

# STATUTORY STRUGGLES OF ADMINISTRATIVE AGENCIES: THE DIRECTOR OF NATIONAL INTELLIGENCE AND THE CIA IN A POST-9/11 WORLD

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## INTRODUCTION

Following the terrorist attacks of September 11, 2001, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)<sup>1</sup> in hopes of changing numerous perceived failures of the United States intelligence community.<sup>2</sup> The IRTPA established, among other things, the position of the Director of National Intelligence (DNI) to oversee, coordinate, and improve the performance of the various United States intelligence entities.<sup>3</sup> The DNI is a cabinet-level official who serves as the principle advisor to the President and National Security Council on intelligence-related matters.<sup>4</sup> With centralized access and enhanced oversight into various intelligence activities, the DNI would presumably improve the United States intelligence community and prevent another 9/11-style attack on American soil.

Prior to the passage of IRTPA in 2004, the United States intelligence community was a compartmentalized and competition-based system of civilian and military intelligence assets,<sup>5</sup> held loosely together by a Director

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1. Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 , Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3643–44 (2004) (codified as amended in scattered sections of the National Security Act of 1947, 50 U.S.C. §§ 401 to 403-6 (2006)).

2. RICHARD A. BEST, JR., CONG. RESEARCH SERV., INTELLIGENCE ISSUES FOR CONGRESS 2 (2009), <http://www.fas.org/sgp/crs/intel/RL33539.pdf>.

3. IRTPA § 1011.

4. Office of the Director of National Intelligence, About the ODNI, <http://www.dni.gov/who.htm> (last visited Jan. 14, 2010).

5. National Security Act of 1947, 50 U.S.C. § 401a(4) (2006) (defining the members of the United States intelligence community to include the following: Central Intelligence Agency (CIA), Department of State Bureau of Intelligence and Research (INR), Defense Intelligence Agency (DIA), National Security Agency (NSA), National Reconnaissance Office (NRO), National Geospatial-Intelligence Agency (NGA), Federal Bureau of Investigation (FBI), Army Intelligence, Navy Intelligence, Air Force Intelligence, Marine Corps Intelligence, Department of Homeland Security (DHS), Coast Guard (CG), Treasury Department, and Energy Department).

of Central Intelligence (DCI).<sup>6</sup> The DCI had three main duties: to direct the Central Intelligence Agency (CIA), to be the intelligence advisor to the President, and to be the central coordinator of the various intelligence agencies and departments.<sup>7</sup> To accommodate these tasks, through the years the President would issue orders in an attempt to expand the DCI's power and centralize the DCI's role within the intelligence community.<sup>8</sup> However, more power often resulted in more responsibility, leaving the DCI with too many tasks and not enough resources to complete them.<sup>9</sup> The IRTPA, acknowledging these previous struggles, sought to separate the DCI's three tasks, giving the newly created DNI responsibility for overseeing the United States intelligence community and acting as an advisor to the President<sup>10</sup> while leaving the task of running the day-to-day operations of the CIA to the Director of the Central Intelligence Agency (DCIA).<sup>11</sup> The new DNI authority, outlined in the IRTPA and codified as amended in the National Security Act of 1947, includes authority to specify the intelligence budget, transfer funds and personnel across the intelligence community, and develop priorities for intelligence collection and analysis.<sup>12</sup> But even with stronger statutory powers and a more centralized structure, the DNI has received his share of criticism in the last five years.

One of the chief complaints against the DNI was that even with enhanced authority, Congress still had not bestowed the DNI with enough

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6. *See generally* Exec. Order No. 12,333, 3 C.F.R. 200, 202–03 (1982) (a competition-based, decentralized system).

7. *See id.* at 202–04 (describing the range of the DCI's duties as coordinator of U.S. intelligence activities); *see also* GEORGE J. TENET, DIRECTOR OF CENTRAL INTELLIGENCE DIRECTIVE 1/1: THE AUTHORITIES AND RESPONSIBILITIES OF THE DIRECTOR OF CENTRAL INTELLIGENCE AS HEAD OF THE U.S. INTELLIGENCE COMMUNITY (1998), <http://www.fas.org/irp/offdocs/dcidl-1.htm>.

8. *See* CIA CTR. FOR THE STUDY OF INTELLIGENCE, CENTRAL INTELLIGENCE: ORIGIN AND EVOLUTION 6–11 (Michael Warner ed., 2001), [https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/Origin\\_and\\_Evolution.pdf](https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/Origin_and_Evolution.pdf) [hereinafter CIA ORIGIN AND EVOLUTION REPORT] (noting the various attempts to expand the DCI powers through executive orders in an effort to reach the centralization envisioned by President Harry S. Truman when he signed the National Security Act of 1947 into law, while accommodating the DCI's duty to run effective operational intelligence activities at the CIA).

9. *Id.*

10. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, VISION 2015: A GLOBALLY NETWORKED AND INTEGRATED INTELLIGENCE ENTERPRISE 21 (2008), [http://www.dni.gov/Vision\\_2015.pdf](http://www.dni.gov/Vision_2015.pdf).

11. Under IRTPA the Director of Central Intelligence (DCI) became the Director of the Central Intelligence Agency (DCIA). IRTPA, Pub. L. No. 108-458, § 1071, 118 Stat. 3638, 3689 (2004) (replacing “Director of Central Intelligence” with “Director of National Intelligence” or “Director of the Central Intelligence Agency” where applicable).

12. *Id.* § 1011(a) (adding to the National Security Act of 1947, 50 U.S.C. §§ 403(b)(1), (b)(2), 403-1(c)(1)(B), (f)(1)(A), (3)(A), (5), (g)(1) (2006)).

authority to control and unify the historically autonomous intelligence departments and agencies.<sup>13</sup> In 2008, President George W. Bush responded to this complaint with Executive Order 13,470, further delineating the specific DNI responsibilities under the IRTPA.<sup>14</sup> Despite this executive order, questions of authority continue to arise when the DNI promulgates changes within the intelligence community.<sup>15</sup>

There are several recent examples of statutory ambiguity and overlap of legal authority between the DNI and the CIA as a result of IRTPA's implementation. First is the over-publicized turf battle between the CIA and the DNI concerning appointment of overseas station chiefs.<sup>16</sup> Traditionally, the CIA has been in charge of appointing these positions, but the new DNI statutory authority suggests the DNI may also have some control.<sup>17</sup> The issue of who has the power to appoint these positions fueled national news headlines for months before the White House resolved the issue.<sup>18</sup>

Another example of statutory ambiguity is the DNI's Intelligence Community Directive (ICD) establishing the National Intelligence Civilian Compensation Program (NICCP).<sup>19</sup> NICCP is a DNI initiative to replace individualized pay systems currently used by each of the intelligence entities with a uniform, community-wide, compensation-based pay system.<sup>20</sup> Although the individual agencies and departments appear to have adopted this directive voluntarily, IRTPA does not give the DNI explicit authority to make these entities comply.<sup>21</sup>

A third example of statutory ambiguity can be seen in the DNI's administrative authority to address Freedom of Information Act (FOIA) classification and declassification issues as they relate to the CIA's FOIA

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13. See Pam Benson, *In Today's Intelligence Hierarchy, Who Really Runs the Show?*, CNN.COM, Feb. 12, 2009, <http://www.cnn.com/2009/POLITICS/02/12/cia.dni/index.html>; see also Fred Kaplan, *You Call That a Reform Bill?*, SLATE, Dec. 7, 2004, <http://www.slate.com/id/2110767>.

14. Exec. Order No. 13,470, 3 C.F.R. 218 (2009).

15. See *infra* notes 50–51.

16. See generally David Ignatius, *Duel of the Spy Chiefs*, REAL CLEAR POLITICS, June 11, 2009, [http://www.realclearpolitics.com/articles/2009/06/11/duel\\_of\\_the\\_spy\\_chiefs\\_96947.html](http://www.realclearpolitics.com/articles/2009/06/11/duel_of_the_spy_chiefs_96947.html) (detailing heated exchanges between the DNI and DCIA on who should appoint the overseas station chiefs, with insiders calling the DCIA's response “an act of insubordination” and President Obama being “peeved” with the entire ordeal).

17. See *infra* notes 71–74 and accompanying text.

18. See *infra* notes 75–76 and accompanying text.

19. INTELLIGENCE COMMUNITY DIRECTIVE NO. 650: NATIONAL INTELLIGENCE CIVILIAN COMPENSATION PROGRAM; GUIDING PRINCIPLES AND FRAMEWORK (2008), <http://www.fas.org/irp/dni/icd/icd-650.pdf>.

20. *Id.* at 1–3.

21. See *infra* notes 80, 82 & 88 and accompanying text.

authority. The intelligence reorganization under the IRTPA granted the DNI exclusive authority to “protect intelligence sources and methods from unauthorized disclosure” and to prepare intelligence products for dissemination.<sup>22</sup> However, as was the practice before the IRTPA, the CIA continues to respond individually to FOIA requests and process declassification requests.<sup>23</sup>

Lastly, not only do the statutory ambiguities create uncertainty in agency administration of FOIA and pay systems, but they also have operational implications. The DNI’s National Counterterrorism Center (NCTC), created under the IRTPA, was an effort to centralize various counterterrorism efforts throughout the intelligence and homeland security communities.<sup>24</sup> However, the NCTC still competes with the long-established CIA Counterterrorism Center (CTC) and demonstrates the IRTPA’s failure to resolve operational conflict and redundancy.<sup>25</sup>

While the spirit and intent of the IRTPA suggest intelligence agencies such as the CIA will work in concert with the DNI when implementing these directives and initiatives, the DNI has acknowledged there are legal inconsistencies as to how this will take place.<sup>26</sup> Unless future amendments through Congress or through executive orders fix these ambiguities and overlaps,<sup>27</sup> potential conflicts over future intelligence directives will continue to threaten the success of a centralized intelligence community, detracting from its vital mission of securing the nation.

This Comment addresses whether the DNI, under the IRTPA, has the proper authority to effectively integrate and unify the United States intelligence community by evaluating the current statutory guidelines and clashes of authority between the DNI and the CIA. Part I of this Comment examines the development of the DNI’s statutory authority under the National Security Act of 1947, as amended by the IRTPA in 2004 and

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22. 50 U.S.C. § 403-1(i)(1), (2)(c) (2006).

23. Exec. Order No. 12,958, 3 C.F.R. 333, 346–47 (1996), *as amended in* 70 Fed. Reg. 21,609 (Apr. 26, 2005) (allowing agencies that receive a FOIA request to respond with declassification of the information or state a valid exemption).

24. *See infra* notes 102–104 and accompanying text.

25. *See infra* note 97 and accompanying text.

26. INTELLIGENCE COMMUNITY DIRECTIVE NO. 650, *supra* note 19, at 1 n.1 (“A legal determination as to whether the language in this [Implementation and Administration] paragraph is necessary under the IRTPA, in order for the DNI to execute this ICD, has not been made.”).

27. *See* IRTPA, Pub. L. No. 108-458, § 1018, 118 Stat. 3638, 3670 (2004) (insisting that the DNI’s authority “respects and does not abrogate the statutory responsibilities of the heads of the departments of the United States Government” including the CIA); Exec. Order No. 13,470 § 1.3(c), 3 C.F.R. 218, 224 (2009) (restating the language of the IRTPA, that statutory authorities of intelligence agencies like the CIA will not be abrogated by decisions of the DNI).

Executive Order 13,470 in 2008. Part II analyzes the areas of statutory ambiguity of the DNI's current power and the apparent overlap between the DNI and CIA administrative authority and the effect it has had, and will continue to have, on the relationship between the DNI and CIA. Examples discussed include appointment of overseas station chiefs, efforts to streamline the intelligence community's employee pay system, overlap of classification and declassification procedures as they relate to the intelligence community's FOIA request process, and the operational redundancy of counterterrorism centers. Finally, Part III evaluates various proposed solutions to these statutory problems and suggests ways to improve the relationship of the DNI over the intelligence community by setting forth what authority should stay with intelligence entities like the CIA and what power should be designated to the DNI.

## I. BACKGROUND OF INTELLIGENCE COMMUNITY STATUTORY POWERS

Over the last fifty years, volumes of amendments, National Security Council intelligence directives, and executive orders detail an ongoing struggle to find the most effective organization of the intelligence community following Congress's original plan under the National Security Act of 1947.<sup>28</sup> The 2004 IRTPA was not the first attempt to reorganize the intelligence structure established in 1947 but a concerted effort to again effectuate change after a long line of marginally successful attempts to address decades of perceived shortcomings of a less-than-cohesive intelligence community.<sup>29</sup>

### A. *Pearl Harbor: A Catalyst for Change*

Congress developed the National Security Act in 1947 in response to United States intelligence failures that contributed to the successful Japanese attack on Pearl Harbor in 1941 and led to United States involvement in World War II.<sup>30</sup> The *Joint Committee Report on the Investigation*

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28. See CIA ORIGIN AND EVOLUTION REPORT, *supra* note 8, at 1–2 (detailing frustrations of the DCI's inability to truly run and coordinate national intelligence collection, which manifested into years of attempts to reform the position by the National Security Council, presidents, and Congress, each time being tempered with fears of excessive concentration of power in such a covert arena of government).

29. See *id.* (noting the numerous NSC intelligence directives and executive orders aimed at reforming the intelligence community).

30. JOINT COMM. ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK, 79TH CONG., INVESTIGATION OF THE PEARL HARBOR ATTACK 252–54 (Comm. Print 1946) (reporting the intelligence deficiencies discovered through the Committee's investigation and outlining recommendations to ensure unity in the United States intelligence system).

of the Pearl Harbor Attacks demanded a “centralization of authority and clear-cut allocation of responsibility” within the intelligence community to prevent another attack.<sup>31</sup> Congress responded with the National Security Act of 1947,<sup>32</sup> which established the CIA as an independent agency responsible for “overseeing strategic analysis and coordinating clandestine activities abroad.”<sup>33</sup> At the same time, its director, the DCI, would advise the National Security Council of all intelligence matters and would also produce “national intelligence” by coordinating with the various intelligence departments and agencies.<sup>34</sup> Through the past several decades, amendments, intelligence directives, and executive orders have attempted to provide the DCI more power to effectively centralize intelligence-gathering tasks.<sup>35</sup> However, these efforts seemed to not be working.<sup>36</sup> By 1992, members of Congress began to introduce new bills to reorganize and develop a more coherent and unified intelligence community under a “Director of National Intelligence.”<sup>37</sup> Proponents of the reorganization argued that the DCI was overtasked and lacked the power necessary to exercise proper authority over the intelligence community.<sup>38</sup> It was not

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31. *Id.* at 254.

32. See HISTORY STAFF, CTR. FOR THE STUDY OF INTELLIGENCE, CIA, CIA COLD WAR RECORDS: THE CIA UNDER HARRY TRUMAN 131–35 (Michael Warner ed., 1994) (providing a reproduction of the original intelligence section of the National Security Act of 1947); see also Loch K. Johnson, *A Centralized Intelligence System: Truman’s Dream Deferred*, 23 AM. INTELLIGENCE J. 6, 6–8 (2005) (suggesting that President Truman’s desire to commission a single, cohesive intelligence report became an executive order creating the CIA and the DCI).

33. CIA.gov, *A Look Back... The National Security Act of 1947*, <https://www.cia.gov/news-information/featured-story-archive/2008-featured-story-archive/national-security-act-of-1947.html>.

34. See generally NATIONAL SECURITY COUNCIL INTELLIGENCE DIRECTIVE NO. 1: DUTIES AND RESPONSIBILITIES (1950), <http://fas.org/irp/offdocs/nscid01.htm>.

35. CIA ORIGIN AND EVOLUTION REPORT, *supra* note 8, at 7–12; see also Exec. Order No. 12,333, 3 C.F.R. 200 (1982) (further distinguishing the role and responsibilities of the DCI from what they were in the National Security Act of 1947).

36. See CIA ORIGIN AND EVOLUTION REPORT, *supra* note 8, at 7–12 (explaining that although Cold War administrations added to DCI’s responsibilities, these changes were limited in scope).

37. See, e.g., S. 2198 and S. 421 to Reorganize the United States Intelligence Community: Joint Hearing Before the S. Select Comm. on Intelligence and the H.R. Permanent Select Comm. on Intelligence, 102d Cong. 2 (1992). Recommendations from this proposed legislation and the companion bill offered in the House of Representatives, H.R. 4165, were partially incorporated into the Intelligence Organization Act of 1993, which strengthened the powers of the DCI by codifying increased budgetary powers and provided the DCI with expanded authority to shift certain foreign intelligence program funds.

38. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 402–03 (2004) (explaining that eventually DCI George Tenet and his chief aides were coordinating interagency meetings almost every day and that as he became more of a “lead coordinator” of the intelligence community, it became more difficult for him

until after the terrorist attacks of 9/11 and the perceived failures of the intelligence community that contributed to them that Congress finally took action.<sup>39</sup>

### B. 9/11: A Second Catalyst for Change Spurs the Creation of the DNI

In December 2004, Congress passed the IRTPA, beginning the most comprehensive reform of the intelligence community since its creation over fifty years ago.<sup>40</sup> This legislation was the result of numerous perceived intelligence failures outlined in the 9/11 Commission Report.<sup>41</sup> The report details an intelligence system geared to “wage the Cold War,” and by the late 1990s, the entire system was the product of “the dispersal of effort on too many priorities, the declining attention to the craft of strategic analysis, and security rules that prevented adequate sharing of information.”<sup>42</sup> The goal of Congress in enacting the IRTPA was to ensure the new DNI had more authority, and thus more ability to affect change, than the DCI of the original National Security Act of 1947.

Under the IRTPA, the DNI’s responsibilities are to serve as the head of the intelligence community and advise the President and National Security Council on intelligence matters.<sup>43</sup> Other new and enhanced authorities include authorizing the DNI to transfer or reprogram funds after “consulting” with the DCIA or other intelligence community department heads.<sup>44</sup> The DNI is also authorized to transfer personnel within the intelligence community for up to two years<sup>45</sup> and exercise authority over the appointment of intelligence community leadership.<sup>46</sup> Lastly, the

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“to play all the position’s other roles, including that of analyst in chief”).

39. *See id.* at 86–91 (analyzing the various intelligence failures preceding 9/11 and the recommendations made to unify the intelligence effort in response to those failures).

40. RICHARD A. BEST, JR. & ALFRED CUMMING, CONG. RESEARCH SERV., DIRECTOR OF NATIONAL INTELLIGENCE STATUTORY AUTHORITIES: STATUS AND PROPOSALS 2 (2008), <http://www.fas.org/sgp/crs/intel/RL34231.pdf>.

41. *See* NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 38, at 86–91 (referencing the structure and organization of the intelligence community and outlining how the various changes in technological capabilities, legislative priorities, and decentralized control contributed to a structure that proved to be ineffective in detecting and responding to the growing threat of terrorism).

42. *Id.* at 91.

43. IRTPA, Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3644 (2004) (codified at National Security Act of 1947 § 102 (b), 50 U.S.C. § 403(b) (2006)).

44. *Id.* § 1011, 118 Stat. at 3646 (codified at National Security Act of 1947 § 102A(d)(1)(A), (3), 50 U.S.C. § 403-1(d)(1)(A), (B)(3) (2006)); BEST & CUMMING, *supra* note 40, at 1.

45. IRTPA § 1011, 118 Stat. at 3647–48 (codified at National Security Act of 1947 § 102A(c)(2)(A), 50 U.S.C. § 403-1(e)(2)(A)).

46. *Id.* § 1014, 118 Stat. at 3663–64 (codified at National Security Act of 1947 § 106, 50 U.S.C. § 403-6 (2006)) (providing the DNI with the ability to recommend to the

IRTPA gave the DNI greater budgetary authority than that of the DCI.<sup>47</sup>

However, as the DNI started to carry out his new tasks, issues with the IRTPA's ambiguous statutory authority became apparent. By 2007, reports surfaced that the DNI, Michael McConnell, was requesting stronger and clearer delineations on his authority to run the intelligence community.<sup>48</sup> President Bush quickly responded with Executive Order 13,470, which augments the IRTPA by delineating twenty-four specific responsibilities of the DNI.<sup>49</sup> While Executive Order clearly explained the DNI's authorities, it is questionable whether the order actually expanded them.<sup>50</sup> The only new authority Executive Order 13,470 may have added to the authority of the DNI under the IRTPA was the ability to recommend removal of various intelligence community officials.<sup>51</sup>

### C. What Is Left for the CIA

While the DNI remained busy determining his new role, the various intelligence agencies and departments were adjusting as well. The agency with the largest adjustment was the CIA. Of the sixteen departments and agencies that comprise the intelligence community,<sup>52</sup> all but the CIA fall under the control of a cabinet-level official.<sup>53</sup> The CIA is the only

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President individuals to fill the vacancies of the head of the individual intelligence collection agencies and departments).

47. *BEST & CUMMING, supra* note 40, at 8. *Compare* IRTPA § 1011, 118 Stat. at 3644–45 (codified at National Security Act of 1947 § 102A(c)(1)(B), 50 U.S.C. § 403-1(c)(1)(B)) (authorizing the DNI to “develop and determine” the National Intelligence Program (NIP) budget), *with* 50 U.S.C. § 403-3(c)(1)(A) (2000) (authorizing the DCI to “facilitate the development” of the NIP budget).

48. Shaun Waterman, *State of Security: DNI: Lacking Power-1*, UPI.COM, Apr. 10, 2007, [http://www.upi.com/Security\\_Industry/2007/04/10/State-of-Security-DNI-Lacking-power-1/UPI-43201176209633/](http://www.upi.com/Security_Industry/2007/04/10/State-of-Security-DNI-Lacking-power-1/UPI-43201176209633/).

49. Exec. Order No. 13,470 § 1.3(b)(1)–(24), 3 C.F.R. 218, 220–24 (2009) (amending Exec. Order 12,333, 3 C.F.R. 200 (1982)).

50. *See* Joseph Anzalone et al., *National Security*, 43 INT'L L. 929, 937–38 (2009) (explaining that Executive Order 13,470 merely reiterates most of the authorities granted to the DNI by the original text of IRTPA and clarifies the IRTPA authority by enumerating responsibilities, but it fails to bestow any new, substantial authority to the DNI beyond the original IRTPA legislation).

51. *See id.* at 938 (noting that Executive Order 13,470 also highlighted the importance of DNI consultation with the heads of the various intelligence community agencies and departments, which could be construed as enhancing that power relative to the other members of the intelligence community).

52. *See supra* note 5 (listing the sixteen agencies that make up the intelligence community).

53. *See* Intelligence.gov, Members of the Intelligence Community, <http://www.intelligence.gov/1-members.shtml> (last visited Jan. 22, 2010) (stating that all of the intelligence offices or agencies fall under the control of a cabinet-level position with the exception of the CIA).

intelligence unit exposed to the direct authority of the DNI, subjecting it to closer scrutiny and less protection than its counterparts with nonintelligence cabinet-level leadership.<sup>54</sup>

The IRTPA effectively stripped the DCI of two of his three primary responsibilities—he no longer serves as the President’s advisor on national-intelligence issues, and he no longer has the authority to set collection and analysis priorities as the head of the intelligence community.<sup>55</sup> Pursuant to the IRTPA, the DCI’s new responsibilities include “collect[ing] intelligence through human sources and by other appropriate means”; correlating, evaluating, and disseminating intelligence related to national security; “providing overall direction for and coordination of the collection of national intelligence outside the United States through human sources”; and performing other functions, under DNI direction, such as coordinating relationships between the intelligence services of other countries, or other tasks from the DNI.<sup>56</sup> Additionally, the DCI’s title was changed from Director of Central Intelligence to Director of the Central Intelligence Agency.<sup>57</sup> Although IRTPA altered some of the CIA’s authority, the basis of its statutory authority is still the Central Intelligence Agency Act of 1949.<sup>58</sup>

The IRTPA of 2004 focused instead on shifting powers to the new players, like the DNI, to unify intelligence efforts. However, evaluating the effectiveness of this restructure is just beginning.

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54. The significance of cabinet-level protection from the DNI is that Department of Defense intelligence agencies like the National Security Agency and the Defense Intelligence Agency are afforded certain budgetary protections by the Secretary of Defense, which limits perceived control over them. *See* IRTPA § 1011, 108 Pub. L. No. 458, § 102A(c)(3)(A), 118 Stat. 3638, 3645 (2004) (authorizing the DNI to “participate in the development by the Secretary of Defense of the annual budgets for the Joint Military Intelligence Program and for Tactical Intelligence and Related Activities Program”); *see also* Benson, *supra* note 13 (pointing out that while the National Security Agency and the National Reconnaissance Office report directly to the Defense Secretary and not the DNI, the CIA acknowledges that its only “boss” is the DNI, which highlights the disproportionately larger amount of control the DNI has over the CIA compared with the Department of Defense intelligence agencies).

55. *See* 50 U.S.C. § 403(b)(1)–(2) (2006) (reassigning two of the roles previously held by the DCI, serving as the head of the intelligence community and serving as the President’s intelligence advisor, to the DNI); BEST & CUMMING, *supra* note 40, at 1–2 (discussing IRTPA’s reassignment of roles).

56. § 403-4a(d)(1)–(4).

57. IRTPA § 1071, 118 Stat. at 3689–92 (replacing “Director of Central Intelligence” with “Director of National Intelligence” or “Director of the Central Intelligence Agency” where applicable); BEST & CUMMING, *supra* note 40, at 2.

58. Central Intelligence Agency Act of 1949, Pub. L. No. 81-110, 63 Stat. 208 (codified as amended at 50 U.S.C. §§ 403a–403s (2006)).

## II. PROBLEMS WITH THE IRTPA AND DNI STATUTORY AUTHORITY

During the confirmation hearing of DNI nominee Mike McConnell in early 2007, Senator John D. Rockefeller stated,

[B]eyond the act of separating the two jobs, it is less clear whether the structure of the DNI office is ideal to accomplish its mission . . . . We did not pull the technological collection agencies out of the Defense Department and we did not give the DNI direct authority over the main collection or analytical components of the community. We gave the DNI the authority to build the national intelligence budget, but we left the execution of the budget with the agencies. We gave the DNI tremendous responsibilities. The question is, did we give the position enough authority for him to exercise those responsibilities?<sup>59</sup>

In many ways, it seems Senator Rockefeller is correct. While the spirit of unity and cooperation is apparent from the text of the IRTPA, its real-world impact will meet numerous roadblocks and require modification.

### A. *The Loopholes*

The first issue hindering the progress of the Office of the DNI is § 1018 of the IRTPA, Presidential Guidelines on Implementation and Preservation of Authorities.<sup>60</sup> This section states that the President will provide the DNI with guidelines to implement and execute his mission as long as it is done “in a manner that respects and does not abrogate the statutory responsibilities of the heads of the departments of the United States Government.”<sup>61</sup> This phrase has drawn its fair share of criticism from the legal community at large.<sup>62</sup> Statutory authority of intelligence community members had been established in an atmosphere of relative autonomy prior to 9/11, leaving control over intelligence operations, personnel, and budgets in the hands of the respective agencies and departments rather

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59. *Nomination of Vice Admiral Michael McConnell to Be Director of National Intelligence: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 1 (2007) (opening statement of Sen. John D. Rockefeller, Chairman of the U.S. Senate Select Committee on Intelligence).

60. IRTPA § 1018, 118 Stat. at 3670 (referenced in the codification of the IRTPA at 50 U.S.C. § 403(b)(3) (2006)).

61. IRTPA § 1018, 118 Stat. at 3670–71 (stating that the applicable department heads list presented is “not limited to” the ones listed, thus allowing the CIA, as an independent government agency, to qualify).

62. See BEST, *supra* note 2, at 8 (stating that the concession of the DNI to not abrogate the statutory responsibilities of the individual intelligence units was a hotly debated issue in the drafting of the IRTPA); see also Kaplan, *supra* note 13 (noting that the clause in IRTPA § 1018 is a huge loophole hindering the ability of the DNI to enforce any changes and enhancements within the intelligence community, specifically within the Department of Defense, which controls about 80% of the U.S. intelligence community’s budget).

than under the coordinated control of a DNI.<sup>63</sup>

As recently as February 2008, DNI Mike McConnell suggested that an executive order was necessary to strengthen the statutory authority the DNI needed to allow him to perform the task of integrating the intelligence community.<sup>64</sup> However, the much-anticipated Executive Order 13,470 merely reiterates the IRTPA § 1018 loophole. It states that the DNI's authority should "not abrogate the statutory or other responsibilities of the heads of departments of the United States Government or the Director of the Central Intelligence Agency."<sup>65</sup> It also states that if any members of the intelligence community believe that the DNI issued a directive or abrogated their individual statutory authority, they can appeal the issue to the National Security Council.<sup>66</sup> This limitation of authority over the intelligence community seems to be the origin for several instances of overlap and friction between the DNI and individual intelligence entities like the CIA.

#### *B. Examples of Statutory Ambiguity and Overlap*

In dealing with current issues regarding conflicting authorities between the DNI and the CIA, Congress has been slow to reevaluate the perceived conflicts. Rather, it has opted to deal with each issue as it arises.<sup>67</sup> The problem with this approach is that it prompts Congress to react to each individual problem rather than fix the statute once and save itself future time and effort.<sup>68</sup> Without a clear delineation of authority, whether or not something becomes an issue rests within the discretion of individual

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63. See Kaplan, *supra* note 13 (referring to the pre-9/11 intelligence community as a "vast, disparate, and sometimes quarrelsome array of federal departments, agencies, and sub-agencies").

64. See *DNI Authorities and Personnel Issues: Hearing of the S. Select Comm. on Intelligence*, 110th Cong. 23 (2008), [http://www.dni.gov/testimonies/20080214\\_transcript.pdf](http://www.dni.gov/testimonies/20080214_transcript.pdf) (statement of J. Michael McConnell, Director of National Intelligence) [hereinafter *McConnell Hearing*] (discussing the statutory shortcomings of IRTPA and his anticipation of an executive order which would expand DCI statutory authority over the various intelligence community assets).

65. Exec. Order No. 13,470, 3 C.F.R. 218, 224 (2009) (amending Exec. Order No. 12,333, 3 C.F.R. 200 (1982) and clearing up past ambiguity as to whether or not the CIA, as an agency rather than a department, qualifies for protection).

66. *Id.*; see also Anzalone et al., *supra* note 50, at 937–38 (arguing that Executive Order 13,470 did not address or ameliorate the failures of IRTPA but only reinforced the troublesome loopholes and appeal process).

67. See INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010, S. REP. NO. 111-55, at 50 (1st Sess. 2009) (providing congressional interpretation of the conflicting authorities of the IRTPA relative to the DNI and DCIA's respective roles in appointing overseas station chief positions, without directly addressing any possible changes to the law to clarify the current issue or prevent future ones).

68. See *id.* (providing an example of Congress's piecemeal response to issues).

agencies to challenge the DNI's directive. The following examples demonstrate statutory ambiguity causing administrative overlap of the DNI and DCIA's powers.

### 1. *Overseas Station Chiefs: Statutory Ambiguity*

On May 19, 2009, DNI Dennis Blair issued Intelligence Community Directive 402—a classified directive proclaiming that the DCI would now be able to appoint the top spy in each country, known as an overseas station chief, a job that was traditionally held by the CIA.<sup>69</sup> News outlets, however, proclaimed that the DCIA refused to concede the CIA's traditional duty to appoint station chiefs, igniting controversy as to which position, the DNI or the DCIA, retained the right to appoint the overseas station chief position.<sup>70</sup>

Executive Order 13,470, the Bush Administration's attempt to further clarify and define the authority of the DNI, states that the DNI has authority to enter into agreements with foreign governments and international organizations, as well as the authority to "formulate policies concerning" and "align and synchronize" intelligence relationships with foreign governments and international organizations.<sup>71</sup> This wording likely provides the DNI with the expectation that he would be responsible for the appointment of U.S. station chiefs at overseas intelligence posts.<sup>72</sup> At the same time, however, the CIA's authority states that the DCIA "shall coordinate the relationships between elements of the intelligence community and the intelligence or security services of foreign governments

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69. Mark Mazzetti, *Turf Battles on Intelligence Pose Test for Spy Chiefs*, N.Y. TIMES, June 9, 2009, <http://query.nytimes.com/gst/fullpage.html?res=9400E0DA1331F93AA35755C0A96F9C8B63>; see also Darrell Issa, *CIA's Panetta, DNI Blair Must End Turf War and Switch Jobs*, USNEWS.COM, June 18, 2009, <http://www.usnews.com/articles/opinion/2009/06/18/cias-panetta-dni-blair-must-end-turf-war-and-switch-jobs.html> (stating that the distinction in authority of the DNI and the CIA appointing station chiefs "couldn't be more apparent" and that the DNI's authority is administrative oversight, leaving DCIA Leon Panetta in charge of the "active 'command and control' of the CIA's foreign intelligence officers").

70. See Ignatius, *supra* note 16 (arguing that "[t]he right division of labor is to let the CIA run operations, which begins with picking the people who will be America's point of contact with foreign intelligence services" and that IRTPA added "unnecessary new layers of bureaucracy . . . partly duplicating jobs that used to be done by the CIA.").

71. Exec. Order No. 13,470 § 1.3(b)(4)(A)–(C), 3 C.F.R. 218, 220–21 (2009); IRTPA, Pub. L. No. 108-458 § 1011(a), 118 Stat. 3638, 3651–52 (2004) (codified at 50 U.S.C. § 403-1 (2006)).

72. See Issa, *supra* note 69 (explaining the difficulty facing both the DNI and the DCIA in confining themselves to the boundaries created by IRTPA, specifically the DNI "resist[ing] the urge to assert command and control" and the DCIA "working within a legal framework that potentially buffers his direct access to the President").

or international organizations on all matters involving intelligence related to national security or involving intelligence acquired through clandestine means.”<sup>73</sup>

From a plain-text reading of both of these current authorities, the DNI is tasked with “overseeing” the coordination of intelligence community relationships with foreign governments, while the CIA is tasked with the actual “coordination” of those relationships.<sup>74</sup> Given the current wording of the law coupled with the long-standing tradition of being the sole entity to appoint overseas station chiefs, this similarity in statutory mission explains why the DCIA might feel that the DNI overstepped his statutory authority. Congress threw in its support for the DNI in July 2009.<sup>75</sup> After months of attempting to resolve the issue, the White House finally issued its decision, siding with the DCIA on the issue but also reinforcing the DNI’s authority over the intelligence community as a whole.<sup>76</sup>

Even with the dispute currently resolved, this station chief debacle remains an example of how shifting authorities between the DNI and CIA, if not clearly defined in the IRTPA and ensuing legislation, creates problems for unification and cooperation within the intelligence community. With a lack of clear-cut statutory authority, the DNI’s powers are only effective when the individual intelligence community entities agree to cooperate.<sup>77</sup>

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73. IRTPA § 1011(a), 118 Stat. 3638, 3660–61 (codified at 50 U.S.C. § 403-4a(f) (2006)).

74. *Compare* IRTPA § 1011(a) (codified at 50 U.S.C. § 403-1(k) (2006)) (“oversee the coordination”), *with* IRTPA § 1011(a) (codified at 50 U.S.C. § 403-4a(f) (2006)) (“shall coordinate”).

75. *See* INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010, S. REP. NO. 111-55, at 50 (1st Sess. 2009) (stating that Intelligence Community Directive 402 “recognizes the value of turning to the CIA Chief of Station to be the DNI’s representative in foreign countries” and that in exercising his authority, the DNI “has made the decision that the directive is the right choice for the Intelligence Community. The Committee supports the DNI in that choice and looks forward to the CIA’s prompt adherence to his decision.”).

76. *See* Posting of Jake Tapper to Political Punch, <http://blogs.abcnews.com/politicalpunch/2009/11/white-house-backs-cia-over-dni-in-turf-battles.html> (Nov. 12, 2009, 23:05 EST) (reporting that after months of back-and-forth between National Security Advisor Jim Jones and Vice President Joe Biden attempting to resolve the issue, the White House eventually made a decision that the CIA-appointed overseas station chiefs will remain the representatives abroad for the United States intelligence community).

77. For the IRTPA to successfully transform the intelligence community from its once-individualized and autonomous system into a unified and cooperative body, the DNI and DCIA must address statutory conflicts and ambiguity privately rather than detailing rifts and competition. *But see* Issa, *supra* note 69 (calling the issue an outright feud between the CIA and DNI); Ignatius, *supra* note 16 (detailing a duel and a battle over “turf”); Benson, *supra* note 13 (characterizing the issue as a “clash of the titans” with a visible “trench line”).

## 2. National Intelligence Civilian Compensation Program: Statutory Ambiguity

For another area of ambiguity, consider employee compensation. In early 2008 the DNI promulgated Intelligence Community Directive 650 (ICD 650), instructing the various intelligence community entities to abandon their individualized pay systems and adopt a uniform pay-for-performance system.<sup>78</sup> The purpose of the National Intelligence Civilian Compensation Program (NICCP) is to enable the intelligence community to “recruit, motivate, and retain highly qualified individuals . . . and facilitate the rotation of [intelligence community] employees between [intelligence community] components.”<sup>79</sup> The IRTPA and subsequent amendments provide the DNI with the power to “encourage and facilitate the recruitment and retention . . . of highly qualified individuals,”<sup>80</sup> but do not delineate how the DNI should do so. As a result, the lack of explicit DNI authority to control the payment of CIA personnel coupled with the DCIA’s customary role of paying CIA employees, the codified loophole in the IRTPA that prohibits the DNI from “abrogating” the CIA’s statutory authority,<sup>81</sup> and the wording included within ICD 650<sup>82</sup> could technically allow the CIA to challenge the NICCP.

For instance, the CIA could argue that it retains the authority to pay its employees through historical and codified law.<sup>83</sup> Additionally, the CIA has the statutory authority to control personnel expenses related to travel and transportation costs for employees and their families stationed overseas<sup>84</sup> and to pay for certain medical and physical exams of officers and

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78. INTELLIGENCE COMMUNITY DIRECTIVE NO. 650, *supra* note 19, at 2.

79. *Id.* at 1.

80. 50 U.S.C. § 403-1(f)(3)(A)(iii) (2006) (emphasis added).

81. IRTPA, Pub. L. No. 108-458, § 1018, 118 Stat. 3638, 3670 (2004).

82. See INTELLIGENCE COMMUNITY DIRECTIVE NO. 650, *supra* note 19, at 6 (“Where applicable, the heads of executive departments and independent agencies with [intelligence community] employees may use their respective authorities to deviate from this ICD when necessary to carry out their independent missions and functions.”).

83. See 50 U.S.C. § 403j(a)(1) (2006) (“Notwithstanding any other provisions of law, sums made available to the Agency by appropriation or otherwise may be expended for purposes necessary to carry out its functions, including—(1) personal services . . . without regard to limitations on types of persons to be employed . . . .”); see also BUS. EXECUTIVES FOR NAT’L SEC., PAY FOR PERFORMANCE AT THE CIA: RESTORING EQUITY, TRANSPARENCY AND ACCOUNTABILITY; THE ASSESSMENT OF THE INDEPENDENT PANEL ON THE CENTRAL INTELLIGENCE AGENCY’S COMPENSATION REFORM PROPOSALS 8 (2004), [http://www.bens.org/mis\\_support/cia-reform-report.pdf](http://www.bens.org/mis_support/cia-reform-report.pdf) (“The Central Intelligence Agency is exempt from certain provisions of Title 5 of the US Code (the federal law governing employment in the civil service) in particular, those provisions concerning compensation and federal employment regulations. . . . [E]ach Agency Senior Manager heads a separate career service and has authority to unilaterally determine salary levels for positions within their span of control with little centralized oversight.”).

84. 50 U.S.C. § 403e(a)(1)(A)–(F) (2006).

employees<sup>85</sup> or other allowances and benefits related to “travel, personnel and physical security activities, operational activities, and cover-related activities.”<sup>86</sup> Because this authority extends beyond a base salary, it could thus undermine the DNI’s intent to normalize salaries across the overseas intelligence community. When coupled with the various loopholes<sup>87</sup> in the IRTPA, the CIA could likely challenge any DNI request to adhere to the NICCP. Absent clear changes to the IRTPA clarifying who retains control over administrative personnel functions, future attempts by the DNI to unify other administrative processes—like agency hiring standards, retirement programs, or employee health care benefits—might also be plagued by the same hypothetical arguments made above. At the same time it is important to note that the DNI implemented ICD 650 without any challenges from members of the intelligence community. The DNI’s ability to get these entities to the negotiating table, keeping its authority while still agreeing to abide by the NICCP goals, is a success acknowledging the DNI’s power as a centralizing force within the intelligence community, even without the requisite statutory authority on this issue.<sup>88</sup>

### *3. Freedom of Information Act Requests: Statutory Overlap*

Another issue that arose during the IRTPA reorganization of the intelligence community was the ambiguity over who would be in charge of protecting the sources and methods of intelligence concerning FOIA requests. FOIA, enacted in 1966, provides public access to U.S. government records and outlines the responsibilities of agencies carrying out the procedures.<sup>89</sup> FOIA requests make these government records

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85. *Id.* § 403e(a)(5)(A)–(D).

86. *Id.* § 403e(b)(2).

87. See IRTPA, Pub. L. No. 108-458, § 1018, 118 Stat. 3638, 3670 (2004) (codified at 50 U.S.C. § 403(b)(3)) (directing the DNI to not abrogate the statutory authority of any individual intelligence agency or department); *see also* INTELLIGENCE COMMUNITY DIRECTIVE NO. 650, *supra* note 19, at 6. (clarifying that despite the spirit and intent of collaboration under this directive, the heads of the independent intelligence agencies, under their respective authority may “deviate from this ICD when necessary to carry out their independent missions and functions”).

88. See Mike McConnell, Dir. of Nat’l Intelligence, Media Briefing on National Intelligence Civilian Compensation Program (NICCP) at the Office of the Director of National Intelligence Headquarters in Washington, D.C. 5 (May 15, 2008), [http://www.dni.gov/interviews/20080515\\_interview.pdf](http://www.dni.gov/interviews/20080515_interview.pdf) [hereinafter NICCP Briefing] (acknowledging that the intelligence community initially questioned the DNI’s authority but recounting that the senior leadership preferred to focus on coming together and establishing a set of policies to “move forward as a community” rather than worry about legal authority).

89. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2006)).

available to “any person,” unless the agency can show that the requested record contains information outlined in one of the nine statutory exemptions.<sup>90</sup> FOIA legislation outlines the responsibilities of agencies carrying out the procedures.<sup>91</sup> The intelligence community is afforded certain FOIA exemptions for areas of national defense and foreign security.<sup>92</sup>

Under the IRTPA, the DNI was given the authority to “protect intelligence sources and methods from unauthorized disclosure,” including “access to and dissemination of intelligence” and “preparation of intelligence products . . . for dissemination.”<sup>93</sup> In some ways, the IRTPA language conflicts with the administrative authority granted to the individual intelligence agencies under Executive Order 12,958 to classify and declassify their own information for instances such as FOIA requests.<sup>94</sup> For example, consider when citizens file FOIA requests for information and records from an intelligence agency like the CIA.<sup>95</sup> Although the FOIA request would traditionally go directly to the CIA, IRTPA could be read to give the DNI a role in the CIA’s declassification process, adding a layer of review to the request which elongates the time to file a response and generally decentralizing an important administrative process. However, DNI has presently delegated authority back to the agencies through a classified memorandum.<sup>96</sup> This private resolution may indicate the DNI acknowledges that his role is to guide the intelligence community rather than to control all administrative functions—even if the current law does not reflect that understanding.

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90. See 5 U.S.C. § 552(b)(1)–(9) (2006) (exempting, *inter alia*, documents properly classified as secret for national defense or foreign policy reasons and documents related solely to internal agency personnel rules and practices).

91. See *id.* § 551(1)(A)–(H) (providing the definition of *agency* and allowing the CIA to qualify).

92. See *id.* § 552(b)(1)(A)–(B) (stating that this section does not apply to matters “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” as well as those matters “properly classified pursuant to such Executive order”).

93. 50 U.S.C. § 403-1(i) (2006).

94. Exec. Order No. 12,958, 3 C.F.R. 333–34 (1996), as amended in 70 Fed. Reg. 21,609 (Apr. 21, 2005) (allowing agencies, upon receiving a FOIA request, to respond with declassification of the information or state a valid exemption).

95. See 50 U.S.C. § 431 (2006) (stating that the exemption of operational CIA files is at the discretion of the DCIA and must be done with “the coordination of” the DNI but failing to identify the DNI’s role relative to “coordination”).

96. The memorandum shifting authority back to the CIA to declassify information in response to FOIA requests is currently classified.

#### 4. Counterterrorism Centers: Statutory Redundancy

One danger of adding another layer of authority to the intelligence community is the possibility of duplicating existing efforts. The 9/11 Commission surmised that the counterterrorism efforts before 9/11 were scattered and resources were spread thin.<sup>97</sup> The CIA had both a Terrorist Threat Integration Center (TTIC) and a Counterterrorism Center (CTC), while the FBI had the Counterterrorist Screening Center.<sup>98</sup> The Commission noted that a “smart” government would *integrate* all sources of information to see the enemy as a whole.<sup>99</sup> In response to this recommendation, the IRTPA established The National Counterterrorism Center (NCTC) and placed it under the control of the DNI.<sup>100</sup>

Counterterrorism efforts today are still somewhat duplicative. The overlap between the CTC and the NCTC illustrates this point. The CIA’s CTC presently coordinates both operational and analytical intelligence efforts, working closely with various United States government agencies and foreign liaisons to disrupt terrorist activities.<sup>101</sup> Meanwhile the DNI’s NCTC, by law, is the “primary organization in the United States Government for analyzing and integrating all intelligence passed or acquired by the United States Government pertaining to terrorism and counterterrorism.”<sup>102</sup>

It is unclear how much of the NCTC’s operations duplicate the CIA’s CTC efforts and how much NCTC merely synthesizes the intelligence provided by CIA and other entities.<sup>103</sup> It is also unclear how much collaboration takes place between the entities. On the surface, however,

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97. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 38, at 400–01; *see also* RICHARD L. RUSSELL, SHARPENING STRATEGIC INTELLIGENCE: WHY THE CIA GETS IT WRONG, AND WHAT NEEDS TO BE DONE TO GET IT RIGHT 153 (2007) (explaining that the IRTPA creation of the NCTC within the DNI to consolidate counterterrorism assets does not solve the problem of duplication of effort because the CIA’s Counterterrorism Center (CTC) still exists).

98. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 38, at 401.

99. *Id.*

100. *See* Exec. Order No. 13,354, 69 Fed. Reg. 53,589 (Sept. 1, 2004) (vesting the DCI with authority over the NCTC), *rescinded* by Exec. Order No. 13,470 (codified at 3 C.F.R. 218, 220–25 (2009)) (including the NCTC in the missions of the DNI).

101. Central Intelligence Agency, Centers in the CIA, <https://www.cia.gov/library/publications/additional-publications/the-work-of-a-nation/cia-director-and-principles/centers-in-the-cia.html> (last visited May 4, 2010).

102. 50 U.S.C. § 404o(d)(1) (2009) (outlining the primary missions of the National Counterterrorism Center).

103. *See* National Counterterrorism Center, About the National Counterterrorism Center, [http://www.nctc.gov/about\\_us/about\\_nctc.html](http://www.nctc.gov/about_us/about_nctc.html) (last visited Apr. 27, 2010) (designating the NCTC with a mission of “integrating and analyzing *all* intelligence pertaining to counterterrorism”).

the NCTC as established by the IRTPA demonstrates another possible area where congressional intent to integrate interagency counterterrorism efforts has not been achieved in actual practice.<sup>104</sup>

### C. Implications

The station chief issue, NICCP ambiguity, FOIA overlap, and CTC–NCTC conflict are just a few examples of how a vague or redundant statutory authority may become troublesome. While some issues, such as the NICCP implementation, have progressed without objection from the CIA, they still demonstrate an inherent problem with the current distribution of administrative authority within the United States intelligence community. These IRTPA statutory loopholes, ambiguities, and administrative overlaps point out flaws in the enabling legislation, providing us with an opportunity to reevaluate the respective roles of the DNI and the DCIA.

The specific instances of agency overlap and statutory ambiguity discussed above provide glimpses into larger organizational problems. Ambiguity over the appointment of overseas station chiefs affects the immediate task of filling overseas intelligence posts, but perhaps more importantly, the level of publicity around this issue demonstrates that the DNI has added to the bureaucratic tensions that the IRTPA was supposed to break down.<sup>105</sup> Likewise, the NICCP directive and the FOIA conflict demonstrate that the statutory overlap becomes an issue beyond bureaucratic tensions and affects the daily administrative tasks of the various intelligence community agencies.<sup>106</sup> Implementing a common pay system throughout the community has already taken considerable time and resources that might have been used elsewhere.<sup>107</sup> Looking beyond purely administrative burdens, IRTPA provisions that do not take into account preexisting infrastructure jeopardize the operational effectiveness of national intelligence efforts. The operation of the NCTC—an organization

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104. The 9/11 Commission Report recommendations, which are reflected in the statutory language of the IRTPA, call for the NCTC to “absorb a significant portion of the analytical talent now residing in the CIA’s Counterterrorist Center.” NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 38, at 404.

105. Ignatius, *supra* note 16.

106. See discussion *supra* Parts II.B.2, II.B.3.

107. Although there is little public information on the amount of resources used to evaluate the NICCP, DNI Mike McConnell said of the evaluation process,

We looked at how it would fit across all of the community, and we worked through all of that in a coordinated way, probably taking a little more time than we should have, we would like to, but we’re at a point now where we signed off on this and we’re going to put this in action.

NICCP Briefing, *supra* note 88, at 2.

that parallels the counterterrorism mission of the well-established CIA CTC—has spread thin already-limited intelligence-community resources rather than integrating and unifying them.<sup>108</sup>

The resolution of each of these conflicts of authority should result in solutions that mend any tension between the DNI and the rest of the intelligence community. However, as evidenced by the current struggles between the DNI and the CIA to determine proper authority for station chief appointment, personnel, FOIA, and counterterrorism center issues, many potential conflicts remain unresolved. Ultimately, legislation should provide the DNI with a succinct scope of authority and clear power to implement that authority without loopholes, ambiguity, or overlap.

### III. PROPOSED AMENDMENTS AND RECOMMENDATIONS

When Congress established the DNI position, many critics felt that it would be no more successful at centralization than the now-defunct DCI, merely adding another layer of bureaucracy over an arguably already-stove-piped system.<sup>109</sup> Given the amount of effort and development in building the DNI—the employee count is now well over one thousand<sup>110</sup>—it would be ineffective to argue that the right solution would be merely to undo its creation. Before advancing solutions, it is important to look back to the intent of Congress in framing the DNI's authority under the IRTPA.

#### *A. Remembering Congressional Intent: Administrative Versus Operational*

One of Congress's chief goals in creating the DNI was to alleviate some of the pressure on the DCI, who up until then had acted as the President's intelligence advisor, coordinated the entire intelligence community, and headed the CIA.<sup>111</sup> The principle responsibility of the DNI set forth by IRTPA is to “oversee and direct the implementation” of the National Intelligence Program, signaling an advisory and policy role rather than an

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108. *See supra* note 97 and accompanying text.

109. *See* RICHARD A. POSNER, THE REORGANIZED U.S. INTELLIGENCE SYSTEM AFTER ONE YEAR 3 (2006) [http://www.aei.org/docLib/20060411\\_SENSOg.pdf](http://www.aei.org/docLib/20060411_SENSOg.pdf) (arguing that the Office of the DNI “has become a new bureaucracy layered on top of the intelligence community” and that merely adding one more intelligence asset to the fifteen that already exist as part of the national intelligence community does not reorganize the intelligence community into the effective body that was envisioned by the IRTPA).

110. *See* Ignatius, *supra* note 16 (indicating that the DNI presently has at least 1,500 employees).

111. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 38, at 409 (discussing the previous burden of responsibilities that the DCI had in his capacity as head of the CIA, leader and manager of the intelligence community at large, and intelligence advisor to the President); *see also* BEST & CUMMING, *supra* note 40, at 1 (describing the primary responsibilities of the DCI).

operational one.<sup>112</sup> Congress's intent to separate the administrative policy and oversight aspects of intelligence coordination from the operational acts of intelligence gathering is implicit in the express prohibition against a current DNI serving concomitantly as the DCIA.<sup>113</sup> Additionally, the wording of statutory authority in the appointment of station chiefs indicates Congress intended the DNI to have more of an administrative, policy-based role. As mentioned before, the DNI is given the authority to "oversee" the appointment while the CIA's statutory authority is to actually "coordinate" the appointments.<sup>114</sup> Therefore, when attempting to rectify these statutory ambiguities and inconsistencies, a solution should reflect the congressional intent while accommodating some of the strengths of the pre-IRTPA structure.<sup>115</sup>

#### *B. General Reorganization Strategies*

Critics of the IRTPA reorganization, both past and present, offer various solutions to the legislation. Some draw from the legislative intent, while some use historical reorganizations as a model. However, both camps acknowledge that the intelligence reorganization is not complete. Various suggestions have been made as to the role the DNI should play within the national intelligence infrastructure. The following sections discuss several options.

##### *1. The DNI as an Intelligence Czar*

One of the more popular suggestions made to rectify the various IRTPA criticisms calls on Congress to empower the DNI to exercise greater control over the intelligence community.<sup>116</sup> The idea of enhancing the power of

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112. IRTPA, Pub. L. No. 108-458, § 1011(a), 118 Stat. 3638, 3643–62 (codified at 50 U.S.C. § 403(b)(3) (2006)).

113. IRTPA § 1011(a) (codified at 50 U.S.C. § 403(c) (2006)) ("The individual serving in the position of Director of National Intelligence shall not, while so serving, also serve as the Director of the Central Intelligence Agency or as the head of any other element of the intelligence community.").

114. The word *oversee* denotes a supervisory or administrative role, while the task of actual coordination denotes an operational role. *See supra* note 74 and accompanying text.

115. For example, even though FOIA requests may be considered administrative tasks that would, under congressional intent, be delegated to the DNI, the DNI conceded that the system would be more efficient if the agencies continued to process FOIA requests independently. *See supra* note 96 and accompanying text.

116. This view of increased DNI authority has been extolled by members of Congress, members of the intelligence community, legal commentators at large, and even the DNI himself. *See* S. COMM. ON INTELLIGENCE, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010, S. REP. NO. 111-55 (1st Sess. 2009), available at [http://fas.org/irp/congress/2009\\_rpt/srpt111-55.pdf](http://fas.org/irp/congress/2009_rpt/srpt111-55.pdf) (setting forth in Title III, Subtitle A,

the DNI to improve his effectiveness was first introduced in the 9/11 Commission Report. The Commission set forth various perceived intelligence community failures, such as a lack of channels for cooperation and information sharing that would have allowed the community to predict the imminence of a 9/11-style attack.<sup>117</sup> A powerful National Intelligence Director would presumably be this centralizing figure, overseeing all intelligence and counterterrorism collection efforts of the CIA, the FBI, and the Department of Defense.<sup>118</sup>

Although the 9/11 Commission Report and the legislative history of the IRTPA suggest the intent was to provide the DNI with administrative authority over the entire intelligence community, that solution has not been completely feasible, as shown by the FOIA classification issue<sup>119</sup> or the pay-for-performance directive.<sup>120</sup> The issue with this centralization of power is that with so many administrative and operational activities and missions, the sixteen individual intelligence entities are better left with current entity leadership like the DCIA, who has a better understanding of the daily budgetary and personnel needs, and not with the DNI, who has spent the first several years of his new position playing catch-up.<sup>121</sup>

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and Title IV, Subtitle A, the enhanced authority sought for the DNI, such as authority to conduct accountability reviews of the various intelligence community entities, authority to use funding for information access and sharing across the community, the ability to approve interagency financing of boards, commissions, and councils, as well as providing the Office of the DNI with several new positions such as chief information officers, an enhanced inspector general, and a chief financial officer); Kaplan, *supra* note 13 (noting that the DNI's authority under the IRTPA looks "nothing like the locus of decision-making and responsibility that the 9/11 commission had in mind"); *McConnell Hearing*, *supra* note 64, at 1-2 (voicing the same concerns as DNI McConnell, Senator Rockefeller stated that "[s]ome of us worry that Congress may not have given the DNI enough authority to match his enormous responsibilities," with Senator Christopher S. Bond adding that that IRTPA denied the DNI "the full authorities required truly to direct the intelligence community, not just coordinate its activities").

117. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 38, at 357 (detailing CIA efforts to remain vigilant despite a lull in terrorist activity abroad, even though the warning was unavailable to or disregarded by intelligence entities beyond the CIA).

118. *Id.* at 411.

119. See 50 U.S.C. § 403-1(i)(C) (2006) (providing the DNI with exclusive authority for the "preparation of intelligence products . . . for dissemination"). *But see* Exec. Order No. 12,958, 3 C.F.R. 333 (1995), *as amended in* 70 Fed. Reg. 21,609 (Apr. 26, 2005) (allowing agencies, upon receiving a FOIA request, to respond with declassified information or a valid exemption).

120. See *supra* notes 82-87 and accompanying text.

121. The Office of the DNI is still playing catch-up within some of its own administrative functions. See Dennis Blair, Dir. of Nat'l Intelligence, Statement for the Record by the Director of National Intelligence Before the S. Select Committee on Intelligence on the Intelligence Authorization Proposal for FY10, p. 1-2 (May 19, 2009) [hereinafter Blair Statement], <http://intelligence.senate.gov/090617/proposals.pdf>

## 2. The DNI as an Intelligence Advisor and Policymaker

While the most popular of the publicly offered solutions to the intelligence community reorganization is to give the DNI more power and control over the intelligence agencies, the position could be more effective with more of a policy and oversight role.<sup>122</sup> In light of the need for increased collaboration and communication, the DNI position could focus on just that—coordinating all the various entities just as the Secretary of Defense coordinates the various military branches. A DNI with oversight power would not be an “intelligence czar” with absolute power over all the entities but would be in charge of budgetary issues, threat estimates, and other community-wide policy decisions.<sup>123</sup>

Focusing the DNI’s authority on administrative coordination and oversight would leave the operational component of intelligence gathering to the various intelligence community entities, with the CIA director as the President’s advisor for operational efforts. The CIA’s preeminence in collection and analysis of human intelligence—and its long history of being a customer of the other intelligence entities like the National Security Agency and the National Reconnaissance Office<sup>124</sup>—position it to facilitate operational coordination of intelligence issues.

Meanwhile, the DNI should have the power to centralize administrative and policy issues through the use of committees comprised of representatives from each agency tasked with controlling issues like budget and personnel. Specifying the administrative tasks over which the DNI has undisputed authority may fix the statutory ambiguity and overlap problems exemplified by the NICCP, FOIA, and NCTC issues without disrupting operational intelligence gathering and analysis.

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(requesting source and method protections under FOIA that are equal to those explicitly provided to the CIA for operational file exemptions, as well as similar exemptions under the Privacy Act “akin to [exemptions] enjoyed by the Director of the Central Intelligence Agency” and Federal Advisory Committee Act (FACA) exemptions “identical to the exemption the Director of the CIA has”).

122. *See generally* POSNER, *supra* note 109, at 2–3 (acknowledging that while the effect of the IRTPA reorganization was founded on the idea of creating a DNI with the capabilities of being an “administrator,” “czar,” or “presiding deity” of the intelligence community bureaucracy, the DNI should not be given absolute authority but rather a role of “coordinator” or “board chairman”).

123. *Id.*

124. The CIA has been a long-standing “customer” of the NRO and the NSA, two of the largest intelligence collection and analysis agencies within the Department of Defense. *See* Welcome to the NRO, <http://www.nro.gov/> (last visited Apr. 27, 2010); National Security Agency, About NSA, <http://www.nsa.gov/about/index.shtml> (last visited Apr. 27, 2010).

### 3. *Goldwater–Nichols Act as a Model*

Another suggestion is to model the intelligence community after the Department of Defense following the Goldwater–Nichols Reorganization Act of 1986.<sup>125</sup> Congressional concerns in 1986 about the need to unify the military seem to parallel the 2004 concerns about the need to unify the intelligence community—both relate to improving communication and coordination among the individual entities.<sup>126</sup>

Both the military and the intelligence community are comprised of specialized branches. In the military, the branches are divided essentially by function: the Army occupies the land, the Navy operates in the oceans, and the Air Force concentrates on the air operations.<sup>127</sup> Likewise, members of the intelligence community often contribute specialty services to the national intelligence effort.<sup>128</sup> And as it became important that the various military services be able to unify their specific capabilities on the

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125. Goldwater–Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in scattered sections of 10 U.S.C.); *see* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 38, at 408–09 (highlighting the structural barriers of the intelligence community prior to 9/11 by contrasting its organization with that of the United States Armed Services after the Goldwater–Nichols reorganization in 1946, which focused on creating joint commands based on field operations and not capabilities or type of service); *see also* 150 CONG. REC. S9555 (daily ed. Sept. 23, 2004) (statement of Sen. Graham) (“The key to this mission-based decentralization of intelligence, in my opinion, is that we must give the Director of National Intelligence the statutory authority to manage the community with flexibility and nimbleness so he or she can quickly establish new centers or modify existing centers as future threats emerge, just as Goldwater–Nichols has given that authority to the Secretary of Defense.”); *id.* at S9556 (citing Flynt Leverett, *Force Spies to Work Together*, N.Y. TIMES, July 9, 2004, at A19 (“We need to develop a model of ‘jointness’ for the intelligence community, analogous to what the Goldwater–Nichols Act did for the uniformed military 18 years ago.”)).

126. *See* STAFF OF S. COMM. ON ARMED SERVICES, 99TH CONG., REPORT ON DEFENSE ORGANIZATION: THE NEED FOR CHANGE 86 (Comm. Print 1985) (setting forth perceived problems with the Department of Defense’s ability to cooperate and work effectively in light of the technological changes, the changing international political landscape, and the changing demands of protecting U.S. security interests); *cf.* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 38, at 399 (setting forth the intelligence issues prior to 9/11 of entities that were facing technological challenges in the face of a new enemy much different than the enemy of the Cold War).

127. This is an oversimplified representation of military capabilities used merely to illustrate a possible solution to IRTPA’s perceived shortcomings. Both the armed services and members of the intelligence community provide overlapping capabilities that further complicate the integration process but will not be discussed at length here.

128. *See* NATIONAL INTELLIGENCE: A CONSUMER’S GUIDE 32–42 (2009), [http://www.dni.gov/IC\\_Consumers\\_Guide\\_2009.pdf](http://www.dni.gov/IC_Consumers_Guide_2009.pdf) (providing an overview of special intelligence capabilities, such as the CIA providing human intelligence efforts, the DIA providing intelligence on foreign military capabilities, the National Geospatial-Intelligence Agency providing geospatial intelligence, the NSA being responsible for signals intelligence, and the National Reconnaissance Office providing reconnaissance via satellites).

battlefield, as evidenced in the Goldwater–Nichols legislation, the same desire to unify and coordinate intelligence capabilities is seen in the IRTPA legislation.<sup>129</sup> Essentially, IRTPA could provide the DNI with the same oversight and advisory role over the intelligence community that the Chairman of the Joint Chiefs of Staff has over the armed services.<sup>130</sup> Further, the DNI would relinquish operational control over intelligence capabilities to the DCIA and the heads of other intelligence entities, who would act in the operational capacity similar to a combatant commander.<sup>131</sup>

The most apparent problem with applying the Goldwater–Nichols model to the intelligence community is that most intelligence entities are already part of another cabinet-level department and thus already report to a cabinet-level official.<sup>132</sup> The reorganization may not be as successful as the original Goldwater–Nichols reorganization without supplanting the sixteen intelligence agencies from their current cabinet departments into a new one. Several independent panels suggested such recommendations in 2001, but the Bush Administration never adopted them.<sup>133</sup>

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129. See *supra* note 126.

130. See 10 U.S.C. § 151(b)(1) (2006) (stating that the Chairman of the Joint Chiefs of Staff shall serve as the “principal military adviser to the President”); *see also* § 153(a)(1)–(6) (stating that the Chairman shall be responsible for providing strategic direction, strategic planning, training and education policies, and advising on programs and budgets of the armed forces while deferring to the combatant commanders for recommendations on operational capabilities and assessments).

131. See DEPARTMENT OF DEFENSE DIRECTIVE 5100.1: FUNCTIONS OF THE DEPARTMENT OF DEFENSE AND ITS MAJOR COMPONENTS (2002) <http://www.dtic.mil/whs/directives/corres/pdf/510001p.pdf> (providing the roles and responsibilities of each of the Department of Defense entities, including the relationship of authority between the Secretary of Defense and the Chairman of the Joint Chiefs of Staff); *see also* DEPARTMENT OF DEFENSE DIRECTIVE 5158.1: ORGANIZATION OF THE JOINT CHIEFS OF STAFF AND RELATIONSHIPS WITH THE OFFICE OF THE SECRETARY OF DEFENSE (1985), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA272367&Location=U2&doc=GetTRDoc.pdf> (setting forth “policies, procedures, and organizational relationships” necessary to accomplish the reorganization of the “defense establishment”).

132. See Members of the Intelligence Community, *supra* note 53 (stating that all intelligence entities except the CIA fall under a cabinet-level official).

133. See Walter Pincus, *Intelligence Shakeup Would Boost CIA: Panel Urges Transfer of NSA, Satellites, Imagery from Pentagon*, WASH. POST, Nov. 8, 2001, at A1 (recommending that the NRO, NSA, and NGA should be removed from the Department of Defense and placed under the control of the CIA); *see also* POSNER, *supra* note 109, at 6 (noting that a commission headed by Brent Scowcroft, the Chairman of President George W. Bush’s Foreign Intelligence Advisory Board, suggested that the Department of Defense’s disproportionate control over the intelligence budget could be offset if the intelligence agencies within the Department of Defense were removed and placed under the control of the DNI).

#### 4. *Recommendations that Should Be Adopted*

Each of these recommendations have merit and backing from DNI supporters and critics alike. The first task is to remove barriers imposed by having intelligence community entities under the direct control of cabinet-level departments outside the DNI structure.<sup>134</sup> Richard Posner, a judge on the U.S. Court of Appeals for the Seventh Circuit and a respected commentator on the intelligence reorganization efforts, refers to this as the “twin stars problem.”<sup>135</sup> One of his suggestions, which is adopted as a recommendation here, is to pull the large intelligence-gathering agencies out of the Department of Defense and align them under the direct control of the DNI.<sup>136</sup>

Instead of making the DNI an “intelligence czar,” as was often the suggestion following the 9/11 Commission Report recommendations, the operational capabilities as well as the daily administrative functions—responding to FOIA requests and implementing payment, retirement, and benefit packages—should remain with the individual entities. While it is easy to understand the value of keeping operational capabilities with the individual entities who have developed and dominated their fields in both knowledge and resources, the benefit of leaving certain administrative duties to the individual entities is that it allows the DNI time to adjust his own FOIA and personnel issues before taking on sixteen others.<sup>137</sup> This would leave the DNI with the larger policy and oversight issues of running an intelligence community.

If focusing the individual intelligence entities on operational intelligence gathering and analysis were a central goal of the IRTPA legislation, placing the NCTC under the DNI—an administrative coordination and oversight organ—does not necessarily adhere to that goal.<sup>138</sup> Rather, the NCTC should absorb all of the individualized counterterrorism efforts and be placed under the control of an operational agency like the CIA.<sup>139</sup>

Lastly, as each of these examples demonstrates, the statutory language of

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134. *See supra* note 132.

135. *See* POSNER, *supra* note 109, at 6 (defining the “twin stars” problem as “the secretary of defense and the director of national intelligence circling warily around each other”).

136. *See id.* (suggesting that removing the larger intelligence assets from the Department of Defense will do more than alleviate financial issues, as it will resolve some of the cultural clashes among military and nonmilitary intelligence activities).

137. *See* Blair Statement, *supra* note 121, at 1 (documenting the DNI’s request for FOIA authority comparable to that currently afforded to the CIA).

138. *See supra* notes 97–104 and accompanying text (noting that the various counterterrorism programs are predominantly operational, having been established by the FBI and CIA).

139. *See* POSNER, *supra* note 109, at 3 (“[K]eep the analysts close to the operations officers.”).

the IRPTA is not always clear and there is currently no established system to interpret inconsistencies.<sup>140</sup> As suggested by the 9/11 Commission Report prior to the drafting of the IRTPA, the intelligence community must have a formal channel to discuss inconsistencies and ambiguities with the heads of the intelligence entities and resolve disputes before they become national headlines.<sup>141</sup>

### CONCLUSION

Before the enactment of the IRTPA, the DCI position entailed three jobs but lacked statutory authority to perform all of them efficiently.<sup>142</sup> While the IRTPA contributes important changes to the intelligence landscape and creates a new structure that holds the promise of marked improvements in communications and asset sharing among intelligence entities, the aforementioned statutory ambiguities and overlap indicate there is still room for improvement within the current IRTPA legislation.

Further DNI reorganization, modeled loosely after the Goldwater-Nichols Act, should remove the various intelligence entities from their cabinet-level shields. In doing so, the DNI should be tasked with coordinating intelligence community policies, controlling the overall intelligence budget, and setting priorities for their operational activities. Daily administrative tasks such as FOIA requests and employee compensation should remain with the individual intelligence agencies, along with all operational tasks of collecting and analyzing intelligence. A dispute system should be created to ensure that any statutory ambiguity could be addressed efficiently and privately. Any resolutions should be documented and should guide the refinement of the IRTPA legislation to prevent future disputes over similar statutory ambiguities.

Hopefully, future changes to the current IRTPA legislation will be more than cosmetic, helping our vital national security assets accomplish their administrative duties without undue friction or confusion. IRTPA brings the nation closer than it has ever been to having a unified U.S. intelligence community helping to protect our nation from any future threats.

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140. *See supra* notes 71–74 and accompanying text.

141. This recommendation existed in the 9/11 Commission Report but was not adopted by the IRPTA legislation. *See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S.*, *supra* note 38, at 414 (“Too many agencies now have an opportunity to say no to change. The National Intelligence Director should participate in an NSC executive committee that can resolve differences in priorities among the agencies and bring the major disputes to the president for decision.”).

142. *See CIA ORIGIN AND EVOLUTION REPORT*, *supra* note 8, at 7 (arguing that the CIA was given contradictory mandates by being responsible for coordinating intelligence efforts across the community but not having the ability to control intelligence assets, rendering the DCI's job practically impossible).