees about the new procedure would be negligible because the number of employees covered by the bill would be small and the cost of each notice would be minimal. Because the legislation would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Dawn Sauter. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATES

The committee agrees with the estimate of the Congressional Budget Office (CBO). As reported, however, H.R. 3829 would not “require” that employees report through the mechanism established by the bill, as described in the CBO estimate, but would only “enable” them to use the new process.

SPECIFIC CONSTITUTIONAL AUTHORITY FOR CONGRESSIONAL ENACTMENT OF THIS LEGISLATION

The intelligence and intelligence-related activities of the United States government are carried out to support the national security interests of the United States, to support and assist the armed forces of the United States, and to support the President in the execution of the foreign policy of the United States. Article 1, section 8, of the Constitution of the United States provides, in pertinent part, that “Congress shall have power * * * to pay the debts and provide for the common defence and general welfare of the United States; * * *”; “to raise and support Armies, * * *”; “to provide and maintain a Navy; * * *” and “to make all laws which shall be necessary and proper for the carrying into execution * * * all other powers vested by this Constitution in the Government of the

United States, or in any Department of Officer thereof." Therefore, pursuant to such authority, Congress is empowered to enact this legislation.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**SECTION 17 OF THE CENTRAL INTELLIGENCE AGENCY
ACT OF 1949**

SEC. 17. INSPECTOR GENERAL FOR THE AGENCY.

(a) * * *

* * * * *

(d) SEMIANNUAL REPORTS; IMMEDIATE REPORTS OF SERIOUS OR FLAGRANT PROBLEMS; REPORTS OF FUNCTIONAL PROBLEMS; *REPORTS TO CONGRESS ON URGENT CONCERNS.*—(1) * * *

* * * * *

(5)(A) *An employee of the Agency, or of a contractor to the Agency, who intends to report to Congress a complaint or information with respect to an urgent concern may report to the Inspector General.*

(B) *Within the 60-calendar day period beginning on the day of receipt from an employee of a complaint or information under subparagraph (A), the Inspector General shall determine whether the complaint or information appears credible. If the Inspector General determines that the complaint or information appears credible, the Inspector General within such period shall transmit the complaint or information to the Director.*

(C) *The Director shall, within 7 calendar days after receipt of the transmittal from the Inspector General under subparagraph (B), forward such transmittal to the intelligence committees together with any comments the Director considers appropriate.*

(D) *If the Inspector General does not transmit, or does not transmit in an accurate form, the complaint or information described in subparagraph (B), the employee may contact the intelligence committees directly to submit the complaint or information, if the employee—*

(i) furnishes to the Director, through the Inspector General, a statement of the employee's complaint or information and notice of the employee's intent to contact the intelligence committees directly; and

(ii) obtains and follows direction from the Director, through the Inspector General, on how to contact the intelligence committees in accordance with appropriate security practices.

(E) *The Inspector General shall notify the employee of each action taken under this paragraph with respect to the employee's complaint or information not later than three days after any such action is taken.*

(F) *In this paragraph:*

(i) The term "urgent concern" means any of the following:

(I) A serious or flagrant problem, abuse, violation of law or executive order, or deficiency relating to the administration or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.

(II) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the administration or operation of an intelligence activity.

(III) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under subsection (e)(3)(B) in response to the employee's reporting an urgent concern pursuant to the terms of this act.

(ii) The term "intelligence committees" means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(G) An action taken by the Director or the Inspector General under this paragraph shall not be subject to judicial review.

* * * * *

INSPECTOR GENERAL ACT OF 1978

* * * * *

SEC. 8H. (a)(1)(A) Employees of the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office, and the National Security Agency, and of contractors to those Agencies, who intend to report to Congress a complaint or information with respect to an urgent concern may report to the Inspector General of the Department of Defense (or designee).

(B) Employees of the Federal Bureau of Investigation, and of contractors to the Bureau, who intend to report to Congress a complaint or information with respect to an urgent concern may report to the Inspector General of the Department of Justice (or designee).

(C) Any other employee of, or contractor to, an executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities, who intends to report to Congress a complaint or information with respect to an urgent concern may report to the appropriate Inspector General (or designee) under this Act, or section 17 of the Central Intelligence Agency Act of 1949.

(2) The designee of an Inspector General under this section shall report such employee complaints or information to the Inspector General within 7 calendar days of receipt.

(b) Within the 60-calendar day period beginning on the day of receipt of an employee complaint or information under subsection (a), the Inspector General shall determine whether the complaint or information appears credible. If the Inspector General determines that the complaint or information appears to be credible, the Inspector General within such period shall transmit the complaint or information to the head of the establishment.

(c) The head of the establishment shall, within 7 calendar days after receipt of the transmittal from the Inspector General pursuant

to subsection (b), forward such transmittal to the intelligence committees, together with any comments the head of the establishment considers appropriate.

(d) If the Inspector General does not transmit, or does not transmit in an accurate form, the complaint or information pursuant to subsection (b), the employee may contact the intelligence committees directly to submit the complaint or information, if the employee—

(1) furnishes to the head of the establishment, through the Inspector General, a statement of the employee’s complaint or information and notice of the employee’s intent to contact the intelligence committees directly; and

(2) obtains and follows direction from the head of the establishment, through the Inspector General, on how to contact the intelligence committees in accordance with appropriate security practices.

(e) The Inspector General shall notify the employee of each action taken under this section with respect to the employee’s complaint or information not later than three days after any such action is taken.

(f) In this paragraph:

(1) The term “urgent concern” means any of the following:

(A) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the administration or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters.

(B) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the administration or operation of an intelligence activity.

(C) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under section 7(c) in response to the employee’s reporting an urgent concern pursuant to the terms of this Act.

(2) The term “intelligence committees” means the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(g) An action taken by the head of an establishment or an Inspector General under this section shall not be subject to judicial review.

RULE OF CONSTRUCTION OF SPECIAL PROVISIONS

SEC. [8H] 8I. The special provisions under section 8, 8A, 8B, 8C, 8D, [or 8E] 8E, or 8H of this Act relate only to the establishment named in such section and no inference shall be drawn from the presence or absence of a provision in any such section with respect to an establishment not named in such section or with respect to a designated Federal entity as defined under section 8F(a).

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