MEMORANDUM FOR THE RECORD

FROM: **Nate Adler, Brett Ekberg, Clete Johnson, Andy Johnson, Mike Davidson, Melvin Dubee, and John Williams**
DATE: **December 17, 2014**
RE: **Review of Senator John D. Rockefeller's Service on the Senate Select Committee on Intelligence: 2001-2015**

This unclassified record draws on interviews, press statements, floor speeches, legislation, articles, op-eds, and public and private letters written over the course of Senator Rockefeller's time on the Senate Select Committee on Intelligence (SSCI). It also relies on his personal accounts of these events, and the collective memory of several current and former members of his staff who worked – directly or indirectly – on intelligence issues over this 14 year period.

Introduction

Senator Rockefeller was appointed to the SSCI in January 2001 by then-Democratic leader, Tom Daschle. In 2001 the SSCI rules still limited the terms of members to eight years, and the Senator joined six other newly appointed Democrats on the Committee. Senator Bob Graham, who was given a two year waiver of the term limit to allow him to serve as Vice Chairman, was the only Democrat remaining on the SSCI from the 106th Congress. When the majority in the Senate changed after Senator Jim Jeffords began caucusing with the Democrats in June 2001, Senator Graham became Chairman of the SSCI.

As a select committee, vice a standing committee, appointments to the SSCI are made by the respective party leaders. In Senator Rockefeller's case, Senator Daschle purposely appointed him into

a position of seniority that put him in line to be the ranking Democrat, either Chairman or Vice Chairman depending on party control, for the 108th Congress. After the 2002 elections, control of the Senate went back to the Republicans and Senator Rockefeller became the Vice Chairman. Senator Pat Roberts, also with only two years of experience on the SSCI, assumed the Chairmanship.

Senator Rockefeller's tenure on the Committee, and particularly his time as Chairman and Vice Chairman, coincided with some of the most important, difficult, and critical years for both the SSCI and the Intelligence Community. Only eight months after he joined the SSCI, the country was stunned by the terrorist attacks of September 11, 2001. Within a month of that attack the United States launched operation Enduring Freedom in Afghanistan, and then in March 2003 invaded Iraq. These conflicts, and the conduct of what came to be known as the Global War on Terror, dominated American national security policy and defined the agenda of the SSCI during his term as Vice Chairman, Chairman, and beyond.

The 9/11 attacks thrust the Intelligence Community, and consequently the SSCI, into the limelight in unprecedented ways and changed the nature of the conduct of intelligence oversight. The aftermath of the 9/11 attacks led to a level of public exploration of intelligence activities and public conduct of intelligence oversight not seen since at least the days of the Iran/Contra investigation and possibly not since the Church and Pike Committees. The intense public focus accelerated in mid-2003 when no weapons of mass destruction were discovered in Iraq.

The controversial nature of the Iraq war and the political ramifications of how it was launched led almost inevitably to a deterioration of both comity and historical bipartisanship on the SSCI. Subsequent disclosures of intelligence programs related to domestic surveillance, and detention and interrogation of terrorist suspects, of which most members of the SSCI were unaware, perpetuated the partisan tensions and dramatically undermined members' trust in the Intelligence Community.

Against this backdrop of turmoil this memo will focus on Senator Rockefeller's contributions in several key areas, primarily: the 9/11 investigation; the Iraq War and flawed intelligence on weapons of mass destruction; Intelligence Community reform; surveillance oversight and reform; the CIA's detention and interrogation program; cybersecurity; and, the intelligence authorization process.

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HPSCI/SSCI Joint Inquiry of the Terrorist Attacks of September 11, 2001

In February 2002, the SSCI and the House Permanent Select Committee on Intelligence, led by Democratic Senator Bob Graham and Republican Congressman Porter Goss respectively, agreed to conduct a Joint Inquiry into the activities of the U.S. Intelligence Community in connection with the terrorist attacks perpetrated against our nation on September 11, 2001. This was the first time in Congressional history that two permanent committees from the two separate bodies would join together to conduct a single, unified inquiry.

During the course of this Inquiry, these Committees held nine public hearings and thirteen closed sessions to receive testimony and review materials in a classified setting. Senator Rockefeller attended eight of the public hearings and almost all of the classified sessions. The Committees assembled a separate staff which reviewed almost 500,000 pages of documents and conducted approximately 300 interviews. They also participated in numerous briefings and panel discussions involving almost 600 individuals from the Intelligence Community agencies, other U.S. Government organizations, state and local entities, and representatives of the private sector and foreign governments.

This Joint Inquiry identified three primary goals:

- conduct a factual review of what the Intelligence Community knew or should have known prior to September 11, 2001, regarding the international terrorist threat to the United States, to include the scope and nature of any possible

international terrorist attacks against the United States and its interests;

- identify and examine any systemic problems that may have impeded the Intelligence Community in learning of or preventing these attacks in advance; and
- make recommendations to improve the Intelligence Community's ability to identify and prevent future international terrorist attacks.

[Source: Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence, p.1, 2002]

The Joint Inquiry had the specific charter to review the activities of the Intelligence Community and not the broader operation of the U.S. government, or state and local entities, that may have had significant roles before during or after the attacks. It was recognized that there were many other issues relating to the events of September 11, 2001, outside the scope of the review and in their final report, the Committees recognized the need for the follow-on investigation that became the 9/11 Commission.

The Committees jointly reported their findings and conclusions to the public on December 10, 2002, and also issued a classified report (which was provided to the Executive Branch). A redacted version of the report was released on July 24, 2003.

The Committee's central conclusion was:

> In short, for a variety of reasons, the Intelligence Community failed to capitalize on both the individual and collective

significance of available information that appears relevant to the events of September 11. As a result, the Community missed opportunities to disrupt the September 11th plot by denying entry to or detaining would-be hijackers; to at least try to unravel the plot through surveillance and other investigative work within the United States; and, finally, to generate a heightened state of alert and thus harden the homeland against attack.

[Source: Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence, p.xv, 2002]

The Committees also identified specific failures and systemic weaknesses and made several recommendations, including:

- Create a statutory Director of National Intelligence
- Immediately revamp national intelligence priorities to reflect focus on counterterrorism.
- Develop a U.S. government wide strategy for combatting terrorism, including the terrorism threat posed by the proliferation of weapons of mass destruction, employing all the elements of national power
- Create the position of National Intelligence Officer for Terrorism on the National Intelligence Council
- Develop and all-source terrorism information fusion center within the Department of Homeland Security
- Strengthen and improve FBI domestic intelligence capabilities while examining the best way to structure and manage domestic intelligence responsibilities

- Improve the use of FISA collection and dissemination
- Improve the IC workforce including consideration of a more "jointness" akin to the Goldwater-Nichols model
- Present a separate Intelligence Community budget with sustained (not supplemental) counterterrorism funding
- Develop and maintain a national terrorist-related watchlist center.

The 9/11 Commission incorporated many of these recommendations into their own final report and recommendations, the central one being the creation of a Director of National Intelligence.

While the Joint Inquiry was concluded prior to Senator Rockefeller becoming Vice Chairman, there were still outstanding issues when he assumed that position. The publically released report was redacted in several places including 28 pages, from 395-422, under the heading of "Finding, Discussion and Narrative Regarding Certain National Security Matters." Following a briefing by FBI Director Robert Mueller and Deputy DCI John McLaughlin, in a letter to Senator Bob Graham in September 2003, Chairman Roberts and Senator Rockefeller declined, on the grounds it might harm sources or methods or have an adverse impact on open investigations, a request from Senator Graham that they seek declassification of the chapter.

The redacted chapter was the subject of a recent online New Yorker Daily Comment, by Lawrence Wright, entitled "The Twenty-Eight Pages" (September 9, 2014), which describes a sense of the House resolution in this Congress, H. Res. 428, introduced by Representatives Walter Jones and Stephen Lynch and referred to the House Intelligence Committee but not acted

on, asking the President to declassify the Joint Inquiry chapter so the public may have “access to information about the involvement of certain foreign governments in the terrorist attacks of September 11.” The Wright article reports that Prince Bandar bin Sultan, Saudi Ambassador to the United States at the time of 9/11, supports its release so that allegations about any Saudi connection to 9/11 hijackers can be addressed.

Intelligence and the Iraq War

On March 19, 2003 President George W. Bush addressed the American people from the Oval Office to announce that, “at this hour, American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger.” While the televised announcement made no explicit use of the phrase “weapons of mass destruction” (WMD), the Bush Administration had spent the previous year engaged in an aggressive public relations campaign making the case to the Congress, the American people, and the world that Saddam Hussein’s Iraq, with stockpiles of chemical and biological weapons, and an advancing nuclear program, posed a grave threat to the United States’ interests and global stability. The intelligence underlying that claim was highlighted repeatedly by the Bush Administration and described as conclusive and irrefutable.

When hostilities began, the U.S. military performed spectacularly, defeating the Iraqi military and ousting the Hussein regime in less than three weeks. After the fall of Baghdad, it quickly became evident, however, that there were no WMD and no active program. This realization soon prompted calls for a review of what went wrong. While the SSCI included in its version of the FY2004 Intelligence Authorization Act a provision requiring intelligence lessons learned, Chairman Roberts initially resisted a full investigation, finally acquiescing in late June.

The Case for War

The Bush Administration’s preference for regime change in Iraq was well known, even prior to President Bush entering the White

House. The Republican Platform adopted at the 2000 Republican National Convention stated that, “the full implementation of the Iraq Liberation Act…should be regarded as a starting point in a comprehensive plan for the removal of Saddam Hussein.” While this predilection was known, the Bush Administration took no overt steps towards regime change in Iraq prior to the attacks of September 11, 2001.

Following the attacks on the Twin Towers and the Pentagon, Iraq was quickly moved to the front of the Administration’s agenda. Members of the Bush team spent much of 2002 and early 2003 making a case for armed intervention in Iraq, a push that culminated with Secretary of State Colin Powell’s February 2003 speech to the United Nations.

With some members of Congress expressing grave doubts about military intervention in Iraq as late as August 2002, the Administration launched an aggressive final push to convince members of both houses that military action was the only appropriate course. A speech on the use of force in Iraq by President Bush on October 8 capped off the effort. Speaking for thirty minutes at the Museum Center in Cincinnati, Ohio, President Bush described Hussein’s Iraq as “a grave threat to peace,” and laid out his reasoning for the need to confront that threat, making direct references to Iraq’s possession of biological and nuclear weapons and referring to Saddam Hussein as a “homicidal dictator who is addicted to weapons of mass destruction.” “Iraq,” the President said, “stands alone because it gathers the most serious dangers of our age in one place.”

Just before 1:00am on October 11, 2002 the Senate passed H.J. Res. 114, authorizing military action against Iraq, by a vote of 77

to 23. Twenty-one Democrats, one Republican and one independent opposed the measure. Senator Rockefeller joined the majority in voting YEA, a vote he cast, in his own words, "based upon the intelligence community's analysis of the situation, particularly weapons of mass destruction."

That intelligence analysis was well reflected in the resolution, which included statements such as "Iraq's demonstrated capability and willingness to use weapons of mass destruction" and "members of al Qaida, an organization bearing responsibility for [the] attacks on the United States…that occurred on September 11, 2001 are known to be in Iraq." Senator Rockefeller later stated, on several occasions, that he regretted casting that vote.

Having successfully convinced Congress and the American people of the necessity of invading Iraq, the Bush Administration spent the next several months, prior to the start of combat operations, working to build global support for an invasion of Iraq. While the Bush Administration ultimately failed to obtain authorization from the UN Security Council, the Administration forged what it called a "coalition of the willing," including the United Kingdom and 39 other nations.

The public relations campaign for military action in Iraq continued into the New Year. In his 2003 State of the Union, President Bush devoted the final third of his annual address to US efforts to combat terrorism, specifically focusing on the dangers of a nuclear- or chemically-armed Iraq, and the need for Saddam Hussein to be removed from power. As part of that push, the President, citing British intelligence, stated, "Saddam Hussein recently sought large quantities of uranium from Africa."

Now colloquially known as the “Niger documents,” the intelligence the President referenced in his speech alleged that Saddam Hussein’s Iraq tried to buy uranium from Niger, the world’s third-largest producer of mined uranium. Prior to the invasion, the Bush Administration used these documents extensively as evidence that Iraq possessed an ongoing nuclear weapons program. In March of 2003, as it began to surface that there were problems with this intelligence Vice Chairman Rockefeller called for the FBI to investigate the “Niger documents.” It was later demonstrated that these documents were forgeries and thus the claim of buying uranium was based on fraudulent information.

Operation Iraqi Freedom

The questions surrounding the legitimacy of the Niger documents notwithstanding, coalition forces consisting of the United States, the United Kingdom, Australia and Poland began major combat operations in Iraq on March 19, 2003. The majority of the forces entered Basra Province from the Iraq-Kuwait border, while special forces launched an amphibious assault from the Persian Gulf. Combat operations in the north of the country were limited – Turkey had refused to permit a combat operation to be launched from its soil – and consisted almost entirely of teams from the CIA’s Special Activities Division.

Despite projections to the contrary, the Iraqi military put up little resistance, and U.S. forces entered Baghdad on April 9, 2003, just three weeks after the beginning of Operation Iraqi Freedom. Saddam Hussein, his capital captured, went into hiding.

Coalition forces spent the next several weeks securing their hold on the country and eliminating the remaining elements of the Iraqi

Army. On May 1, 2003, forty-three days after he announced that war had begun in Iraq, President Bush declared the end of major combat operations from the deck of the aircraft carrier *USS Abraham Lincoln*. Although the President did not declare the end of the war in Iraq, and noted that the larger War on Terror would continue, he delivered his speech in front of a large banner that read "Mission Accomplished." The image of the President in a flight suit in front of those words would become one of the most sardonic images of the war in Iraq and the Bush presidency. At the time of the President's speech, Saddam Hussein had not been captured and there was not yet any hard evidence of or discovery of WMD. In an article on the President's speech, the *New York Times* called these two unfulfilled objectives, "lingering irritants" to the Administration.

Post-War Intelligence Review

By June 2003, the lack of Iraqi WMD had grown from an "irritant" into a sizable political issue for the Bush Administration, with much of the focus on the pre-war intelligence stating that Iraq had such weapons. On June 4, 2003 the *New York Times* reported that the October 2002 National Intelligence Estimate – the document that "provided President Bush with his last major overview of the status of Iraq's program to develop weapons of mass destruction before the start of the war" – was under review by the Central Intelligence Agency. In both the House and Senate, the appropriate committees announced their intentions to conduct reviews of pre-war intelligence. On June 4, 2003, Senator Roberts, then Chairman of the SSCI, announced that SSCI, "will conduct a thorough review of the documented intelligence underlying the assessments which determined the

existence of and the threat posed by Iraq's weapons of mass destruction (WMD) programs." Senator Rockefeller felt this review was too limited, and stated in a June 11 press release,

> But closed hearings and review of documents presented by the Administration are not sufficient. We need to be able to request additional intelligence documents; interview intelligence community and administration officials, past and present; hold closed and open hearings; and prepare a final public report on lessons learned. A full fact-finding investigation is the usual mechanism for congressional oversight committees like the Senate Intelligence Committee in a circumstance like this one.
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> The fact is that Iraqi WMD and links between Saddam Hussein and Al Qaeda were the primary justification offered for the war in Iraq. Even while the search for WMD continues, the American people need and want to know whether our government was accurate and forthcoming in its pre-war assessments.

Pressure for a broader investigation mounted and on June 20, 2003, Chairman Roberts and Vice Chairman Rockefeller announced their joint commitment a review, and identified key areas of focus, specifically:

- The quantity and quality of U.S. intelligence on Iraqi weapons of mass destruction programs, ties to terrorist groups, Saddam Hussein's threat to stability and security in the region, and his repression of his own people;
- The objectivity, reasonableness, independence, and

accuracy of the judgments reached by the Intelligence Community;

- Whether those judgments were properly disseminated to policy makers in the Executive Branch and Congress;
- Whether any influence was brought to bear on anyone to shape their analysis to support policy objectives; and
- Other issues we mutually identify in the course of the Committee's review.

By October 2003 no WMDs had yet been found in Iraq. Dr. David Kay, the Chief Weapons Inspector of the Iraq Survey Group briefed the SSCI. In comments to the press after the briefing Senator Rockefeller expressed his strong dissatisfaction with the lack of weapons found, particularly as “that’s the reason we went to war, and that’s the reason that some of us voted on that authorization bill.”

Later that month, on October 12, 2003, during an appearance on Fox News Sunday, Senator Rockefeller stated publically for the first time that, knowing what he had learned about Iraq’s WMD capabilities, the vote to authorize force in Iraq “would be a vote that I would probably not make today.” He reiterated that point later during an appearance on Meet the Press. His statement, “If I had known then what I know today about the intelligence, or maybe the lack of proper intelligence, if I suspected that there might have been a predetermination to go to war, regardless of the United States, United Nations Security Council, I probably would have voted differently,” was later picked up and used in an article by The Hotline. Senator Rockefeller consistently reiterated this point during a number of television appearances over the next

several months.

On December 13, 2003, Saddam Hussein was found and captured outside the Iraqi town of ad-Dawr, near his hometown of Tikrit. He was found hiding at the bottom of a camouflaged hole in a small mud hut. One of the “irritants” the Bush Administration faced had been taken care of but, of course, the lack of WMD remained.

As it became apparent that no WMD would be found Senator Rockefeller and the Democrats on the SSCI urged Chairman Roberts to expand the parameters of the ongoing investigation. It was during this period, in November 2003, that the SSCI majority staff obtained a private staff memorandum intended for Senator Rockefeller and provided it to the press in violation of SSCI policy. This incident initially brought all work of the SSCI to a complete halt. Despite this conflict, Chairman Roberts eventually directed the SSCI to return to work and continue the ongoing Iraq review.

By February 2004, with it becoming increasingly unlikely that any WMD would be found in Iraq, Chairman Roberts finally relented and the SSCI unanimously agreed to expand the scope of the original investigation, adding a number of new elements. These included the collection of intelligence on Iraq from the end of the Gulf War to the commencement of Operation Iraqi Freedom; whether public statements, reports, and testimony regarding Iraq during this time period were substantiated by intelligence information; a comparison of pre- and post-war findings about Iraq’s WMD programs and links to terrorism; prewar intelligence assessments about postwar Iraq; intelligence activities relating to Iraq conducted by the Policy Counterterrorism Evaluation Group and the Office of Special Plans within the Office of the Under

Secretary of Defense for Policy; and, finally, the use by the intelligence community of information provided by the Iraqi National Congress. In the joint statement released with Senator Roberts, Senator Rockefeller stated that he felt that the review "had made a lot of progress and is moving in the right direction."

Throughout the winter and spring of 2004, the SSCI's main focus was the investigation and composition of the pre-war intelligence report. From January to June 2004 the Committee held a number of hearings on pre-war intelligence as well as the future of our country's intelligence gathering and analysis capabilities. On June 17, the Committee voted unanimously to approve the report. Following the vote, in a joint statement with Chairman Roberts, Senator Rockefeller stated, "The Committee is extremely disappointed by the CIA's excessive redactions to the report. Our goal is to release publicly as much of the report's findings and conclusions as soon as possible."

Several weeks later, on July 9, the completed report – with redactions made by the CIA – was made available to the public. To mark the public release, Chairman Roberts and Vice Chairman Rockefeller held a joint press conference, during which Senator Rockefeller admitted his frustration with the fact that many of the "new elements" – those announced on February 12 – and "virtually everything that has to do with the Administration" are not included with this report. Instead, the newer pieces were combined into a second review – dubbed "Phase II" – which would be released in September 2006. Despite this delay, however, Senator Rockefeller strongly supported the report and the investigation, calling the conclusions "devastating." He stated, "The intelligence community began with a presumption…that Iraq

had the weapons, never questioned the assumption that Iraq had the weapons, and viewed every bit of ambiguous information as supporting the fact that the weapons were there."

In additional views to the report, joined by Senators Levin and Durbin, Senator Rockefeller laid out his concerns that serious issues related to the use of intelligence by the Administration along with the other elements dubbed "Phase II," were being deferred. The additional views enumerated many of the statements senior Administration officials had made that went beyond what the intelligence showed, particularly related to the Iraqi regime's connections to terrorism.

In July 2004 the Committee held the first of several hearings regarding Intelligence Community reform. During this hearing, Senator Rockefeller again pointed to the particular problem of the politicization of intelligence as one in great need of solving, stating, "One of our biggest challenges is finding a way to insulate the intelligence community and its head from the kind of political pressure that we may have seen. Intelligence must be completely objective, regardless of the past, and beyond reach of politicization." Throughout 2004 and into 2005, he continued to express the view that there needed to be greater separation between the intelligence community and the policy makers, and that the lack of a big vacuum between those two entities was a particular problem that led to the failures in Iraq.

On August 3, 2006, more than three years after Chairman Roberts and Vice Chairman Rockefeller pledged that SSCI would review the pre-war Iraq intelligence, Senator Rockefeller announced that the Committee had finished work on two of the five sections that comprised Phase II of the Committee's review.

These two sections dealt with how information from the Iraqi National Congress affected intelligence and how postwar evidence uncovered in Iraq over the past three years compared to prewar intelligence assessments. In his press release, Senator Rockefeller reiterated his commitment to completing the Phase II report, stating, “No matter how difficult the coming days and months are in reaching agreement, we must remain committed to answering all of these important questions – both for our citizens today and for generations to come.” The two reports were released to the public a month later, on September 8. In a statement on the Senate floor regarding the reports, Senator Rockefeller stated that, “the Committee’s investigation into prewar intelligence on Iraq has revealed that the Bush Administration’s case for war in Iraq was fundamentally misleading.”

On January 3, 2007, six years after joining the Committee and following the Democratic victories in the 2006 midterm elections, Senator Rockefeller became Chairman of the SSCI.

Over the course of the next year and a half, the SSCI would release the remaining three sections of the report. On May 25, 2007, the third section, titled “Prewar Intelligence Assessments About Postwar Iraq” was released.

On April 1, 2008 the Committee voted 10-5, a bipartisan majority, to approve the final two sections of the Phase II report. These were released to the public on June 5, 2008, just shy of five years from the announcement of the initial review.

In his additional views accompanying the final report Senator Rockefeller noted:

> The Committee’s investigation also documented for the

public how the Administration ignored the pre-war judgments of the Intelligence Community that the invasion of Iraq would destabilize security in-country and provide al-Qaida with an opportunity to exploit the situation and increase attacks against United States forces during and after the war. After five years and the loss of 4,000 lives, these ignored judgments were tragically prescient.

[Source: Whether Public Statement Regarding Iraq by U.S. Government Officials Were Substantiated by Intelligence Information, S. Report 110-345, p. 92, June 5, 2008] More than six years after that was written, given the threat now posed in Iraq by the Islamic State, those ignored judgments seem even more tragically prescient.

In his press statement announcing the release of the final sections of the report, Senator Rockefeller reiterated his sentiment that the Bush Administration "deliberately misled the American people [and] repeatedly presented intelligence as fact when, in reality, it was unsubstantiated, contradicted or non-existent. "Sadly, the Bush Administration led the nation into war under false pretenses."

Intelligence Community Reform

Introduction

The September 11 terrorist attacks, followed by the flawed intelligence prior to the Iraq War, exposed specific intelligence shortcomings but also highlighted longstanding structural impediments to effective intelligence.

Senator Rockefeller recognized early in his tenure as Vice Chairman that the Intelligence Community needed fundamental changes. In April 2003, just four months after assuming that position, he spoke to an audience of *Newsweek* reporters and executives laying out some of his thinking:

> Just as we belatedly recognized in the 80's that modern military operations require the seamless integration of air, land and sea-based forces, we also must recognize the need to integrate more closely espionage, imagery, signals intelligence and analysis. This concept of jointness for intelligence could take a variety of forms. We could require the cross assignment of individuals from one agency to another as a prerequisite for individual advancement, or we could use communications technology to link together individuals at different agencies in a way that allows for true collaboration. Or, the DCI could form true community intelligence centers bringing together individuals from all of the collection agencies, collocating them with the analysts. Creating such centers, led by an issue manager for each topic such as proliferation, China, Iran, etc., would allow the DCI to go to one person and find out what the intelligence

issues were, what we were doing to collect the information we needed, and what our shortfalls might be.

[Source: Private Speech prior to the White House Correspondents Dinner, April 25, 2003]

The Senator's immediate focus on reform and ways to improve the intelligence process was undoubtedly shaped by his experience with the House /Senate Joint Inquiry into the 9/11 attacks. The recommendations from that Inquiry were reinforced and expanded by the 9/11 Commission and by the SSCI's own report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq.

On July 31, 2003, Senator Rockefeller cosponsored the 9/11 Memorial Intelligence Reform Act, introduced by Senator Bob Graham. In a speech to the Senate he highlighted the importance of information sharing and the need to implement reforms called for by the Joint Inquiry. He noted, "Rarely before have we had such information about the performance of U.S. intelligence." But, "With that knowledge comes a responsibility, for the intelligence committees, Congress as a whole, the intelligence community, and the President, to complete the improvements that the facts show are required." [Source: Congressional Record – Senate, S10644, July 31, 2003]

Of course, by mid-2003 reform had already begun with the massive reorganization of the country's domestic security agencies through the establishment of the Department of Homeland Security in 2002. While new the DHS intelligence component officially joined the Intelligence Community, the Homeland Security Act, which created the Department, dealt

primarily with law enforcement and other domestic security functions and not with the existing intelligence agencies.

From early on Senator Rockefeller made it clear that he supported a broad reform of the Intelligence Community. During an SSCI hearing on the subject in June 2004, he stated "that post-9/11, we've got to go for the whole thing and in a sense put all of those people who will judge us in the Congress and those who surround the President and finally the President online, that we need to make an unpopular, not entirely defensible, but wholly different change, dramatic change, and that this is the only time we'll be able to do that."

As Vice Chairman Senator Rockefeller made intelligence reform his top priority for 2004. After the SSCI issued its Iraq Intelligence Report he convinced the Chairman to hold a rare August hearing which took place August 18, 2004. By August, however, the Senate leadership had passed over the SSCI and designated the Senate Government Affairs Committee as the lead in crafting intelligence reform legislation.

During this time, as Vice Chairman of the SSCI and, despite certain commonalties – the need for a strong intelligence director, for example – Senator Rockefeller's views on how the Intelligence Community should be structured differed from that of Chairman Roberts. On August 27, Senator Rockefeller sent a letter to Senators Collins and Lieberman, the Chairman and Ranking Member of the Governmental Affairs Committee, outlining his vision for Intelligence Community reform and expressing concern regarding aspects of a separate bill introduced by Chairman Roberts.

In the letter, Senator Rockefeller proposed a National Intelligence Director with unified budget, tasking, and personnel authorities over all elements of the Intelligence Community, including the NSA, NRO, NGA, and DIA, except during times of war. This directly contrasted with Chairman Roberts's bill which would have broken the CIA into three separate entities: one for analysis, another for clandestine operations, and a third for science and technology. The Roberts's bill additionally would have removed Department of Defense entities from Pentagon control and placed them under a new intelligence chief with greater centralizing authority, but who was not a National Intelligence Director as described by Senator Rockefeller. The Roberts's plan was met with strong objections from the Intelligence Community, particularly from then CIA Director George Tenet, who felt it would "drive the security of the American people off a cliff."

Later that fall, Senator Rockefeller published an article in the Council of American Ambassadors' Review outlining the need for Intelligence Community reform, specifically the need to "create a strong National Intelligence Director with unified control over budgets and personnel." This put Senator Rockefeller again in direct conflict with Chairman Roberts, but had the support of Director Tenet.

As the reform legislation began to move forward, the SSCI considered the nomination of Porter Goss to replace George Tenet as the Director of the Central Intelligence Agency. During the confirmation process Senator Rockefeller highlighted highly partisan statements Goss had made while Chairman of the HPSCI. Senator Rockefeller used the public hearing to debunk a charge Goss had made that Senator John Kerry, then the

Democratic nominee for President, had proposed intelligence cuts that would have been harmful by juxtaposing those cuts with deeper cuts endorsed by Goss during the same period. One of the concerns that had come to light during the SSCI Iraq review was the potential politicization of the intelligence process. This led Senator Rockefeller to vote against confirmation, saying that Goss, "repeatedly used intelligence issues for partisan purposes during his tenure on the House panel…I sincerely hope that Porter Goss proves my vote wrong and becomes an independent and exceptional director." On September 22, 2004, the Senate voted 77-17 to confirm Goss.

Unlike Chairman Roberts, Senator Rockefeller chose to work closely with Senators Collins and Lieberman on the reform legislation. He articulated his own key principles in a letter to them which he also released to the press. Among the ideas he put forth were the need for an Intelligence Community ombudsman, an intelligence reserve corps and an alternative analysis unit (red teaming), each of which were sustained in modified form in the final bill.

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) passed the Senate on December 8, 2004 by a vote of 89-2, with Senator Byrd being one of the two members, and the only Democrat, to vote against the final bill. Senator Rockefeller called final passage of the bill a "monumental achievement." The Act created a Director of National Intelligence, something he had advocated strongly for, and established the National Counterterrorism Center and a National Counterproliferation Center, along the lines of the community intelligence centers he had described in the April 2003 Newsweek speech. It also took

steps to improve aviation security and enhance civil liberties protection.

Immediately after completing work on the IRTPA, the Senate turned to the question of internal reform, something the 9/11 Commission also had said was among their most difficult and important recommendations. Senators Reid and McConnell, then their respective party whips, led this effort and Senator Rockefeller provided counsel and advice. In December 2004 the Senate passed S. 445 making significant changes to the structure and operation of intelligence oversight in the Senate. Arguably the most important change for the SSCI was the elimination of the eight year term limit on members. S. 445 also:

- Elevated the SSCI to "A" committee status;
- Reduced the time the Armed Services Committee could hold the intelligence authorization bill from 30 to 10 days;
- Created an Appropriations Subcommittee on Intelligence (this was never implemented);
- Revived the practice of allowing each SSCI member to designate one committee staffer; and
- For the first time allocated the funding between the Chairman and Vice Chairman and set a split of "not less than 40% for the minority"

In January 2007, after Senator Rockefeller became Chairman and two years after the passage of the Intelligence Reform Act, the SSCI held two hearings on the status of IC reform. At the time, he described the implementation as "a work in progress," recognizing the enormity of the task, the short timeline, and the challenging climate in which the implementation needed to take

place. However, he also identified areas of concern, like whether or not high-level efforts at reform were having an effect at the agencies or in the field, and he expressed his continuing desire to identify and address obstacles to meaningful reform.

Electronic Surveillance – Oversight and Legislation

107th Congress (2001-2002)

In Senator Rockefeller's first two years on the SSCI, 2001 and 2002, the Committee considered provisions that became part of the USA PATRIOT Act of 2001. During that time, Senator Rockefeller and other SSCI Members joined with the House Intelligence Committee to review NSA and surveillance authorities through the Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001. At that time Senator Rockefeller had not been briefed on the Terrorist Surveillance Program that President Bush first authorized on October 4, 2001.

(a) USA PATRIOT Act of 2001

On September 21, 2001, Senator Rockefeller joined others on the SSCI in sponsoring S. 1448, a bill introduced by Senators Bob Graham and Dianne Feinstein that was entitled "The Intelligence to Prevent Terrorism Act of 2001." The bill was introduced only 10 days after the September 11 terrorist attacks, but had been in preparation for months. Among other things, the legislation proposed to lengthen the period of certain FISA orders, augment the role of the Director of Central Intelligence (as head of the Intelligence Community) in establishing FISA priorities and requirements, and improve law enforcement and intelligence information sharing.

In a prepared statement for a September 24, 2001 hearing on S. 1448, Senator Rockefeller described the challenge that defined

much of the Committee's work throughout his 14-year service as a member:

> The challenge we now have is to evaluate these proposed changes, not as a response to recent events, but for how they will help our intelligence and law enforcement communities deal with terrorism in the long term. As we bolster those efforts to protect America from terrorist attacks, we must make sure we do not sacrifice civil liberties for short-term security. Changes we make in the next few weeks will be with us long after we have vanquished Osama bin Laden. Therefore, those changes must be consistent with our underlying values.

[Source: S. 1448, *The Intelligence to Prevent Terrorism Act of 2001 and Other Legislative Proposals in the Wake of the September 11, 2001 Attacks: Hearing Before the Senate Select Committee on Intelligence*, 107th Cong. 6 (2001).]

S. 1448 and a broader proposal for FISA amendments and other authorities submitted on September 19 by Attorney General John Ashcroft (chiefly considered by the Judiciary Committee) formed the basis for the USA PATRIOT Act of 2001. On October 25, Senator Rockefeller joined the Senate's 98-1 passage of the bill.

(b) First Briefings on the President's Surveillance Program

On October 4, 2001, President Bush authorized the Terrorist Surveillance Program (TSP). Under the TSP, the National Security Agency (NSA) was directed to intercept - within the United States - the content of telephone and Internet communications believed to originate or terminate outside the United States and that included a member or agent of al Qaeda or

an affiliated terrorist organization. Under the broader umbrella of what came to be known as the President's Surveillance Program, NSA also was authorized to collect, in bulk, telephony and internet (e-mail) metadata (numbers or e-mail addresses and time and length of phone calls or e-mails). None of this was undertaken under authority of the Foreign Intelligence Surveillance Act or pursuant to an order of the FISA Court.

The SSCI and HPSCI chairmen, Senate vice chairman, and House ranking member were briefed by Administration officials about the program on October 25, 2001. Subsequent briefings for them, including one briefing that included the chairman and ranking member of the Senate Defense Appropriations Subcommittee, were held in 2001 and 2002. Neither Senator Rockefeller nor any other member of either intelligence committee was briefed during that Congress.

[Source: *Nomination of General Michael V. Hayden, USAF, to be Director of the Central Intelligence Agency, Hearing Before the Senate Select Comm. on Intelligence,* 109th Cong. 70-71 (2006).]

(c) The Joint Inquiry Into the September 11 Attacks

During the 2002 SSCI-HPSCI Joint Inquiry, one investigative team focused on the NSA's capabilities and performance prior to 9/11, and issues concerning the use or non-use of FISA pervaded the Joint Inquiry's work. Among the questions specifically relating to NSA, the Committees investigated what the NSA collected, analyzed, and shared about communications of the 9/11 terrorists prior to the attack.

At the Joint Committee's final public hearing, on October 17, 2002, General Hayden, then NSA Director, testified on a panel

with Director of Central Intelligence George Tenet and FBI Director Robert Mueller. In his testimony, General Hayden pointed out that the hearing was only the third time an NSA Director had testified publicly. Gen. Hayden concluded his opening statement as follows:

> Let me close by telling you what I hope to get out of the national dialogue that these committees are fostering – and frankly I'm not really helped by being reminded that I need more Arab linguists or by someone second-guessing an obscure set in our files that may or may not make more sense than it did two years ago. What I really need you to do is talk to your constituents and find out where the American people want that line between security and liberty to be.
>
> In the context of NSA's mission, where do we draw the line between the government's need for counterterrorism information about people in the United States and the privacy interests of people located in the United States? Practically speaking, this line drawing affects the focus of NSA's activity, foreign or domestic, the standard in which surveillances are conducted, probable cause versus reasonable suspicion, for example, the type of data NSA is permitted to collect and how and the rules under which NSA retains and disseminates information about U.S. persons.
>
> These are serious issues that the country addressed and resolved to its satisfaction once before in the mid-1970s. In light of the events of September 11, it is appropriate that we as a country re-address them, and as the Director of Central Intelligence said a few minutes back, we need to get it right.

> We have to find the right balance between protecting our security and protecting our liberty. If we fail in this effort by drawing the line in the wrong place – that is, overly favoring liberty or security – then the terrorists win and liberty loses, in either case.

[Source: *Hearings Before the Senate Select Comm. on Intelligence and House Permanent Select Comm. on Intelligence*, S. Hrg. 107-1086, Vol. II, 801-802 (2002).]

Despite encouraging a "national dialogue", at the time of General Hayden's testimony, 13 of 15 members of the Senate Committee, including Senator Rockefeller, and 18 of the 20 members of the House Committee, had no awareness of the NSA's then year-old Terrorist Surveillance Program.

The Joint Inquiry's findings included (after the text was edited in the redaction process with the Executive Branch):

> Prior to September 11, the Intelligence Community's ability to produce significant and timely signals intelligence on counterterrorism was limited by NSA's failure to address modern communication technology aggressively, continuing conflict between Intelligence Community agencies, NSA's cautious approach to any collection of intelligence relating to activities in the United States, and insufficient collaboration between NSA and the FBI regarding the potential for terrorist attacks within the United States.

[Source: *Report of the Senate Select Comm. on Intelligence and House Permanent Select Committee on Intelligence,* S. Rep. No. 107-351 and H.R. Rep. No. 107-792, at xvi-xvii (2002).

Substantial portions of the NSA part of the Joint Inquiry report, e.g., at 368-383, remain redacted.]

108th Congress (2003-2004)

As the SSCI's new Vice Chairman for the 108th Congress, Senator Rockefeller began to receive "Gang of Eight" briefings. During this time, several key surveillance related events took place. One was Senator Rockefeller's letter to Vice President Cheney following a briefing on July 17, 2003, which Senator Rockefeller made public in 2005. Another was a revolt in the Department of Justice in March 2004. The revolt led to then-Acting Attorney General James Comey refusing to certify the legality of an element of the President's Surveillance Program, and the decision to bring that element under a judicial order of the Foreign Intelligence Surveillance Court.

(a) Letter to Cheney

Senator Rockefeller became SSCI Vice Chairman in January 2003 and was briefed that month and again on July 17, 2003, on the President's Surveillance Program. After receiving the second briefing, Senator Rockefeller consulted with Chris Mellon, then SSCI Minority Staff Director, without divulging the contents of the briefing. He then sent a hand written letter to Vice President Cheney stating that the topics discussed raised profound oversight issues and setting forth reasons why the limited briefings were not satisfactory:

> I am writing to reiterate my concerns regarding the sensitive intelligence issues we discussed today with the DCI,

DIRNSA, Chairman Roberts and our House Intelligence Committee counterparts.

Clearly, the activities we discussed raise profound oversight issues. As you know, I am neither a technician nor an attorney. Given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse these activities.

As I reflected on the meeting today, and the future we face, John Poindexter's TIA project sprung to mind, exacerbating my concern regarding the direction the Administration is moving with regard to security, technology, and surveillance. Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received.

In James Risen's 2006 book, "State of War," at page 56, the author offers this detail about the letter to Cheney: "Rockefeller told the White House in advance that he was planning to write the letter raising objections. In response, he was told by administration officials that he had to write the letter himself."

Vice President Cheney did not respond to the letter. Other than an emergency briefing of the "Gang of Eight" on March 10, 2004 - in the midst of the Department of Justice refusing to further certify the legality of an element of the President's program - no other briefing of SSCI leadership on the program occurred during the 108th Congress.

(b) DOJ Reevaluation of the Legality of the Program and the Decision to Bring Part of it Under FISA

In the fall of 2003, a new Assistant Attorney General for the Office of Legal Counsel, Jack Goldsmith, began reconsideration of the legal basis of the President's program, originally formulated by Deputy OLC Assistant Attorney General John Yoo. Yoo had opined that a key limitation of FISA, requiring that electronic surveillance may only be conducted "as authorized by statute," did not apply to wartime operations. Goldsmith came to reject that view, while finding legal support for the content interception part of the President's program based on the view that it was supported by the 2001 Authorization for the Use of Military Force. In 2008, Congress responded to that argument in the FISA Amendments Act of 2008 by tightening, through a Feinstein provision that Senator Rockefeller actively supported, the exclusivity provision in FISA.

Of more immediate consequence to the President's program, Goldsmith also questioned the legality of a metadata collection part of the President's program. While Goldsmith's rationale and the exact aspect of the program that he questioned remain classified, a draft NSA IG report leaked by Edward Snowden, however, identifies it as NSA's collection of e-mail metadata without approval of the FISA Court.

Because of the continued inclusion of e-mail metadata in the President's program, Acting Attorney General James Comey refused to certify the legality of the program. This resulted in a dramatic nighttime scene in Attorney General Ashcroft's hospital room on March 10, 2004, when Ashcroft refused to override Comey and officials of the Department of Justice prepared to resign.

Earlier, as the crisis escalated toward the hospital room confrontation that evening, Administration officials briefed the full Gang of Eight. This was the first briefing on the President's Surveillance Program that involved the top congressional leadership as well as Intelligence Committee leadership. There is no officially released record of the briefing, other than that it occurred. The draft NSA IG report disclosed by Snowden states that on March 11, 2004, General Hayden decided to continue the program because, among other reasons, "the members of Congress he briefed the previous day, 10 March, were supportive of continuing the Program."

On March 19, 2004, President Bush withdrew authority for NSA to continue the bulk internet metadata part of the program, and in July 2004 the Department of Justice obtained approval of the FISA Court for the establishment of a bulk e-mail metadata program under the pen register title, Title IV, of FISA.

109th Congress (2005-2006)

As the 109th Congress began, the legislative agenda regarding surveillance was first shaped by the scheduled December 31, 2005 sunset of 16 provisions of the USA PATRIOT Act of 2001 and the lone wolf provision enacted in the Intelligence Reform and Terrorism Prevention Act of 2004. SSCI and HPSCI leaders received briefings on the President's Terrorist Surveillance Program on February 3, 2005 and again on September 14, 2005. There has been no public indication what those briefings addressed.

Around this time, Administration officials became aware that the *New York Times* was working on a story about the President's Terrorist Surveillance Program. The NSA story broke on December 15, 2005, when the *Times* printed James Risen and Eric Lichtblau's story "Bush Lets U.S. Spy on Callers Without Courts." From that point through 2006 (and into the following Congress), the NSA program became a dominant focus of Congress's attention to surveillance authorities.

(a) PATRIOT Act Reauthorization

In April and May 2005, the SSCI held three open hearings on 16 provisions of the USA PATRIOT Act of 2001, and also on the lone wolf provision of the Intelligence Reform Act of 2004, that were scheduled to sunset at the end of the year. In June 2005, the Committee reported S. 1266, to permanently authorize the expiring provisions and to also create a new FBI administrative subpoena. Senator Rockefeller joined a majority of 11 Committee Members in ultimately reporting the bill, but the Committee divided 8-7 on a number of votes, including on the proposed new title of FISA that would grant the Attorney General and the FBI Director broad powers to issue administrative subpoenas in national security investigations.

The additional and minority views filed by the Committee's seven Democrats noted that the FBI had not documented significant instances when national security investigations were hindered by the absence of an administrative subpoena. They stressed the importance of prior judicial review of subpoenas for records, emphasizing "the responsibility of Congress to determine if there is a convincing need that justifies departure from the careful methodology of the Foreign Intelligence Surveillance Act."

[Source: S. Rep. No. 109-85, at 39 (2005)].

Describing an amendment that failed 7-8, the Democratic views explained how an emergency provision could allow for Attorney General authority to issue subpoenas in narrowly prescribed circumstances. [Source: S. Rep. No. 109-85, at 39-40].

A Judiciary Committee bill, which had passed the Senate on a voice vote, became the vehicle for conference on the USA PATRIOT Improvement and Reauthorization Act of 2005. Chairman Roberts and Vice Chairman Rockefeller were named conferees together with a number of Members of the Judiciary Committee. When the conference reported on December 8, 2005, no Democrat signed the conference report. Senator Rockefeller opposed cloture, and after cloture efforts on the conference report failed in the Senate, short term extensions of the sunset to March 10, 2006 were enacted. The USA PATRIOT Act Additional Authorizing Amendments of 2006 sufficiently resolved a number of Democratic concerns, although not all, regarding the reauthorization. In March 2006, Senator Rockefeller joined in voting to pass the bill.

In his floor statement prior to passage, Senator Rockefeller first made it clear that he and other Democrats fully supported providing intelligence and law enforcement the tools they needed to fight terrorism, but went on to point out the need to have a transparent process that built public support as well:

> From the outset of the PATRIOT Act reauthorization debate, there has been neither division nor doubt in the Congress that we would unite in extending the investigative and information sharing powers that were enacted in the wake of

> September 11. Over this past year, as we have debated the checks and balances that should be added or strengthened, Republicans and Democrats alike have been prepared throughout to achieve what we have now accomplished, the extension of essential national security authorities.

[Source: *Congressional Record,* S1611, March 2, 2006]

Senator Rockefeller used the opportunity to make the point that the Administration still had not granted the Congress sufficient access to the Terrorist Surveillance Program to allow for adequate oversight and debate:

> This process has not been followed, unfortunately, with respect to the NSA warrantless surveillance program inside the United States recently disclosed and acknowledged by the President. The administration continues to withhold important facts about the NSA program and, in turn, has prevented Congress from understanding the program and evaluating whether it is both legally and operationally sound. If a President refuses to deal with the Congress as a co-equal branch of Government, then the Congress cannot fulfill its responsibility on behalf of the people to ensure that the executive branch is acting under the rule of law.

[Source: *Congressional Record,* S1611, March 2, 2006]

> (b) Efforts to Investigate the NSA Program

Prior to the *New York Times* Dec 15, 2005 disclosure of the Terrorist Surveillance Program, General Hayden – who at the time was serving as Principal Deputy Director of National Intelligence – asked Senator Rockefeller during a meeting at the

White House to weigh in with Jim Risen's editors at the *Times* and to describe both support of the program and concern about harm to national security. Senator Rockefeller did not do so, but after the story ran, General Hayden and the Bush Administration argued that the program had the full support of Congress. On December 19, Senator Rockefeller, after confirming with General Hayden that the July 17, 2003, letter to Vice President Cheney contained no classified information, released it. The Washington Post reported on the letter on December 20 in an article entitled "Senator Sounded Alarm in '03." At the weekly Democratic luncheon that day, Senator Rockefeller received a standing ovation.

On January 10, 2006 Senator Rockefeller wrote to Chairman Roberts requesting that the SSCI undertake an investigation of the NSA's warrantless electronic collection and surveillance. Later that month, on January 25, Senator Rockefeller and other Committee Democrats wrote to Chairman Roberts to formally request an investigation of these programs. On February 8, Senator Rockefeller wrote to President Bush urging him to reconsider his decision to withhold critical information from 13 of the 15 members of the SSCI regarding programs connected to domestic surveillance.

In March 2006, the Committee reached agreement with the Administration on the establishment of an ad hoc subcommittee of seven members, including the Chairman and Vice Chairman, to have responsibility for oversight of the program. Senator Rockefeller designated Senators Feinstein and Levin to serve with him on the subcommittee. In May, all Committee members were given access to information about the program, although

issues persisted about the extent of access. Three staff members, but not the Committee's minority counsel, were also given access to information about the program.

On September 13, 2006, Senator Rockefeller addressed the Senate regarding oversight of the program. He recounted that as far back as February, he had asked the NSA Director, DNI, and Attorney General for information "including the Presidential orders authorizing the program, legal reviews and opinions relating to the program, procedures and guidelines on the use of information obtained through the program, and specifics about the counterterrorism benefits of the program." Senator Rockefeller described a letter in May that identified specific items based on recent briefings. He stressed that basic documentation was necessary to fully understand the NSA program and consider whether legislation was needed. Yet, he had received no response, other than a forwarded fax from the NSA General Counsel office with administration-approved talking points about the program. [Source: 113 Cong. Rec. S9450.]

In the course of 2006, civil lawsuits multiplied around the country claiming damages by U.S. telephone users from the NSA program and U.S. telephone and e-mail company cooperation with it. The total damages sought were astronomical.

110th Congress (2007-2008)

The 2006 election shifted control of the Senate to the Democrats and, in January 2007, Senator Rockefeller became SSCI's chairman and Senator Kit Bond became the Vice Chairman. On January 17, the Attorney General wrote to Congress that a FISA

judge had issued orders that enabled the Executive Branch to conduct, under FISA, the electronic surveillance it had conducted under the TSP. Soon after, the SSCI requested that the Administration undertake a comprehensive review of FISA. The Committee's surveillance-related work then proceeded in phases through the Congress.

(a) Initial Hearing on the Administration's Long-term Proposal

On April 12, 2007, DNI McConnell submitted to Congress the Administration's proposal, which included new collection authority under FISA, but with a markedly limited role for the FISA Court, to achieve what the Administration described as the "modernization" of FISA. It also included a proposed legislative grant of immunity to telephone and e-mail providers who had cooperated with the President's surveillance program without naming the specific companies. On May 1, the Committee held a public hearing on the proposal, receiving testimony from the DNI and the Assistant Attorney General for National Security, and statements from organizations and individuals. [Source: *Hearing on the Modernization of the Foreign Intelligence Surveillance Act Before the Senate Select Comm. on Intelligence*, S. Hr. 110-399 (2007).]

Senator Rockefeller's opening statement concerning the Administration's request for immunity legislation reiterated the Committee's need for access to the legal opinions of the Department of Justice that had justified the program, saying:

> Congress is being asked to enact legislation that brings to end lawsuits that allege violations of the rights of Americans. In considering that request, it is essential that the Committee

> know whether all involved, government officials and anyone else, relied on sound, legal conclusions of the government's highest law officer. The opinions of the Attorney General are not just private advice. They are an authoritative statement of law within the Executive Branch.

[Source: S. Hrg. 110-399, at 2.]

Concerning the request for new FISA authorities, which Senator Rockefeller described as "the most significant change to the statute since its enactment in 1978," his opening statement identified three of the questions the Committee should ask: (1) whether the proposal would give the Attorney General authority, without a court warrant, to wiretap - in the United States - international communications to or from a person in the U.S. (most of whom would be U.S. citizens), and if so, how would that affect the private interests of U.S. citizens and permanent residents; (2) would authority to require the assistance of private persons without a court order, give the Attorney General a power that is inconsistent with American legal traditions; and (3) would the proposal allow the Attorney General to resume warrantless collection. [Source: S. Hrg. 110-399, at 3.]

Senator Rockefeller concluded his opening statement with an observation about the NSA:

> General Keith Alexander, the Director of the National Security Agency, is representing the National Security Agency here today. The NSA, people should know, has a limited ability to speak for itself in public, but we can, the rest of us, and so I'd like to share this thought with my colleagues and with the American public.

> NSA does not make the rules. It has no wish to do so. Congress sets policy for the NSA in law, and the President issues directives that the NSA must follow. Every American should have confidence, as we do from close observation of this important truth, that the ranks of the NSA are filled with dedicated and honorable people who are committed to protecting this Nation while scrupulously following the laws and procedures designed to protect the rights and liberties of Americans.

[Source: S. Hrg. 110-399, at 4.]

(b) The Protect America Act

In May 2007, a second FISA judge issued a ruling that the DNI said would significantly divert NSA analysts from their counterterrorism work. The Committee responded by turning to short-term legislation, which became known as the Protect America Act of 2007, before returning in October to consideration of long-term, more comprehensive legislation.

The Protect America Act, both in process and substance, sharply divided the Senate.

There were two competing proposals in the Senate, one introduced by Senators McConnell and Bond, the other by Senators Levin and Rockefeller. A fundamental difference between the two proposals concerned the role of the FISA Court: whether the Attorney General should be granted the power to direct surveillance from within the United States of foreign targets, or whether the FISA Court should have, as in Senator Rockefeller's statement on the eve of the August 3 vote on the bill, "an essential role in authorizing surveillance and overseeing

its execution." There was also a great deal of concern about the potential looseness of the provision that authorized the collection of foreign intelligence "concerning" persons outside the U.S.

The DNI issued a terse statement on August 3 just before the Senate vote: "The Majority Bill creates significant uncertainty in an area where certainty is paramount in order to protect the country. I must have certainty in order to protect the nation from attacks that are being planned today to inflict mass casualties on the United States."

The McConnell-Bond bill attained the 60 votes for passage, but not before it was amended to establish a 180-day sunset (February 1, 2008) to assure further consideration in the 110th Congress. The need for that was heightened by the fact that the Protect America Act did not address the second main concern of the Administration - legal protection for communications providers that had cooperated with the President's Surveillance Program.

On returning from August recess, the first task for Chairman Rockefeller was to communicate frankly to the DNI how the trust necessary for a long-term solution had been injured. Chairman Rockefeller also needed to get the process required for that long-term solution onto a bipartisan track within Congress and also onto a cooperative track between Congress and the Executive Branch.

(c) The FISA Amendments Act

The SSCI, by a bipartisan vote of 13-2, favorably reported the FISA Amendments Act of 2007, which became the FISA Amendments Act of 2008. A key step in proceeding to a markup

of the bill on October 18, 2007, was the Administration's decision on October 9, to provide the Committee access to the presidential authorizations under which the NSA program had operated, and the legal opinions of the Department of Justice that had supported those authorizations.

On October 31, shortly after the Committee filed its report accompanying the bill, Senator Rockefeller reached out to a public audience, through an op-ed in the Washington Post, on the reasons why the Committee included a controversial immunity provision. The op-ed concluded as follows:

> The fact is, private industry must remain an essential partner in law enforcement and national security. We face an enemy that uses every tool and technology of 21st-century life, and we must do the same.
>
> If American business – airlines, banks, utilities, and many others – were to decide that it would be too risky to comply with legally certified requests, or to insist on verifying every request in court, our intelligence collection could come to a screeching halt. The impact would be devastating to the intelligence community, the Justice Department and military officials who are hunting down our enemies.
>
> The passions stirred by this case are understandable. The president's secret programs have generated intense anger and resentment, and, as someone who has challenged this misuse of power from the beginning, I share those sentiments.
>
> But this president is only going to be in office for another year or so, while the fight against terrorism will go on,

> perhaps for decades. Even as we hold government officials accountable for mistakes or wrongdoing – through the courts, congressional investigations and the electoral process – we must preserve the cooperation of private industry for the next president, and for every one who follows.

[Source: John D. Rockefeller IV, *Partners in the War on Terror*, Washington Post (Oct. 31, 2007).]

Senator Rockefeller in cooperation with Vice Chairman Bond (notwithstanding periodic disagreements) shepherded the bill through the Committee, as well extensive debate on the Senate floor in January and February 2008, negotiations with the House during the spring of 2008, and throughout negotiations with the Executive Branch leading to final passage in July and a presidential signature on July 9. The final legislation they produced included these key components: (1) a collection system that met U.S. foreign intelligence needs, while establishing requirements and procedures for FISA Court review and approval to ensure legality; (2) protections to ensure that the system would not be used to override provisions of FISA on the targeting of persons within the United States; (3) historically new protections on surveillance of U.S. persons outside the United States; (4) statutory rules for immunity for private entities that cooperated with the U.S. Government during the President's program, while making clear that the legislation did not immunize from suit Government entities or officials; (5) a requirement for a comprehensive review of the President's program by Inspectors General of departments and agencies instrumental in it, so that there would be a full historical record, although the availability of

that to the public would be subject to Executive Branch classification decisions; and (6) tightened statutory exclusivity requirements to reduce the possibility of future end runs around FISA.

(d) Beginning the Business Records Reauthorization Process

On October 29, 2008, Senator Rockefeller and Senator Wyden joined in a letter to the Presiding Judges of the FISA Court and the FISA Court of Review, and to the DNI and Attorney General, on the importance of establishing a process for classification review and public release of FISA Court rulings on important issues of law. The letter included:

> As members of the Senate Select Committee on Intelligence, we are familiar with the need to balance public transparency and accountability with the secrecy that national security sometimes requires. We accordingly understand why many foreign intelligence surveillance decisions are classified and must remain so. But we also are aware of a cost of the secrecy that surrounds these decisions: members of the public, and even many policymakers, often do not understand how the Foreign Intelligence Surveillance Act is interpreted by the Judicial branch, or how the Judicial branch balances constitutional concerns with the Executive branch's need to collect foreign intelligence information. This lack of knowledge makes it challenging for members of Congress and the public to determine whether the law adequately protects both national security and the privacy rights of law-abiding Americans.

> Those decisions that contain important rulings of law are, we believe, a minority of all decisions. Their public release, in a form in which sensitive national security information is redacted, would greatly inform the public debate over federal surveillance laws, such as the recent revisions of the Foreign Intelligence Surveillance Act, or those FISA provisions enacted as part of the PATRIOT Act that are currently set to expire at the end of next year.

At the time of the letter, no member of the Committee was permitted to provide a public example of a classified FISA Court opinion that may have prompted the concerns stated in the letter. Since the Snowden disclosures in 2013, officially declassified FISA opinions in the last year show that a prominent example, that the Committee had become aware of at the time of the 2008 letter, was a FISA court opinion approving an e-mail metadata program under the "relevance" requirement of Title IV of FISA on pen register and trap and trace authority. That FISC opinion became a key basis of the Government's assertion in 2006 that the term "relevance" in Title V, popularly known as Section 215, also supported bulk metadata telephony business records collection. A basic point of the Rockefeller-Wyden letter was that this interpretation of "relevance" might be key to the approaching sunset debate on business record authority.

111th through 113th Congresses (2009-2014)

In January 2009, Senator Rockefeller became Chairman of the Senate Committee on Commerce, Science, and Transportation and Senator Feinstein assumed the chairmanship of the SSCI.

Senator Rockefeller continued to serve as the next most senior member of the Committee.

In April 2009 the *New York Times* published a story titled "Officials Say U.S. Wiretaps Exceeded Law" by Eric Lichtblau and James Risen. The two reported that the NSA had gone beyond its legal limits in obtaining Americans' email messages and phone calls. Senator Rockefeller issued a statement saying that mistakes and improprieties such as those reported in the story are "exactly why we [Congress] put in place strong oversight and civil liberties protections in the FISA Amendments Act last year," emphasizing the ongoing need for Congressional oversight of the implementation of the law.

A month later, on May 12, 2009, the SSCI held a closed hearing on FISA and the IC's Bulk Records Collection Program. That September, the Committee held another closed hearing on FISA Compliance and Expiring Provisions. Then on December 19, 2009, the Senate voted 88 to 10, as part of the Department of Defense Appropriations Act, to extend Section 215 business records authority from December 31, 2009 to February 28, 2010. Senator Rockefeller supported this extension.

Five days before the extended sunset date, on February 23, 2010, Chairman Feinstein and Vice Chairman Bond circulated a Dear Colleague invitation to all Senators to review a Department of Justice document detailing the classified uses of Section 215 business records authority. The next day, on February 24, 2010 the Senate voted by voice to extend 215 for one year, until February 28, 2011.

In February 2011, Chairman Feinstein and Vice Chairman Chambliss, again circulated a Dear Colleague invitation to all Senators to review a Department of Justice document describing the classified uses of Section 215 business record authority.

On February 15, 2011, Senator Rockefeller supported another temporary extension of Section 215 authority which passed the Senate, by a vote of 86 to 12. After months of discussion and deliberation on May 26, 2011, the Senate voted 72 to 23 to extend Section 215 authority for four years, until June 1, 2015. Of the fifteen members of the SSCI, only Senators Wyden and Udall voted no, although Senator Rubio did not vote.

On June 14, 2011, honoring a commitment she made to Senator Wyden, Chairman Feinstein held a full Committee hearing on bulk collection under Section 215. Attorney General Eric Holder and NSA Director General Keith Alexander were the primary witnesses. Senator Rockefeller joined with the majority of the members expressing strong support for the program as it was being implemented under the recently reauthorized Section 215. Only Senators Wyden and Udall dissented.

In October 2011, the SSCI held another closed hearing on FISA Implementation and, on February 9, 2012, a second hearing on the FISA Amendments Act Reauthorization. Soon after, with Senator Rockefeller's support, the reauthorization bill was reported out of the SSCI with no amendments. Senators Wyden and Udall again were the only no votes. On December 30, 2012, the Senate reauthorized the FISA Amendments Act by a vote of 73 to 22. Of the 15 members of the Committee, only Senators Wyden and Udall voted no.

On June 5, 2013, leaked documents from former NSA and CIA contractor Edward Snowden were first published in *The Guardian* and the *Washington Post* newspapers. The initial revelation – that Verizon Business had been compelled by a court order to "provide the NSA with daily information" on its customers' phone calls – was only a precursor to disclosures which eventually amounted to the largest ever leak of U.S. classified information. Snowden's leaks sparked spirited debate across the country about whether his actions were somehow justified in the name of transparency, and also whether the government had gone too far in the name of protecting its citizens.

On November 12, 2013, the Committee reported S. 1631, the FISA Improvements Act of 2013. The vote to report favorably was 11-4, with Senator Rockefeller voting in favor. The report concluded that the legal authorities supporting the bulk telephony metadata program should be reauthorized, and found that there had been no willful efforts by government officials to circumvent the statute. Nevertheless, the bill proposed to codify privacy protections that are currently in FISA Court approved minimization procedures or Executive branch policy. The Committee rejected, by a vote of 7 ayes to 8 noes, a Senator Rockefeller amendment to establish a three-year limit (in place of the FISA Court's current five-year limit) on NSA retention of bulk metadata. [Source: S. Rep. No. 113-119, at 9.]

The fallout from the Snowden leaks, including significant pressure from the public, U.S. companies and foreign countries - including some allies - led the President to announce on August 12, 2013, the establishment of a Review Group on Intelligence and

Communications Technologies. The Review Group released a public report on December 12, 2013.

On January 7, 2014, the SSCI held a closed briefing with representatives of the President's Review Group. Senator Rockefeller strongly opposed the idea of moving the data retention part of the 215 program out of NSA to the private telecommunications providers and described the rigorous system of oversight that had been put in place at the NSA to prevent abuses. Senator Rockefeller provided his colleagues with copies of the Commerce Committee's report on data brokers to illustrate the privacy risks of holding and searching such data in the private sector.

On January 17, President Obama gave a speech announcing a number of reforms to signals intelligence programs and procedures. The most significant among them was that he would end the 215 program as it existed, and would look for ways to maintain the necessary capabilities while ending the government's role in holding telephone metadata. On January 29, during the SSCI's annual open hearing on national security threats Senator Rockefeller spoke strongly in opposition to the plan the President had announced.

On May 22, 2014, the USA Freedom Act, which implemented many of the Administration's desired changes, passed the House of Representatives 303-121. Following that vote, on June 5, the SSCI held an open hearing on the USA Freedom Act with witnesses from the FBI, NSA, DNI, and DOJ, as well as the telecommunications industry and privacy community. At that hearing Senator Rockefeller again spoke out strongly and publicly

against the idea of moving the data retention part of the 215 metadata program from NSA to private providers.

Senator Leahy developed an alternative to the House bill that included many of the same reforms. On November 18, by a vote of 58 in favor and 42 opposed, cloture was not invoked on a motion to proceed to the consideration of this bill, S. 2685, which effectively ended consideration of Section 215 amendments in the 113th Congress.

In his farewell address on December 4th, 2012, Senator Rockefeller again spoke about NSA reform and the importance of not "outsourc[ing] our intelligence work to telecommunications firms governed by profits rather than a solemn oath to our Country's security."

Subject to a statutory exception for open investigations, Section 215 together with FISA roving electronic surveillance and lone wolf authority are scheduled to sunset on June 1, 2015.

Detention and Interrogation

107th Congress (2002)

On March 28, 2002, the CIA took custody of Abu Zubaydah, the first detainee held under the new covert action authorities issued by President Bush on September 17, 2001. Throughout the spring and summer of 2002, the CIA, the FBI, the Department of Justice and the White House engaged in a highly compartmented and senior level policy and legal discourse. Despite specific questions from the Committee about the status of Abu Zubaydah's interrogation, the Committee was not made aware of the deliberations regarding an alternative set of harsh interrogation techniques. [Source: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, S. Rep. No. 113-288, at 438 (2014)]

On August 1, 2002, the Department of Justice's Office of Legal Counsel issued opinions approving the legality of techniques that the CIA proposed for use in Abu Zubaydah' interrogation, which the CIA then began to employ. At this time, no member of the Committee was aware of the development of an alternative set of interrogation techniques. A month later, on September 4, HPSCI Chairman Goss and Ranking Member Pelosi received a briefing. As detailed in the Study, unnamed HPSCI leaders or staff questioned the legality of the techniques. [Source: S. Rep. No. 113-288, at 438 (Quoting from a CIA internal e-mail: "HPSCI attendees also questioned the legality of these techniques if other countries would use them.")] This key detail was deleted from the CIA's initial one-paragraph record of this briefing. On September 27, SSCI Chairman Graham and Vice Chairman Shelby, and their staff directors, received a briefing. The CIA's one-paragraph

record of that briefing was a near-verbatim copy of its altered record of the previous HPSCI briefing. Following the briefing, Chairman Graham made multiple requests for additional information on the CIA's Detention and Interrogation Program. Internal CIA emails discuss how the CIA could "get... off the hook on the cheap" in responding to Chairman Graham's requests for more information. Ultimately, CIA officials simply did not respond to Graham's requests prior to his departure from the Committee. No other member of either committee received, at that time, any information about the beginning of the CIA’s interrogation program.

108th Congress (2003-2004)

(a) 2003

Senator Rockefeller became vice chairman in January 2003. Prior to developing doubts about the veracity of the CIA’s representations about the program in mid-to-late 2004, Senator Rockefeller received at least one, and possibly two, formal briefings on the program: a scheduled briefing on September 4, 2003 (which may not have occurred as scheduled), and a briefing on July 15, 2004.

Additionally, on February 4, 2003, Chairman Roberts, SSCI staff director Bill Duhnke, and SSCI minority staff director Mellon were briefed in a carefully planned introduction to the program for the new SSCI leadership. Senator Rockefeller did not attend this briefing. The only record that exists of this briefing is a CIA Memorandum for the Record. The May 2009 CIA list of interrogation briefings contains a note: “later individual briefing to Rockefeller.” The list states that the subject of the February 4

briefing was “EITs, including that interrogations of Zubaydah and Nashiri were taped.” Apparently quoting from another CIA memorandum, it also stated: “EITs ‘described in considerable detail’ including ‘how the water board was used.” The process by which the techniques were approved by DoJ was also raised.”

Khalid Sheik Mohammed (KSM) was captured on March 1, 2003. The CIA took custody of him soon after and immediately subjected him to EITs. There were no formal briefings to the Committee leadership about KSM’s interrogation and there are no records of informal discussions with Senators Roberts and Rockefeller. Multiple Committee members inquired about KSM’s interrogation throughout the spring and summer, but the CIA declined to answer these questions. [Source: S. Rep. No. 113-288, at 440]

On March 2, 2003, Senator Rockefeller was interviewed on CNN’s Late Edition. In commenting on KSM’s capture the day before, Rockefeller said “he’s in safekeeping, under American protection. He’ll be grilled by us. I’m sure we’ll be proper with him, but I’m sure we’ll be very, very tough with him.” Also, in response to Wolf Blitzer’s question whether the U.S. might transfer KSM to a country where torture is allowed: “I don’t know that. I can’t comment on that. And if I did know it, I wouldn’t comment on it (laughter). But I wouldn’t rule it out. I wouldn’t take anything off the table where he is concerned, because this is the man who has killed hundreds and hundreds of Americans over the last ten years.” The program’s defenders cite these as evidence of his approval, although, with respect to how KSM would be interrogated in American custody, Senator Rockefeller said we’d be “proper” while “very tough” and that KSM would be

“under American protection,” which should have been understood to mean not subject to the interrogation methods of other countries.

According to a CIA memorandum written six months later, a second briefing on the program for SSCI leadership occurred on September 4, 2003. This briefing was scheduled following significant deliberations in the Administration over whether to reaffirm the program – again, without the knowledge of the Committee – to include briefing Secretaries Powell and Rumsfeld on the program for the first time. (There are records of the preparation for the SSCI briefing, but there are no records that the briefing actually took place as scheduled. Staff Directors Duhnke and Mellon did not recall this briefing.)

According to the subsequent CIA memorandum, Chairman Roberts, Vice Chairman Rockefeller, Staff Director Duhnke and Minority Staff Director Mellon were “[b]riefed on EITs, including a slide presentation where non-enhanced and enhanced interrogation techniques were named, described, and compared on the same slide.” If, per CIA’s subsequent record, this briefing did occur, this was Senator Rockefeller’s first direct briefing by the CIA on the interrogation program. As with the similar prepared documents for the briefings for Powell and Rumsfeld, the slides for this scheduled briefing contained materially false information about the professionalism, humaneness and effectiveness program, and material omissions about the program’s systemic problems. In May 2009, Politico reported that a Rockefeller aide, referring to 2003, said that “Senator Rockefeller has repeatedly stated he was not told critical information that would have cast significant doubt on the program’s legality and effectiveness.”

(b) 2004

From late 2003 to the summer of 2004, there was a crescendo of events, that combined to stimulate calls for investigations and legislation: Abu Ghraib, including military investigations (starting with Gen. Sanchez's appointment of Gen. Taguba, building to the Schlesinger report, and fueled by the Abu Ghraib photos in April 2004); the May 2004 CIA IG report, provided to SSCI leadership and staff directors in June 2004 (by which time Andy Johnson had become Senator Rockefeller's staff director); the disclosure of the First Bybee Memo (unclassified but not previously released) in June 2004, which was shortly followed by a scathing legal academic and public critique and then its withdrawal. Director Tenet suspended the program, and also announced his resignation.

In addition to these detention and interrogation developments, the SSCI reported the first phase of its Iraq review on July 9, 2004. In later conversations with his staff Senator Rockefeller, reflecting back to 2004, offered that the lessons of the Iraq review gave him a different perspective and prompted him to question more intensely the CIA's assertions.

During this period, on July 15, 2004, Chairman Roberts, Vice Chairman Rockefeller, Staff Director Duhnke, and Minority Staff Director Johnson were briefed on the IG report and an ongoing threat stream that was the primary basis for the CIA's case for reaffirming and restarting the program. (A CIA 2009 briefing list mistakenly lists Chris Mellon, but Johnson had replaced Mellon by that time.) The CIA list states they were "Briefed on Interrogation Techniques, including waterboarding, abdominal slap, and sleep deprivation. Also briefed on actionable intelligence derived from

the use of EITs." Handwritten notes by CIA staff and Andy Johnson indicate that as with other previous and contemporaneous briefings to the Committee and other Executive Branch entities, the information provided in the briefing was incomplete and materially inaccurate, and was presented as a case for reaffirmation of the program. The notes indicate that Roberts and Rockefeller generally supported the CIA's interrogation efforts but questioned the effectiveness of the techniques.

Also, the 9/11 Commission issued its final report on July 22, 2004. The Commission addressed the abuse of prisoners:

> Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need.

[Source: Report of the National Commission on Terrorist Attacks Upon the United States, at 379 (2004)]

The 9/11 Commission recommended:

> The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.

[Source: Id. at 380]

Porter Goss was confirmed as CIA Director on September 22, 2004. Senator Rockefeller voted against his confirmation, citing Goss's politicization of intelligence issues.

In September 2004, Senator Rockefeller began to refer to CIA testimony about detention and interrogation as a "kabuki dance." On October 6, 2004, the Senate passed the National Intelligence Reform and Terrorism Prevention Act of 2004. Section 1014 addressed treatment of foreign prisoners. It began with findings intended to be consistent with the 9/11 Commission report. It would have established a policy of the United States that "all officials" of the United States are bound in wartime and peacetime by legal prohibitions against torture and cruel, inhuman, or degrading treatment. It would have prohibited violations, imposed reporting obligations on the proposed National Intelligence Director, including about regulations to ensure compliance not only by all U.S. personnel but also by persons providing contractual services to the United States.

The conference on the Intelligence Reform Act dropped the provision. On January 13, 2005, the New York Times reported that "four senior members from the House and Senate deleted the restrictions from the final bill after the White House expressed opposition." The Times elaborated: "In interviews on Wednesday, both Senator Susan Collins of Maine, a Republican negotiator, and Representative Jane Harman of California, a Democratic negotiator, said the lawmakers had ultimately decided that the question of whether to extend the restrictions to intelligence officers was too complex to be included in the legislation. 'The conferees agreed that they would drop the language but with the

caveat that the intelligence committees would take up the issue this year.' "

By this time, most of the 119 detainees in the program were in CIA custody, and the interrogations of most of the 39 detainees who were subjected to EITs had ended.

109th Congress (2005-2006)

(a) Calls for a Committee Investigation

On March 7, 2005, in response to Senator Rockefeller's request in the context of his intent to investigate the program, CTC Director Jose Rodriguez and other CIA officials briefed Senator Rockefeller and Andy Johnson on the program. Rockefeller took seven pages of detailed handwritten notes that indicate that the briefing consisted of material inaccuracies and omissions about the techniques and the program's effectiveness. Rockefeller asked about videotaping of interrogations, and the notes indicate that Rodriguez withheld the existence of the videotapes of the Abu Zubaydah and al-Nashiri interrogations, whose destruction Rodriguez would order approximately six months later.

On March 10, 2005, all seven Democrats on the SSCI wrote to Chairman Roberts requesting, as described in Senator Rockefeller's public statement that day, a business meeting "to authorize an investigation into the collection of intelligence using detention, interrogation and rendition." He explained:

> This is an extremely critical issue before our committee, and there are several questions we must answer: Have any of our interrogation policies led to abuse? Are we complying with United States and international law? Are our current

interrogation techniques effective, and are we getting the information we need? And, finally have U.S. officials in the field been given clear and proper guidelines related to detention, interrogation, and rendition?

The Intelligence Committee is the only committee in the Senate authorized to perform oversight of the Intelligence Community. If we don't carry our duties, these important questions won't be answered.

On March 11, 2005, Senator Rockefeller and Representative Jane Harman met with Vice President Cheney to request support for an investigation of the program for the explicit purpose of constructive oversight to improve CIA detentions and interrogations. The Vice President opposed this suggestion, which was the subject of significant disagreement between Senator Rockefeller, Senator Roberts and other Committee members.

On April 14, 2005, Senator Rockefeller submitted an amendment to an emergency supplemental appropriations bill. The amendment proposed that it be the sense of the Senate that the Intelligence Committee shall conduct a six-month investigation into the authorities, policies, and practices of U.S. Government agencies on the detention, interrogation, or rendition of prisoners for intelligence purposes, other than for purely domestic law enforcement. The sense of the Senate amendment set forth the elements of the proposed investigation, including all facts concerning actual detention, interrogation and rendition for intelligence purposes and all plans for long-term detention or trial by civilian courts or military tribunals or commissions. [Source: 151 Cong. Rec. S3706-3707 (daily ed., Apr. 14, 2005)]

In a statement on April 19, 2005, Senator Rockefeller said that he was turning to the full Senate "after several months of trying to encourage the Senate Select Committee on Intelligence to fulfill its oversight responsibilities related to the detention and interrogation practices of U.S. intelligence agencies." He noted there have been a number of separate Defense Department investigations, and that the CIA Inspector General was investigating multiple allegations of abuse, but each has been limited to the jurisdiction of the investigating agency and all have been by the Executive Branch, concluding:

> There has been no review of the fundamental legal and operational issues that apply to the entire intelligence community.
>
> No other committee in Congress has the jurisdiction to review this issue. These programs are too important and the damage to our nation's reputation and our security is too great to ignore the serious problems that have surfaced.

Unable to bring up the amendment under post-cloture rules, Senator Rockefeller addressed the Senate on why "the committee should carry out its oversight duties and carefully, thoroughly, and constructively evaluate the interrogation practices of the U.S. Intelligence Community." [Source: 151 Cong. Rec. S4060 (daily ed., Apr. 21, 2005)] His remarks stressed both the importance of interrogation as an intelligence tool and assuring that interrogation remains within bounds:

> The collection of intelligence through interrogation and rendition is an extremely important part of our

> counterterrorism effort and one of our most important intelligence tools.
>
> But this tool, as with all others, must be applied within the bounds of our laws and our own moral framework. It must be subject to the same scrutiny and congressional oversight as every other aspect of intelligence collection. This, unfortunately, has not been the case.

[Source: Id., S4061]

Rebutting arguments that the Committee should defer to the CIA IG's reviews, Rockefeller's remarks stressed the independent responsibility of the legislative branch. He emphasized the extent to which Americans were being put at risk:

> America is not a nation that uses or condones torture. We are party to international agreements that prohibit these acts, and we demand humane treatment for our citizens when they are arrested abroad and for our soldiers when they are captured on the battlefield. We must uphold the same high standards for individuals in our custody or we will rightly be branded as hypocrites, and we will put our soldiers and our citizens in danger. I cannot emphasize that enough.

[Source: Id., S4062]

Following the blocking of the attempt for a Committee investigation of the program, Senator Rockefeller sought access to over 100 specific documents cited in the May 2004 IG report.

(b) Nomination Hearings

On July 19, 2005, the Committee held a hearing on the nomination of Benjamin Powell to be the first General Counsel of the Office of the DNI. Senator Rockefeller could not be at the hearing. Senator Levin read Senator Rockefeller's statement, which included:

> At several points in his answers to pre-hearing questions, the nominee notes that he would from time to time consult with the Office of Legal Counsel at the Department of Justice. As we now know, the opinions of DOJ's Office of Legal Counsel are of great importance in establishing legal policy for the intelligence community. As we also know, secret legal opinions that are kept from Congress can lead to great error.
>
> To refer now only to the public record, a major opinion of the Department of Justice, on interrogations, issued in August 2002 and often referred to as the torture memorandum, could not withstand the light of day when it was disclosed in June 2004. It was promptly rescinded. The opinion was replaced by a far more supportable, publicly issued opinion in December 2004.
>
> I believe that our Committee needs the full record of secret Administration legal opinions on detention, interrogation, and rendition matters. To perform our responsibility on behalf of the Senate and the American public, those opinions need to be examined by the Committee's full membership, which includes members of the Judiciary Committee, and by our counsel. One question that I have for the nominee is whether we will have his support and that of the Office of the Director of National Intelligence in obtaining for the

Committee the full record of secret law on these important matters.

[Source: S. Hrg. 109-242, at 4 (2005)]

In his questions to the nominee, Senator Levin focused on the "second Bybee memo," which he had repeatedly requested. S. [Source: Id., at 13] Unknown then to him, the second Bybee memo, a classified August 2002 OLC opinion to Acting CIA General Counsel Rizzo approving use of specific interrogation methods (including waterboarding), had been attached to the May 2004 IG report when that was provided to the Chairman and Vice Chairman in June 2004 under restrictions barring sharing with other members.

(c) Efforts to Act Though Annual Intelligence Authorizations

(i) Fiscal Year 2006 Authorization Report

On September 29, 2005, the Committee reported the Intelligence Authorization Act for Fiscal Year 2006. The additional views of the committee's seven Democrats praised the Committee's action on the bill as being in its long tradition of bipartisanship, but noted two serious disagreements. One concerned the limited progress on completing the second phase of the inquiry concerning pre-war intelligence on Iraq. The second was "the Committee's refusal, despite repeated requests from the minority, to initiate a formal review of the many questions surrounding the detention, interrogation and rendition of individuals held in U.S. custody." [Source: S. Rep. No. 109-142, at 49 (2005)]

The additional views noted that the Committee had adopted three amendments to the classified annex accompanying the bill,

amendments that had been offered by Vice Chairman Rockefeller. [Source: Id., at 53]

One had been discussed briefly, in unclassified language, in the Committee Comments portion of the report:

> During his February 16, 2005, testimony in open session before the Committee, then-Director of Central Intelligence Porter Goss stated that the CIA had received a CIA Inspector General report on the treatment of detainees by members of the Intelligence Community. Director Goss stated that he believed that eight of the ten recommendations made by the CIA Inspector General had been implemented by the CIA.
>
> According to the CIA's Office of Inspector General, only five of the ten corrective recommendations have been implemented. The Committee is concerned with this delay in implementation and urges the Director of the CIA, in consultation and coordination with the DNI, to complete the remaining actions recommended by the CIA Inspector General without further delay.

[Source: Id., at 39]

DCI Goss's February testimony had been at the annual threat hearing for 2005. At that hearing, Senator Levin had expressed his understanding that a CIA Inspector General report on detainee treatment was "somewhere in the pipeline." In fact, the May 2004 report had been provided to the Chairman and Vice Chairman in June 2004. The report was provided under ground rules precluding availability to other members, although members were aware that such a report was in the works. Director Goss

volunteered: "There is one report that was ordered by my predecessor, which has come back, which had 10 recommendations or so in it. About, I think, eight of those have been done." [Source: S. Hrg. 109-61, at 67 (2005)]

Director Goss's error about the extent of implementation of the CIA IG's recommendations led to full Committee access to the recommendation portion of the IG report (while the body of the IG report continued to be withheld from the full Committee), and the Committee's public call in the FY 2006 authorization report for action on the remaining recommendations. The classified annex described the issue more fully.

The Democratic member additional views tersely described the other two Rockefeller amendments to the classified annex, while underscoring that they were not a substitute for the oversight that is needed:

> The other two amendments require the CIA and the President to provide certain information to the Congress. While these three amendments will help answer some of the questions related to these issues, they are not a substitute for the kind of effective oversight these issues demand.

[Source: S. Rep. No. 109-142, at 53]

The Rockefeller-led additional views described the reasons for, and rebutted the arguments against, having an investigation:

> Interrogation is a major intelligence tool in the war on terrorism and an essential component of the intelligence related to the insurgency in Iraq. Just as it conducts oversight of human, signals, and imagery intelligence

collection, the Committee's obligation under S. Res. 400 "to provide vigilant legislative oversight over the intelligence activities of the United States" requires it to undertake oversight of intelligence collection through interrogation. It is this Committee's responsibility, not only to answer questions related to abuse, but just as importantly to examine the effectiveness of the methods used in interrogations and the reliability of the information obtained from those investigations.

Despite repeated attempts to initiate a detailed review of fundamental legal and operational questions surrounding the detention, interrogation and rendition of individuals held in U.S. custody, the Committee majority has refused to conduct such an investigation.

One result of the Committee's failure to thoroughly review these programs is the continued ambiguity in the underlying legal authority creating an ongoing risk to intelligence personnel engaged in these programs. This ambiguity has created serious concerns about the legal and operational protection of intelligence officers involved in detention and interrogation operations. Rules applicable to detention, interrogation, and rendition are the product of treaties, federal statutes, judicial decisions, the legal opinions of the Department of Justice and agency counsel. Unfortunately, in the realm of Department of Justice and agency opinions, there appears to be a body of secret law. To assess the lawfulness and efficacy of current practices, and to bring to the attention of the Executive Branch matters requiring reassessment or correction, the Committee should be

> carefully examining this body of secret legal opinions and operational directives.
>
> One argument put forward by those opposed to a Committee investigation into detention and interrogation matters was the notion that any inquiry would be perceived as an attack on the brave men and women of the Intelligence Community performing these duties. The opposite is in fact true. A full investigation could aid in clarifying the legal and operational ambiguity that currently hampers the program's effectiveness and possibly endangers intelligence personnel. If the Committee is serious about supporting the intelligence officers in the field, we should be pushing the Executive Branch to resolve this and other shortcomings in the detention and interrogation program without delay.

[Source: S. Rep. No. 109-142, at 53-54]

After sequential referrals, S. 1803 was placed on the Senate calendar but not acted upon.

On November 7, 2005, in a floor statement in support of Senator Levin's amendment to establish an independent commission to investigate detention and interrogation operations, for which Rockefeller was an original co-sponsor, he expressed his regret that the Intelligence Committee had not met its responsibility:

> I am proud to be an original cosponsor of the amendment based on the belief that a comprehensive, objective, and independent investigation into the collection of intelligence through the detention, interrogation, and rendition of prisoners is long overdue. While I am a strong supporter of the amendment, I regret greatly the fact that we have been

forced to seek the creation of a national commission on such a critically important matter that falls squarely within the oversight responsibility of the Congress. Unfortunately, Congress's unwillingness to carry out these oversight duties in the past year has left us with no remaining alternative but to seek the creation of a national commission.

Why do I say this? The collection of intelligence through interrogation and rendition is an extremely important part of our counterterrorism effort. The interrogation of captured terrorists and insurgents is, in fact one of the most important of intelligence tools. We must ensure that those interrogations are carried out in a proper and effective manner. This tool, as with all others, must be applied within the bounds of our laws and our own national moral framework, and it must be subject to the same scrutiny as every other aspect of intelligence. This, unfortunately, has not been the case.

[Source: 151 Cong. Rec. S12420 (Nov. 7, 2005)] The amendment was defeated on November 8 by a vote of 43-55. [Source: 151 Cong. Rec. D1166] The next day, the CIA destroyed the videotape records of the 2002 Abu Zubaydah and al-Nashiri interrogations. [Source: S. Rep. No. 113-288, at 443-44]

(ii) FY 2007 Authorization Report

On October 5, 2005, the Senate passed a measure proposed by Senator McCain to restrict the interrogation techniques that may be used by United States personnel. On November 2, the

Washington Post published Dana Priest's story "CIA Holds Terror Suspects in Secret Prisons." On November 4, the Senate passed Senator McCain's measure on a different bill. By January 6, 2006, the amendment, which came to be known as the Detainee Treatment Act of 2005, had been enacted into law in both an appropriation and defense authorization law. With public disclosure of the existence of secret CIA prisons and the enactment of the Detainee Treatment Act, the effort accelerated to have the Committee act publicly.

On May 25, 2006, the Committee reported an Intelligence Authorization Act for Fiscal Year 2007. By a vote of 9 – 6, with Senators Snowe and Hagel joining the Committee's seven Democrats, it approved an amendment by Senator Levin to require a report by the DNI on compliance by the Intelligence Community with the Detainee Treatment Act of 2005. [Source: S. Rep. No. 109-259, at 10 (description of section 313) and 47 (vote)] By an identical vote, the Committee also agreed to a Levin amendment to require the DNI to submit a classified report to the members of the Committees on "alleged" clandestine prisons. [Source: Id., at 11 (description of section 314) and 47 (vote)] By the same vote, it approved a Feinstein amendment that notifications of intelligence activities and covert actions be to "each member" and, if not, that all "will be provided with a summary of the intelligence activity or covert action in a manner sufficient to permit such Members to assess the legality, benefits, costs, and advisability of the intelligence activity or covert action." [Source: Id., at 4-5 (description of section 304) and 46 (vote)]

The full text of the report's description of section 314 reflected the breadth of the Committee's oversight interests, which included not

only the prisons and the methods used but also plans for the ultimate disposition of the detainees held there:

> Section 314 requires the DNI to submit a classified, detailed report to the Members of the intelligence committees that provides a full accounting on each clandestine prison or detention facility, if any, currently or formerly operated by the United States Government, regardless of location, at which detainees in the global war on terrorism are or have been held. Section 314 sets forth required elements of this report: the location and size of each such prison or facility, its disposition if no longer operated by the United States Government, plans for the ultimate disposition of detainees currently held, a description of interrogation procedures used or formerly used, and whether those procedures are or were in compliance with United States obligations under the Geneva Conventions and the Convention Against Torture. The classified report is to be submitted no later than 60 days after enactment of this Act.

[Source: Id., at 11]

On September 6, 2006, President Bush publicly disclosed existence of the CIA's detention and interrogation program in an announcement that the fourteen prisoners, then in the CIA program, had been transferred to Guantanamo. On that day, the CIA briefed all members of the Committee about the program, including the CIA's enhanced interrogation techniques, although the second Bybee opinion (while physically at the Committee under limitations) was not made available to all Committee members until spring of 2007. Although the September 2006 transfers to Guantanamo meant that no one then remained in the

CIA program, the President explicitly provided for the possibility that new detainees could be brought into the program.

Unanimous consent could not be obtained to proceed to consideration of the 2007 Intelligence Authorization, and 2006 came to an end with Congress adjourning for the second straight year without enactment of an intelligence authorization.

110th Congress (2007-2008)

Senator Rockefeller became chairman of the SSCI on convening of the 110th Congress. As a first item of business, he sought to revive the 2007 intelligence authorization that had died at the end of the preceding Congress. From then until the end of the Congress in 2008, the interrogation debate continued across a range of legislative and oversight proceedings: intelligence authorizations, including a presidential veto and attempted override; open and closed nomination and other hearings; the beginning of a Committee review of CIA interrogation records precipitated by disclosure of the agency's destruction in 2005 of its 2002 interrogations videos; and an effort, completed in the following Congress, to provide a public description of the history of Department of Justice interrogation opinions.

(a) 2007 Intelligence Authorization

On January 24, 2007, the SSCI reported, by a vote of 12-3, an Intelligence Authorization Act for 2007, which tracked (except for minor changes) the bill reported by the Committee in 2006. Section 313 again called for a report by the Director of National Intelligence on compliance with the Detainee Treatment Act of 2005, and section 314 again would have required the DNI to submit a classified report to the membership of the Intelligence

Committees providing a full accounting on each current or former clandestine prison or detention facility. [Source: S. Rep. No. 110-2, at 12-13 (2007)] Additionally, section 304 would have amended the reporting provisions in title V of the National Security Act of 1947 to make clear that requirements for reporting to the intelligence committees meant reporting to "each member" of them, at least to the extent of "a summary of the intelligence activity or covert action in a manner sufficient to permit such Members to assess the legality, benefits, costs, and advisability of the intelligence activity or covert action." [Source: Id., at 6]

In supplemental views, Vice Chairman Bond, joined by Senators Warner, Chambliss, and Burr, stated their opposition to sections 304 and (except for Senator Warner) to 314. With respect to section 304, they argued that the amended reporting obligations for intelligence activities and covert actions would increase executive and legislative branch tension, and should be reserved for a separate discussion that would not jeopardize the entire bill. Concerning the section 314 requirement for a classified report on clandestine prisons, Senators Bond, Chambliss and Burr argued that the Executive Branch had met its obligations by briefing all Committee members about the program and that requiring further detail, including location information, would have a negative impact on relationships with foreign intelligence services. [Source: Id., at 43-45]

After two cloture votes, first on the motion to proceed and then on the bill, cloture on the bill was not invoked by a vote on April 17, 2007 of 50 yeas to 45 nays.

(b) Initial Hearing on the Legal Basis of the Interrogation Program

Interrogation issues were discussed at a range of hearings in the 110th Congress, from annual threat hearings, to nomination hearings, to open and closed hearings expressly on interrogation.

On April 12, 2007, the SSCI held an initial, classified hearing on the CIA's detention and interrogation program, at which CIA Director Hayden testified. The Executive Summary of the Committee's report on detention and interrogation analyzes extensively "significant inaccuracies" in that testimony. [Source: S. Rep. No. 112-288, at 449-50, and Appendix 3.] Earlier, in response to an ACLU Freedom of Information Act lawsuit, the prepared four-page testimony that day of Steven Bradbury, then Acting OLC Assistant Attorney General was released. As he described, his testimony provided "a summary" or "general description" of the legal standards applicable to the CIA's interrogation and detention program. The topics that he covered were the federal anti-torture statute, the Detainee Treatment Act of 2005, the War Crimes Act, and Common Article 3 of the Geneva Conventions.

(c) Reporting the Intelligence Authorization Act of 2008

On May 31, 2007, the SSCI reported its Intelligence Authorization bill for Fiscal Year 2008.

The Committee comments portion of the report discussed the status of the SSCI's oversight of the detention and interrogation program. The comments noted that the FY 2008 bill was the first passed by the Committee after all members had been briefed on the CIA's detention and interrogation program. The Committee noted that "significant legal issues" were unresolved, and that the Department of Justice had not produced a review of aspects of

the program since the Detainee Treatment Act of 2005, the Supreme Court's Hamdan decision (June 2006), and the Military Commissions Act of 2006. (The Bradbury April 2007 summary had not sufficed.) The SSCI urged prompt completion of such a review, whether or not the program was being used, and the provision of it to the Committee.

The Committee also set forth a general framework, based on the information it had, for evaluation of the program:

> The Committee recognizes that the program was born in the aftermath of the attacks of September 11, when follow-on attacks were expected. The Committee acknowledges that individuals detained in the program have provided information that has led to the identification of terrorists and the disruption of terrorist plots. More than five years after the decision to start the program, however, the Committee believes that consideration should be given to whether it is the best means to obtain a full and reliable intelligence debriefing of a detainee. Both Congress and the Administration must continue to evaluate whether having a separate CIA detention program that operates under different interrogation rules than those applicable to military and law enforcement officers is necessary, lawful, and in the best interests of the United States.
>
> Moreover, the Committee believes that the demonstrated value of the program should be weighed against both the complications it causes to any ultimate prosecution of these terrorists, and the damage the program does to the image of the United States abroad.

[Source: S. Rep. No. 110-75, at 36 (2007)]

While agreeing on this general framework, the Committee divided on a specific legislative measure, rejecting by a vote of 7 ayes and 8 noes (with Sen. Nelson joining the Committee's seven Republican members in voting "no") a Whitehouse-Feinstein amendment that would bar, absent a determination by the President of a national exigency in which an individual has information about a specific and imminent threat, the use of appropriated funds for CIA interrogation methods not explicitly authorized by the Army Field Manual. [Source: Id., at 51 (vote) and 60-61 (additional views of Sen. Whitehouse)] With a manager's amendment, the Senate passed the 2008 authorization on October 3, 2007.

(d) Further 2007 Hearings

On June 19, 2007, the Committee held a public hearing on the nomination of John Rizzo to be CIA General Counsel, [Source: S. Hrg. 110-47 (2007)], followed by a closed hearing later that day. The nomination initially had been made on March 15, 2006, but was not acted on in the 109th Congress. With interrogation questions clearly central to the nomination, on opening the hearing Chairman Rockefeller set forth his understanding of the pivotal responsibilities of the CIA General Counsel:

> Over a decade [after Congress made the position confirmable], today's hearing is timely in addressing the difficult issues of accountability and oversight. As a country, we are struggling to find the equilibrium between fighting terrorism and protecting the liberties and the rule of law that define us as a nation. On the one hand, we do not want to

deny CIA officers the tools they need to do their job. On the other, we must recognize that democracy and American values are at risk if we fail to live up to our ideals.

The weight of this balance, interestingly, falls heavily on the shoulders of the CIA General Counsel alone. As the CIA's activities are largely carried out in secret, the General Counsel often makes legal decisions without the benefit of public debate or the constraints of public scrutiny. By necessity, the public must therefore trust that the person in that position will ensure that the CIA's activities are consistent with both the spirit and the letter of the Constitution and the laws of the United States.

Our country must have faith that the intelligence professionals working to defend us have a General Counsel who defends them by ensuring that they receive lawful guidance. However difficult it may be to draw legal lines, it cannot be those on the front lines who suffer from legal uncertainty. Equally so, it is those officers who suffer when the institutional integrity of the agency is weakened by questionable legal decisions. Public trust and professional respect are earned by navigating these very difficult paths.

Ensuring that the CIA follows the law is important to protect not just the CIA and its intelligence officers, but also to protect the image of the United States. Our international security depends on upholding our ideals upon a world stage.

[Source: S. Hrg. 110-407, at2-3 (2007)] On September 25, 2007, President Bush withdrew the nomination.

After President Bush issued, on July 20, 2007, Executive Order 13440 ("Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency"), the SSCI held an oversight hearing on September 25, 2007 on "U.S. Interrogation Policy and Executive Order 13440." In conjunction with the executive order, the Office of Legal Counsel issued a legal opinion on the legality of the interrogation techniques then authorized for use by the CIA.

At the September 25 hearing the SSCI heard from two panels. The first was a panel of government witnesses; that hearing record remains classified. The second consisted of nongovernmental witnesses, including individuals with practical interrogation or academic experience, or who provided the perspectives of human rights or professional medical organizations. The panelists were heard in closed session but their prepared statements were posted immediately after the panel testified; the full hearing record of the second panel was published upon the SSCI's determination that no classified information had been inadvertently disclosed during the questioning of the panel. [Source: S. Hrg. 110-849 (2007)]

(e) Conference Report on 2008 Intelligence Authorization

On December 6, 2007, the House-Senate conference on the 2008 authorization reported. Section 327 of the conference report provided that no individual in the custody of or under the effective control of an Intelligence Community element, regardless of nationality or location, may be subject to any treatment of interrogation technique not authorized by the United States Army Field Manual on Human Intelligence Collector Operations.

[Source: H.R. Conf. Rep. 110-478, at 27 (text) and 76-77 (explanation) (2007)] The section was adopted after lengthy debate by the conference in a vote in which Senator Rockefeller's vote provide a one vote favorable margin among the Senate conferees. [Source: 154 Cong. Rec. S930 (daily ed., Feb. 13, 2008) (Sen. Bond, describing one-vote margin)] In urging passage of the conference report, Senator Rockefeller recounted that the Committee, once it had begun oversight of the program, had held multiple hearings, "to learn as much as possible about the basis for and the consequences of CIA's program, as well as interrogation in more general terms." [Source: Id., S941] Concerning the effectiveness of the CIA program, he stated "I have heard nothing – nothing – that leads me to believe that information from interrogation using coercive interrogation techniques has prevented an imminent terrorist attack." [Source: Id]

On a broader plane, Rockefeller told the Senate:

> This debate is about more than legality. It is about more than ensuring that the intelligence community has the tools it needs to protect us. It is also about morality, the way we see ourselves, who we are, who we want to be as a nation, and what we represent to the world. What we represent to the world has a direct effect on the number of people who determine they want to join the jihadist movement and come after us.

[Source: 154 Cong. Rec. S940-41] The Senate passed the authorization bill 51-45, but on March 8, 2008, President Bush vetoed the bill and it died when the House failed to attain the two-thirds vote necessary to override the veto.

(f) Intelligence Authorization for Fiscal Year 2009

The Committee came right back, on May 8, 2008, when it reported the Intelligence Authorization for Fiscal Year 2009, the last authorization bill during Senator Rockefeller's tenure as chairman. By a vote of 9-6 (Senators Hagel and Snowe in favor, Senator Bayh opposed), the Committee agreed to an amendment to prohibit any Intelligence Community treatment or technique not authorized by the Army Field Manual. [Source: S. Rep. No. 110-333, at 11-13 (explanation) and 65-66 (vote)] It agreed by a voice vote to a Whitehouse amendment on notification to, and access by, the International Committee of the Red Cross. [Source: Id., at 14-15 (explanation) and 67 (vote)] The bill never came before the full Senate and no further action occurred.

(g) Tape Destruction

As efforts to pass an authorization bill played out publicly through late 2007 and the first months of 2008, another interrogation related matter came to the fore in late 2007.

On December 6, 2007, the New York Times reported the CIA had destroyed, two years earlier, videotapes of the 2002 Abu Zubaydah and al-Nashiri interrogations. In a statement to CIA employees that day, CIA Director Hayden stated: "At one point, it was thought that the tapes could serve as a backstop to guarantee that other methods of documenting the interrogations – and the crucial information they produced – were accurate and complete. The Agency soon determined that its documentary reporting was full and exacting, removing any need for tapes."

Director Hayden then briefed the Committee in December 2007. As described by Senator Feinstein in March 2014 remarks to the

Senate, “he assured us that this was not destruction of evidence, as detailed records of the interrogations existed on paper – in the form of CIA operational cables describing the detention conditions and the day-to-day CIA interrogations.” [Source: 160 Cong. Rec. S1488 (daily ed., Mar. 11, 2014)]

Sen. Feinstein described to the Senate how then-Chairman Rockefeller launched the review that ultimately became the Committee’s comprehensive study of the CIA detention and interrogation program:

> The CIA Director stated that these cables were “a more than adequate representation” of what would have been on the destroyed tapes. Director Hayden offered at that time, during Senator Jay Rockefeller’s chairmanship of the committee, to allow members or staff to review these sensitive CIA operational cables, given that the videotape had been destroyed.
>
> Chairman Rockefeller sent two of his committee staffers out to the CIA on nights and weekends to review thousands of these cables, which took many months. By the time the two staffers completed their review in early 2009, I had become chairman of the committee and President Obama had been sworn into office.
>
> The resulting staff report was chilling. The interrogations and the conditions of confinement at the CIA detention sites were far different and far more harsh than the way the CIA had described them to us. As a result of the staff’s initial report, I proposed and then Vice Chairman Bond agreed, and the committee overwhelmingly approved, that the

committee conduct an expansive and full review of the CIA's detention and interrogation program.

[Source: 160 Cong. Rec. S1488 (Mar. 11, 2014)]

(h) Public Narrative on OLC Interrogation Opinions, 2002-2007

The concluding interrogation-related piece from Senator Rockefeller's tenure as chairman was preparation, in the latter part of 2008, of a narrative describing the Department of Justice's OLC opinions on detention and interrogation. In a statement in the Congressional Record on April 22, 2009, he described the genesis of the effort, referring initially to the August 1, 2002 opinion (generally known as the Second Bybee Opinion), approving specific CIA interrogation methods including waterboarding:

> Last year, I sought declassification of the August 1, 2002, OLC opinion, along with a short contextual narrative to accompany it. While declassification of that opinion was resisted, we engaged in a joint effort with Attorney General Michael B. Mukasey to declassify a broader narrative surrounding all of the OLC's opinions on these matters.
>
> The objective was to produce a text that describes the key elements of the opinions and sets forth facts that provide a context for those opinions, within the boundaries of what the DOJ and the Intelligence Community would recommend in 2008 for declassification.

[Source: 155 Cong. Rec. S4562 (daily ed., Apr. 22, 2009)]
Declassification finally occurred on April 16, 2009, the day the

Department of Justice released four OLC interrogation opinions. Further OLC releases occurred later in 2009. Although overtaken by release of the opinions (with some redactions), the Rockefeller narrative – set forth in the Congressional Record, posted on the SSCI website, and reprinted as a source of information about the OLC opinions – remains both a useful summary of the OLC interrogation opinions and as a potential model for collaborative executive and legislative branch declassification efforts.Senator Rockefeller's April 2009 statement does not elaborate on the procedure invoked in 2008 under the SSCI's authority and rules to declassify the August 1, 2002 opinion, which while certainly unclassified now that the Department of Justice has released the opinion, remains potentially committee sensitive until the Chairman and Vice Chairman or Committee determine otherwise.

111th – 113th Congresses (2009-2013)

A year later, on March 5, 2009, with the ongoing SSCI investigation continuing to uncover previously unknown detail, and with the Committee now under the leadership of Senator Feinstein, SSCI members voted 14 to 1 to undertake a comprehensive review of the entire rendition, detention, and interrogation program.

On September 26, 2009, Republican Senators on the SSCI announced that they would no longer participate in the Study, arguing that Attorney General Eric H. Holder Jr.'s decision to reexamine allegations of detainee abuse by the CIA would interfere with any inquiry. The study continued, however, without support or resources from the minority.

After more than four years from the time Senator Rockefeller first directed his staff to examine operational cables describing the enhanced interrogations, on December 13, 2012, the SSCI voted 9-6, with Senator Snowe joining all eight Democrats, to approve and adopt its study of the CIA's Detention and Interrogation program. The SSCI staff had reviewed 6.2 million documents, and written 6,600 pages supported by 35,000 footnotes.

Following that vote, and throughout his final two years in the Senate, Senator Rockefeller remained actively involved with the Study and the declassification process. In July 2013 he wrote a private letter to CIA Director John Brennan regarding the study and the need to ensure that the necessary lessons were learned going forward. Senator Rockefeller then met with Director Brennan and Director Clapper, in his office, regarding the Study and the path forward for the CIA. Following that meeting he again wrote, in November 2013, to Director Brennan on this subject and received a reply from the Director that emphasized not only that lessons had been learned, but also that those lessons were being implemented.

A Breach of Trust

Despite Director Brennan's letter, shortly thereafter - in January 2014 - Senator Rockefeller learned about the CIA's search of computers reserved at an offsite facility for the exclusive use of SSCI staff for oversight purposes. Through its search, which included the SSCI staff's emails, the CIA had apparently attempted to determine how the SSCI had become aware of the "Panetta Review." This internal CIA assessment corroborated a number of the SSCI Study's findings that the CIA had been publicly refuting. Senator Rockefeller wrote to DNI Clapper and

Director Brennan about the serious consequences that could stem from the CIA's actions, and urged them to find a way to repair the breach of trust.

By February 2014, Senator Rockefeller was growing increasingly concerned that neither the CIA nor the White House was taking sufficient leadership in addressing the situation, and he feared that if news of the search became public it would be tremendously damaging. In February he wrote to President Obama and expressed those concerns. Almost immediately the White House requested a meeting with Senator Rockefeller, Chief of Staff Denis McDonough, and then White House counsel Kathy Ruemmler, to discuss the CIA's search and the Study. In that meeting Senator Rockefeller voiced his strong support for the President, and his desire to prevent him from being pulled into this issue. Senator Rockefeller, however, also strongly voiced the need for the White House to direct the CIA to answer Chairman Feinstein's questions about what happened, and to actively start rebuilding the CIA's relationship with the SSCI.

The following day Chairman Feinstein delivered a floor speech detailing the CIA's search of SCCI computers, and the issue became the subject of considerable national media coverage. It also was disclosed that the CIA General Counsel's Office had made a criminal referral to the DoJ related to the alleged unauthorized access by SSCI staff to the Panetta Review. It was suggested that the SSCI staff had somehow breached the CIA computer system to access the document. The CIA Inspector General also made a criminal referral to the DoJ, but this referral was related to the CIA's search of the SSCI computers.

Roughly one month later, on April 3, 2014, the SSCI voted 11-3 to formally declassify the study, along with additional views from the Minority. In the following months, after multiple delays, and multiple assurances from administration officials that the SSCI would be pleased with how light the redactions were, in early August 2014 the SSCI received the initial redactions from the CIA. Those redactions were exceptionally broad, and among other things, covered a significant amount of information that had already been declassified in other public documents.

Only days before receiving the SSCI's redacted Study, Senator Rockefeller received the CIA Inspector General's report on the search of SSCI computers. That report not only corroborated Chairman Feinstein's floor speech in determining that the CIA had improperly accessed the computers – drawing into question public statements that Director Brennan had made in defense of the CIA – but it also determined that there had been insufficient evidence, on the CIA's part, for the crimes referral of SSCI staff to the Department of Justice. The DoJ subsequently declined to open an investigation of either referral.

In response to the IG report and heavy redactions of the SSCI's Study, in August 2014 Senator Rockefeller wrote a private letter to the President expressing the Senator's deep concern over the state of the relationship between the CIA and the SSCI, and again strongly urging the President to take a leadership role in putting the CIA, and the Study, back on the right path. Later that month President Obama called Senator Rockefeller to discuss how best to move the Study forward, and to assure him that he was personally involved in overseeing the process.

On December 9, 2014, the Committee filed with the Senate the full classified report, which is now available to all members in the Committee's secure space, and which has been provided to the Executive Branch. The Committee also submitted to the Senate and made public the declassified Executive Summary including additional and minority views. [Source: S. Rep. No. 113-288] Chairman Feinstein's covering letter, which is reprinted at the beginning of the report, refers to the entire report in saying that "The full report should be used by the Central Intelligence Agency and other components of the Executive Branch to help make sure that the system of detention and interrogation described in this report is never repeated."

As Senator Feinstein reached the conclusion of her remarks to the Senate, describing the history and principal findings of the report, she acknowledged Senator Rockefeller's key role in the initiation of the study:

> Before I wrap up, I wish to thank the people who made this undertaking possible. First, I thank Senator Jay Rockefeller. He started this project by directing his staff to review the operational cables that described the first recorded interrogations after we learned that the videotapes of those sessions had been destroyed. That report is what led to this multiyear investigation, and without it we wouldn't have had any sense of what happened.

[Source: 160 Cong. Rec. S6410 (Dec. 9, 2014)]

Cyber

Introduction

Most of Senator Rockefeller's public work on cyber issues was accomplished from his position as Chairman of the Senate Commerce Committee. It was, however, his experience on the SSCI that laid the groundwork for his involvement with this issue. During his two years as Chairman, the SSCI held two full hearings and numerous briefings on the cyber threat.

In July of 2008, the Potomac Institute of Policy Studies presented Senator Rockefeller with the Navigator Award for his contributions to further science and technology policy development for promoting a continued understanding of science and technology and its growing impact on government and society. Senator Rockefeller chose to focus his remarks at the award ceremony on his growing concern over cyber vulnerabilities noting:

> For years the cyber threat has been reported, strategies have been written, and partial solutions implemented, but we have not made the leap to a coordinated national effort to confront the challenge.

When he assumed the Chairmanship of the Commerce Committee, Senator Rockefeller drew on his Intelligence Committee experience and used the Commerce Committee as a platform to continue to raise awareness about the serious threat that cyber intrusions present to the U.S. economy and national security. His continued service on both committees allowed him to work at the unique intersection of commerce and intelligence in a way that lends itself particularly well to issues like cybersecurity.

During his tenure as Chairman, the Commerce Committee held five hearings and reported out two bills on cybersecurity matters. Chairman Rockefeller was a central player in the multi-Committee Senate group that worked steadily to develop a comprehensive response to the cybersecurity threat. Even though – six years later – Congress still has not passed comprehensive cybersecurity reform, the Federal Government and the private sector have made huge strides in protecting their networks from these threats and in responding when unauthorized groups gain access to their networks.

111th Congress - Progress

In late 2008-early 2009, cybersecurity was already treated as a serious problem in the national security and intelligence communities. But the issue was receiving much less attention in the private sector, including the industries that operate "critical infrastructure" such as utilities, banks, railroads, pipelines, etc. In late 2008, even before he officially became Chairman of the Commerce Committee, Senator Rockefeller directed his, and Senator Snowe's, Commerce and SSCI staff to work on legislation that would begin addressing the cybersecurity risks to private networks. Senator Rockefeller made the point, often not well known, that foreign nation-states and criminal groups were targeting not only U.S. Government-owned networks, they also were targeting privately owned and operated networks.

Senator Rockefeller and Senator Snowe met with President Obama's top cybersecurity official, Melissa Hathaway, in the winter of 2009 to discuss legislation. At about the same time their respective Commerce Committee staff met with the Homeland Security and Governmental Affairs (HSGAC) staff of Senators

Lieberman and Collins to begin coordinating the two committees' respective cybersecurity activities.

One of the first Commerce Committee hearings chaired by Senator Rockefeller in 2009 was titled: "Cybersecurity: Assessing Our Vulnerabilities and Developing an Effective Response." At that hearing, he laid out his concerns that private businesses in the United States – in particular, private companies operating "critical infrastructure" like power grids, telephone networks, railroads, etc. – were not paying enough attention to cyber threats. One of the witnesses at this hearing was Jim Lewis, from the Center for Strategic and International Studies (CSIS). CSIS had just issued an influential report, "Securing Cyberspace for the 44th Presidency." The bipartisan report – which was signed by Democratic Rep. Jim Langevin and Republican Rep. Mike McCaul – called for a "comprehensive national security strategy for cyberspace" and a "new partnership" between the public and private sectors. It also recommended that the United States "regulate cyberspace," to set minimum cybersecurity standards.

On April 1, 2009, Senators Rockefeller and Snowe introduced S.773, the "Cybersecurity Act of 2009." S. 773 would have authorized the President and certain federal agencies to take steps to protect government information systems and critical infrastructure from cyber attacks. It also would have directed the National Institute of Standards and Technology (NIST) to develop cybersecurity standards within one year, promoted cybersecurity research, training, and awareness, and created a National Security Advisor within the Executive Office of the President.

An added push to the process was provided by the White House. On May 27, it published the results of its 60-day cybersecurity

review, and on May 29, President Obama gave the first-ever presidential speech dedicated to cybersecurity. The bottom line, he explained, is that “America's economic prosperity in the 21st century will depend on cybersecurity.” He spoke about how his campaign’s computer network had been hacked and explained how our critical infrastructure was at risk.

After the introduction of S. 773, Senator Rockefeller’s and Senator Snowe’s staff began meeting with industry and advocacy groups to further develop the legislation. Staff from the offices of Senators Hutchison, Feinstein, and Whitehouse also joined the discussions. Bipartisan groups of staff from HSGAC, SSCI, and Commerce began meeting regularly to talk about legislation. Senator Rockefeller’s and Senator Snowe’s staff circulated a new draft of the Commerce Committee bill in August 2009. In December 2009, the SSCI launched the Whitehouse-Snowe-Mikulski cybersecurity task force.

The Commerce Committee held a second cyber hearing, “Cybersecurity: Next Steps to Protect Our Critical Infrastructure,” on February 23, 2010. Retired Navy Vice Admiral Mike McConnell, a former DNI and NSA director, testified that “If we were in a cyberwar today, the United States would lose.” A month later, on March 24, 2010, the Committee favorably reported an amended version of S. 773 by voice vote. Senators Snowe and Hutchison expressed strong support for the legislation and the bipartisan process through which it had been developed. Over the next few months, the bill gained support from a number of key groups and companies, including AT&T, Verizon, and the National Cable & Telecommunications Association.

Later that year, the SSCI Whitehouse-Snowe-Mikulski group released their report. At about the same time, the Commerce and HSGAC staffs started meeting regularly to merge the Rockefeller-Snowe and Lieberman-Collins bills. Senators Lieberman and Collins introduced their bill in June 2010 and the HSGAC reported it favorably in December 2010. During this time frame, Majority Leader Reid's office became involved in these discussions. On July, 1, 2010, Leader Reid and the Committee chairs wrote a letter to President Obama requesting his support for cybersecurity legislation.

SEC Cybersecurity Reporting

On a different track, Senator Rockefeller also began pushing the Securities and Exchange Commission (SEC) to require companies to disclose cybersecurity incidents that would have a material effect on the price of their publicly traded shares. In a letter co-signed by Senators Menendez, Whitehouse, Warner, and Blumenthal, he wrote a letter to SEC chair Mary Shapiro on May 11, 2011, explaining that companies' exposure to cyber intrusions was a material risk that should be reported to shareholders and requesting that the SEC issue guidance explaining how and when cyber risks should be reported. On October 13, 2011, the SEC issued Corporation Finance Disclosure Guidance that explained when companies had an obligation to disclose their cybersecurity risks to investors. Senator Rockefeller released the following statement:

> This guidance fundamentally changes the way companies will address cybersecurity in the 21st century. For years, cyber risks and incidents material to investors have gone unreported in spite of existing legal obligations to disclose

> them. Intellectual property worth billions of dollars has been stolen by cyber criminals, and investors have been kept completely in the dark. This guidance changes everything. It will allow the market to evaluate companies in part based on their ability to keep their networks secure. We want an informed market and informed consumers, and this is how we do it.

Two years later, on April 9, 2013, Senator Rockefeller wrote a letter to the new SEC chair, Mary Jo White (on her first day of work in her position) asking her to remain focused on cyber risks to publicly traded companies. The letter also requested that she support Commission-level guidance on the issue. She responded quickly that she was looking at the issue and appreciated the seriousness of cybersecurity threats. Although the SEC has not yet acted to issue Commission-level guidance, the current guidance has proved to be a useful tool. In January 2014, for example, Senator Rockefeller wrote the CEO of Target asking him why the company had not disclosed more details about its massive November 2013 breach to its investors.

112th Congress – Stalemate and Filibuster

Following the failure to move cyber legislation in the previous Congress, in early 2011 Senator Rockefeller worked with Senators Snowe, Lieberman and Collins to develop a comprehensive cybersecurity legislative proposal. A working draft largely was complete by the end of March. One issue that required more time to negotiate was information sharing - the legislative changes necessary to encourage private sector and government actors to share cyber threat indicators with each other. A few months later, the White House released its version

of cybersecurity legislation, which included much of the Rockefeller-Snowe, Lieberman-Collins. In July, Majority Leader Reid and Minority Leader McConnell agreed to work together to develop bipartisan cybersecurity legislation and committed to forming working groups that would negotiate different parts of the bill.

In the fall of 2011, the bipartisan effort to develop cybersecurity legislation began to fray. Senator Hutchison's staff stopped attending staff meetings to discuss the legislation and Senators McCain and Chambliss began expressing skepticism about comprehensive cybersecurity legislation and the Administration's approach to cybersecurity. In November 2011, Majority Leader Reid wrote a letter to Minority Leader McConnell saying that he intended to bring cybersecurity to the full Senate during the first work period in 2012. Minority Leader McConnell responded with a list of provisions Republicans would not support.

By this point, the Chamber of Commerce and other business groups were raising objections to the Republican leadership that the bipartisan legislation was too regulatory and not business-friendly enough. Election year politics also may have played a factor with the Republicans reluctant to pass cybersecurity legislation that would give President Obama a national security victory.

In January, 2012, Senators Hutchison, Chambliss, Grassley, and Murkowski published an op-ed critiquing the "duplicative" and "heavy-handed" provisions in the bipartisan Rockefeller, Lieberman, Collins, Feinstein legislation relating to critical infrastructure and information sharing. Another line of criticism was that the legislation gave DHS broad new regulatory powers.

They also complained that Majority Leader Reid was not following "regular order," and was not allowing the Committees to consider their pieces of the cybersecurity issue. In a February 16, 2012, HSGAC hearing, Senator McCain delivered an angry tirade against Lieberman, Collins, and the bipartisan bill and said that Republicans were "compelled" to offer their own bill.

The Rockefeller, Lieberman, Collins bill, the "Cybersecurity Act of 2012" (S. 2105), was officially introduced on February 14, 2012. This version of the legislation contained an information sharing title developed by Senator Feinstein. The bill then became known as "Lieberman, Collins, Rockefeller, Feinstein." This bill won the endorsement of national security leaders and some tech companies such as Cisco, Oracle, and Level 3.

Over the next few months, Senator Rockefeller and his staff negotiated with Republicans and Democrats (in particular, Senators Franken, Durbin, Wyden on privacy and civil liberties issues) to address objections. The meetings with Republicans became increasingly contentious and failed to resolve differences. On March 1, 2012, Senators McCain, Hutchison and Chambliss introduced their own cybersecurity proposal, the "SECURE IT Act" (S. 2151).

During these negotiations, senior Executive Branch officials repeatedly told Congressional leaders, in letters and in classified briefings, that cybersecurity was an urgent issue. In an open SSCI hearing in early 2012, Senator Rockefeller stated:

> The threat posed by cyber-attacks is greater than ever, and it's a threat not just to companies like Sony or Google but also to the nation's infrastructure and the government itself.

> Today's cyber criminals have the ability to interrupt life-sustaining services, cause catastrophic economic damage, or severely degrade the networks our defense and intelligence agencies rely on. Congress needs to act on comprehensive cybersecurity legislation immediately. We can and should create a public-private partnership to combat cyber-attacks.

At one point, a side group consisting of Senators Kyl, Graham, and Whitehouse began their own negotiations and circulated an alternative cybersecurity proposal. In a meeting in Majority Leader Reid's office during the summer of 2012, Senator Rockefeller discussed this effort with Senator Whitehouse and encouraged him to work within the existing group of Senators crafting cybersecurity legislation.

The end result of these negotiations was S. 3414, the "Cybersecurity Act of 2012," introduced on July 19, 2012, which incorporated many changes requested by the privacy and civil liberties communities, and adopted a non-regulatory approach to cybersecurity standards as advocated by the Republicans. Majority Leader Reid committed to bringing it to the Senate Floor before the August recess. On July 25, Senator Rockefeller gave a speech on the Senate floor explaining how this bill was the result of three years of work and negotiations between government and industry, Democrats and Republicans.

The compromise proposed in this bill, however, did not satisfy opponents such as the Chamber of Commerce and Senators McCain, Hutchison, and Chambliss. On July 30, 2012, Senator Rockefeller and Senators Lieberman, Collins, and Feinstein wrote a letter to Chamber of Commerce President Tom Donohue

pointing out that the voluntary standards language in S. 3414 was language the Chamber itself had proposed in 2011. Senator Rockefeller circulated a document rebutting the Chamber's criticisms of S. 3414.

The Senate approved the cloture motion to proceed to consideration of S. 3414 by a margin of 84 to 11, on July 26. Cloture on the bill itself, however, failed a week later, on August 2, by a largely partisan vote of 52-46. The Republicans supporting cloture were: Senators Scott Brown, Coats, Lugar, Collins, and Snowe. The Democrats who opposed cloture were: Senators Baucus, Tester, Wyden, Merkley, and Pryor. After the 2012 elections, Majority Leader Reid moved to reconsider the vote, but on November 12, 2012, cloture failed on an almost identical 51-47 vote.

Fortune 500 Letter

Growing frustrated with the Chamber of Commerce's continued objections to this legislation, on September 19, 2012, Senator Rockefeller wrote letters to the chief executive officers of the 500 largest companies in the United States requesting information about the companies' cybersecurity practices and asking for their view of how the public and private sectors should be working together to best address cybersecurity risks. In the letter he wrote:

> I am writing to our country's five hundred largest companies because the filibuster of the legislation in the Senate was largely due to opposition from a handful of business lobbying groups and trade associations, most notably the Chamber of Commerce. I have spoken with several

> business executives about these issues, and I believe that most recognize the gravity of this threat and that their companies would benefit from deeper collaboration with the government. I would like to hear more – directly from the chief executives of the leading American companies about their views on cybersecurity, without the filter of beltway lobbyists.

More than 300 companies responded to Senator Rockefeller's letter. In a January 23, 2013, memorandum summarizing the responses of these companies, the Commerce Committee staff reported to him that the companies generally supported strengthening the public-private partnership to address our country's cybersecurity vulnerabilities, but were concerned about legislation that might result in an inflexible, "one-size-fits-all" set of practices that could potentially conflict with existing sector-specific federal regulations or slow down companies' responses to cyber attacks.

113th Congress – Slow But Steady Progress

After Congress again failed to pass meaningful cybersecurity legislation during the 112th Congress, the Obama Administration acted. On February 12, 2013, President Obama issued an Executive Order entitled, "Improving Critical Infrastructure Cybersecurity," (Exec. Order No. 13636). A few weeks later on March 7, 2013, Senators Rockefeller and Carper convened a joint hearing for the Commerce Committee and the HSGAC entitled, "The Cybersecurity Partnership Between the Private Sector and Our Government: Protecting Our National and Economic Security." This hearing examined the development and implementation of the February 12 Executive Order, and

discussed ways government and industry can work together to protect critical infrastructure from cyber attacks. Witnesses included DHS Secretary Napolitano and Pat Gallagher from NIST. The Executive Order assigned NIST the crucial job of developing a document of best practices that came to be known as the "Cybersecurity Framework."

In his March 7, 2013, opening statement at this hearing, Senator Rockefeller said:

> Since I have been working on this issue, I've had a lot of good, productive discussions with leaders in our business community, our military, and in other government agencies who understand this threat and have good ideas about how we can tackle it. But we've also wasted a lot of time, by turning an urgent national security issue into a partisan political fight. Back in 2010, we passed a cyber bill out of the Commerce Committee unanimously, without a vote. By the fall of 2012, we couldn't even get enough votes to close debate on the Senate floor, even though our country's top national security leaders were urging us to act. The Obama Administration got tired of waiting for us. I can't blame them. This is a problem that is growing worse every day.

In response to the Republican complaints that he had not followed regular order in the 112th Congress, Majority Leader Reid instructed Senator Rockefeller and other Committee chairs to work on the cybersecurity provisions that fell within their respective jurisdictions. Senator Rockefeller quickly worked with Senator Thune to draft a bill that addressed the cybersecurity reforms under the Commerce Committee's jurisdiction – giving

NIST authority to develop and update cybersecurity best practices (in a way that was consistent with Executive Order's direction to NIST) and promoting cybersecurity research and education within the Federal Government.

Senators Rockefeller and Thune introduced S. 1353 on July 24, 2013, and one day later, the Committee held a hearing on, "The Partnership Between NIST and the Private Sector: Improving Cybersecurity." This hearing focused on the role NIST was playing in developing a "Cybersecurity Framework" which could be adopted by private sector entities to reduce cyber risks to critical infrastructure, as mandated by the President's February 12 Executive Order. The hearing also examined the broader role NIST plays in developing information security standards and the changes to NIST's authority proposed in S. 1353. On July 30, 2013, the Committee reported S. 1353 favorably by voice vote.

The role NIST began playing in 2013 – as the "honest broker" in a process to develop cybersecurity best practices for the private sector – was a role that Senator Rockefeller and Senator Snowe had proposed almost four years earlier in their 2009 cybersecurity bill. Although some industries were at first skeptical of NIST's role in developing the Cybersecurity Framework, confidence in the process grew through 2013 as NIST convened a number workshops to listen to industry, study best practices, and develop a framework that companies could use to improve their cybersecurity.

When NIST delivered the final Cybersecurity Framework, on February 14, 2014, it was broadly praised. For example, in May 2014, the Big Three accounting firm PWC issued a report with the

title, “Why You Should Adopt the NIST Cybersecurity Framework.” This report’s tagline was, “The National Institute of Standards and Technology Cybersecurity Framework may be voluntary, but it offers potential advantages for organization across industries”

While NIST was developing the Framework, many private sector companies called for incentives, such as tax breaks or legal liability protections, to encourage adoption of NIST’s cybersecurity best practices. In a June 3, 2013, letter Senator Rockefeller wrote to Acting Commerce Secretary Cam Kerry, making the case that NIST was not a regulatory agency, and that any standards it developed were by definition voluntary standards. His letter explained that companies will have strong incentives to adopt the best practices because they will want to mitigate the risks of a cybersecurity attack.

In the summer of 2014, HSGAC reported out several bills addressing the cybersecurity workforce in DHS and reforming Federal Government information security practices.

Senators Feinstein and Chambliss negotiated for more than a year on legislation in the purview of the SSCI that allows private companies and the Federal Government to share cyber threat indicators. In reaching their compromise, however, Senators Feinstein and Chambliss moved away from key provisions in the Rockefeller, Lieberman, Collins, Feinstein Cybersecurity Act of 2012. Among other things, the Feinstein-Chambliss information sharing bill would have eroded the centrality of the DHS portal – a key provision for privacy advocates in 2012 – and it also would

have provided broad liability protection for private-to-private information sharing with no oversight and no responsibility to notify the Federal Government of the threat. The bill was strongly opposed by the privacy community and did not have the support of key Democrats like Senator Durbin. During SSCI markup of the bill Senator Rockefeller offered three amendments, all of which were opposed by Republicans, including one with Senator Collins which would have introduced mandatory cyber breach notifications only for the country's most critical infrastructure. All of the amendments were defeated to protect the compromise deal with Senator Chambliss.

On July 8, 2014, the SSCI approved the Cybersecurity Information Sharing Act of 2014 by a vote of 12-3. Having failed to amend the bill in ways he felt would improve it, Senator Rockefeller joined Senators Wyden and Udall in voting no.

On the evening of December 11, 2014, the Rockefeller-Thune Cybersecurity Enhancement Act of 2014 passed both the Senate and the House. Upon passage Senator Rockefeller said, "For years, I have said that cyber attacks pose one of the gravest threats to our national and economic security. Now, with the passage of the Commerce Committee's cybersecurity legislation, protecting our information networks is a top priority for the federal government. NIST and our research agencies will have a leading role in this effort, and the authority to work closely with the private sector to identify and reduce cyber risks."

Annual Intelligence Authorization Legislation

Introduction

Senate Resolution 400 of the 94th Congress, agreed to on May 19, 1976, established the Senate Select Committee on Intelligence and assigned it jurisdiction over legislative matters dealing with the intelligence programs of the United States government, specifically the Director of Central Intelligence and the CIA, but also the major intelligence activities of the Department of Defense and other cabinet level agencies. In 1978 the Congress passed legislation to authorize appropriations for intelligence activities for Fiscal Year 1979. The Congress passed and the President signed annual authorization legislation every year from FY1979 through FY2005. The authorization bills, with accompanying classified annexes, have been the primary mechanism for the Congress to establish priorities and provide or limit Intelligence Community authorities. These annual bills were viewed by the SSCI and by Senate leadership from both political parties as "must pass" legislation.

During the first two years Senator Rockefeller served as Vice Chairman, authorization bills were sent to the President and signed into law. Beginning with FY 2006, however, a variety of factors prevented the passage or final enactment of the annual legislation. Below is a short review of each year's process and product.

Fiscal Year 2004

On May 8, 2003, the SSCI reported S. 1025, the Intelligence Authorization Act for Fiscal Year 2004. After conference with the HPSCI the President signed the final bill on December 13, 2003.

The final bill contained several unclassified substantive provisions, including:

- Establishment of a pilot program to provide analysts throughout the IC with access to data collected by the NSA;
- Establishment of a pilot program to assess the feasibility of a Reserve Officers' Training Corps-like program to train intelligence analysts;
- A requirement for a joint report by the National Science Foundation and the Office of Science and Technology Policy designed to enhance the U.S. Government's approach to security evaluations intended to find a replacement for the polygraph;
- A requirement for the Intelligence Community to conduct Independent Cost Estimates for the acquisition of major systems, something already required for defense acquisitions;
- Establishment of the Office of Intelligence and Analysis of the Department of the Treasury to be headed by a presidentially appointed and Senate-confirmed Assistant Secretary.
- Authorization for the Secretary of Homeland Security to implement a program to improve the sharing of intelligence collected by the Federal government with State and local officials;
- Establishment of a program to improve ethnic and cultural diversity throughout the Intelligence Community through the recruitment of individuals with diverse ethnic and cultural backgrounds, skill sets, and language proficiency;

- Direction to the Intelligence Community to recruit among American armed forces veterans of Operation Enduring Freedom, Operation Iraqi Freedom, and other military service to take advantage of the unique national security, military, and technical experience of such personnel;
- Establishment of several counterintelligence initiatives for the intelligence community in wake of the case of FBI agent Robert Hanssen;
- Requirement for a report on cleared insider threat to classified computer networks;
- Postponement of Central Intelligence Agency compensation reform and other matters given severe misgivings expressed by CIA employees; and
- Authorization to use funds available for intelligence activities to support a unified campaign against drug traffickers and terrorist organizations in Colombia.

The provision asking for a report on insider threats was drafted by Senator Rockefeller's staff Director, Chris Mellon, and seems prescient given subsequent events such as the Edward Snowden and Bradley Manning disclosures.

Fiscal Year 2005

On May 5, 2004, the SSCI reported, S. 2386, the Intelligence Authorization Act for Fiscal Year 2005. After conference with the HPSCI the final bill was sent to the President and signed on December 23, 2004. Highlights of the final bill include:

- Enhancement of authorities of the National Virtual Translation Center;

- Establishment of a Chief Information Officer for the Intelligence Community within the office of the DNI;
- Requirement for an intelligence assessment on sanctuaries for terrorists; and
- Several provisions promoting the teaching of foreign languages in the IC including Pilot project on Civilian Linguist Reserve Corps.

The unclassified provisions in the FY 2005 Authorization bill were not as numerous as most years in large part because the Congress was concurrently considering the Intelligence Reform and Terrorism Prevention Act of 2004 (discussed elsewhere). Perhaps the most noteworthy aspect of the 2005 bill was the decision by Senators Rockefeller, Levin, and Durbin not to sign the Conference Report and to issue additional views related to their opposition to a major classified acquisition program. Senator Rockefeller made statement on the floor of the Senate explaining his view that the acquisition was unneeded and enormously expensive.

Fiscal Year 2006

Because action on the annual defense authorization bill was delayed, the FY 2006 Intelligence Authorization bill was not reported by the SSCI until September 29, 2005. [Source: S. Rep. No. 109-142 (2005)] While the bill was reported out of Committee by a unanimous vote, Republican Senators raised objections to its consideration and the bill was never brought before the full Senate. The bill as reported by the SSCI included a number of provisions including:

- Establishment of a pilot program on disclosure of records under the Privacy Act relating to intelligence activities to facilitate information sharing;
- Creation of additional authorities for the Director of National Intelligence on intelligence information sharing and other info sharing;
- Correction and modification of numerous provisions included in the Intelligence Reform and Terrorism Prevention Act of 2004;
- Establishment of a statutory DNI Inspector General;
- Creation of a statutory, presidentially-appointed deputy director for the CIA;
- Requirement for confirmation of the directors of the NSA, NGA and NRO; and
- Establishment of a National Security Division within the Department of Justice, headed by an Assistant Attorney General for National Security.

For the first time since 1978, the Congress did not pass legislation authorizing the activities of the Intelligence Community. Two issues combined to create this situation. One was the ongoing disagreement between the two sides over the completion of the second phase of the inquiry concerning pre-war intelligence on Iraq. While never stated explicitly, it appeared that part of the rationale for blocking consideration of the bill was to prevent Democratic members from offering amendments this inquiry.

The second obstacle was the inclusion of three amendments to the classified annex accompanying the bill that had been offered by Vice Chairman Rockefeller during Committee markup. These amendments had been opposed by Chairman Roberts and were

strongly opposed by most members of the Republican caucus. The amendments are discussed, to the length possible in an unclassified forum, in the Detention and Interrogation section of this memo.

Throughout the legislative session, during consideration of both the failed authorization bill and the Department of Defense Appropriations Act, Senator Rockefeller continued his effort to block funding for a major classified intelligence acquisition program he viewed as unneeded and wasteful. He was successful in inserting a prohibition on funding into the Appropriation bill in the Senate but this provision was dropped during the Appropriations conference.

The Committee's support for the creation of a National Security Division within the Department of Justice bore fruit in a provision of the USA PATRIOT and Improvement Act of 2005 that established the Division, to be headed by an Assistant Attorney General for National Security. [Source: Pub. L. No. 109-177, sec. 506 (March 9, 2006)] Recognizing that the Intelligence Committee should share responsibility with the Judiciary Committee for oversight of that function within the Department of Justice, the Act also amended section 17 of S. Res. 400 to provide for sequential referral from the Judiciary to the Intelligence Committee of nominations for that position.

Fiscal Year 2007

On May 25, 2006, the SSCI reported, S. 3237, the Intelligence Authorization Act for Fiscal Year 2007 by a vote of 15-0. [Source: S. Rep. No. 109-259 (2006)] A large portion of the unclassified bill consisted of provisions carried forward from the FY 2006 bill

that had not been considered by the full Senate. There were however, several significant additional provisions, many of them added by amendments offered by Democratic Senators during the Committee's markup.

- Improvement of notification of Congress regarding intelligence activities of the United States Government
- A requirement for the DNI to submit a classified report to the intelligence committees on all measures taken by the Office of the DNI, and by any element of the Intelligence Community, on compliance with two provisions of the Detainee Treatment Act of 2005.
- A requirement for the DNI to submit a classified, detailed report that provides a full accounting on each clandestine prison or detention facility, if any, currently or formerly operated by the United States Government, regardless of location, at which detainees in the global war on terrorism are or have been held.

The inclusion of the additional detention and interrogation provisions combined with provisions carried forward from 2006 doomed the FY 2007 bill as well and the full Senate never considered it.

Fiscal Year 2008

On May 31, 2007, the SSCI reported S. 1538, the Intelligence Authorization Act for Fiscal Year 2008 by a vote of 12-3. An earlier part of this memorandum discusses the interrogation and detention provisions of that bill and of the conference report adopted by the Congress, H.R. Conf. Rep. 110-478 (2007), which was followed by a presidential veto and failure to override. In

addition to interrogation and rendition, the bill addressed the backlog of legislative issues that had remained unaddressed by the failure to enact authorizations since the Fiscal Year 2005 Authorization enacted in December 2004. The biannual report of the activities of the Committee in 2007 and 2008 lists these highlights:

- Measures to enhance the authority and flexibility of the Director of National Intelligence to manage personnel, including movement of personnel to where they are needed from one IC element to another;
- Measures to improve information sharing, including authorizing interagency funding to quickly address deficiencies or needs that arise in intelligence access or sharing capabilities;
- Acquisition reforms, including vulnerability assessments of major systems and measures to curb excessive cost growth of major systems;
- Establishment of a strong and independent statutory DNI Inspector General, that the Committee determined was especially necessary to address issues that crossed the jurisdiction of individual IC elements and their inspectors general;
- Requirement for confirmation of the directors of the NSA, NGA and NRO, noting, with respect to NSA, the importance of ensuring that its intelligence collection is consistent with the protection of civil liberties and privacy interests;
- An increase in the penalties for the disclosure of the identity of undercover intelligence officers and agents.

[Source: S. Rep. No. 111-6, at 2-3 (2009)]

President Bush's March 8, 2008 veto message listed, in addition to the Army Field Manual provision discussed in the interrogation section of this memorandum, his objections to the provisions establishing an Inspector General for the Intelligence Community and the confirmation of the NSA, NGA and NRO Directors, and his objections to several other provisions.

Fiscal Year 2009

Two months after President Bush's successful veto of the 2008 bill, the SSCI reported S. 2996, the Intelligence Authorization Act for Fiscal Year 2009 by a vote of 10-5. [Source: S. Rep. No. 110-333 (2008)]

The 2009 bill incorporated provisions of the 2008 bill. It added proposed improvements to the notification requirements of sections 502 and 503 of the National Security Act of 1947 regarding the reporting of intelligence activities and covert actions. These included that if all members of the intelligence committees are not notified, because Gang of Eight limits are invoked by the Executive Branch, all Committee members will be notified of that fact and provided with a description of the main features of the intelligence activity or covert action. [Source: Id.,at 16]

As described earlier in this memorandum, the minority views of Vice Chairman Bond and Senators Warner, Chambliss, Hatch and Burr focused on the Army Field Manual provision of the 2009 bill and advocated, as an alternative, that Congress prohibit specific harsh interrogation techniques. [Source: Id., at 79]

There was no floor action on the 2009 bill.

Fiscal Years 2010 -2015

Starting in 2010, with the Intelligence Authorization Act for Fiscal Year 2010, and continuing through 2014, with the Intelligence Authorization Act for Fiscal Year 2015, Congress has returned to the enactment of annual intelligence authorizations.

In the course of them, Congress has enacted key features of the legislation reported by the Committee in the years authorizations were not enacted, including important provisions in the vetoed 2008 bill. These include the creation of an independent and empowered Inspector General for the Intelligence Community and confirmation of the NSA, NRO, and NGA Directors.

Congress has also enacted Committee proposals for strengthening the intelligence activity and covert action reporting requirements of the National Security Act. While these do not eliminate Gang of Eight procedures, they seek to assure early and full access by all intelligence Committee members in order to reduce the chances that the experiences of the surveillance and interrogation programs will be repeated. Apart from Army Field Manual legislation, the key elements of Senator Rockefeller's legislative agenda at the Intelligence Committee, both through annual authorizations and the FISA Amendments Act of 2008, have been enacted.

Financial Intelligence, Terrorist Finance and Iran Sanctions

Beginning in 2009 with a prominent push to improve the IC's awareness of terrorist finances in Afghanistan and Pakistan, Senator Rockefeller made financial intelligence capabilities a high priority. Much of this work was classified, but this brief description provides an unclassified summary.

First, in 2010, Senator Rockefeller wrote a letter to the President urging him to develop an interagency and IC strategy to track and disrupt the illicit funds that enable Taliban, Al Qaida and associated terrorist activity in Afghanistan and Pakistan. Majority Leader Reid, Chairman Feinstein, Vice Chairman Bond, and several other Committee Members also signed this letter, and it had a profound effect on the IC's activities on these issues. One staff oversight meeting that followed this letter was attended by approximately 40 personnel from 15 different government and IC agencies. Also in 2010, Senator Rockefeller wrote an op-ed in Politico titled, “To fight terrorism, follow the money,” in which he called for a “surge of financial intelligence and financial action — of resources dedicated to dismantling the financial networks that empower the Taliban, Al Qaeda and affiliated terrorist allies.”

Also in 2010, at Senator Rockefeller's request, the Committee held a hearing on this topic, with Treasury Undersecretary for Terrorism and Financial Intelligence Stuart Levey testifying. At Senator Rockefeller's request, in August 2010 the DNI distributed to the Committee a report outlining the IC's strategy and implementation plan for the collection and analysis of terrorist finance intelligence. This report was then followed in October 2010 by another letter by Senator Rockefeller and other

Intelligence Committee members, encouraging DNI Clapper to replicate the threat finance intelligence work that had been successful in Afghanistan and Pakistan outside of those areas, including in other terrorism scenarios and with regard to other countries whose illicit finances are directly relevant to U.S. security concerns -- namely, North Korea and Iran. In response, among other actions, DNI Clapper created a National Intelligence Manager for Threat Finance to coordinate financial intelligence activities throughout the IC.

In 2011, at Senator Rockefeller's direction, Committee staff traveled to several countries in the Middle East, and to Afghanistan and Pakistan, to continue the Committee's oversight of terrorist finance issues. In 2012, again at Senator Rockefeller's direction, Committee staff traveled to several European and Middle East countries to oversee financial intelligence-related activities that support Iran sanctions enforcement.

Senator Rockefeller's work to improve financial intelligence activities accelerated the maturation of this relatively new intelligence discipline and brought significant senior-level attention to the important work the IC was doing on these issues. This laid the groundwork for the kinds of intelligence that have enabled the extremely tight enforcement of targeted financial sanctions related to Iran's nuclear program, which was the key to Iran's decision to come to the negotiating table.

Iran Sanctions Debate

In late November 2013, following the Obama Administration's announcement that a Joint Plan of Action had been reached between Iran and the P5 +1 regarding Iran's nuclear program,

there was a significant effort in Congress – led by Senators Menendez and Kirk and supported by AIPAC - to preemptively pass new sanctions legislation that would automatically trigger into effect if Iran stalled or reneged on its part of the deal. Such legislation would have clearly violated the spirit of the deal that had been reached, and Iran said plainly that it would walk away from the negotiations if such legislation passed. Believing that the bill seriously risked scuttling the agreement before it could ever be implemented; the Administration was strongly opposed to the introduction of the Menendez – Kirk new, prospective sanctions. Nevertheless, momentum in support of the sanctions was building across the political spectrum in the Senate, and given that the bill would have almost surely passed had it gone to the floor, pressure was mounting on Majority Leader Reid to allow a vote.

In part, the momentum toward allowing new sanctions came from the absence of a vocal opposition in Congress. Only a few other Members had publicly expressed their reservations, and those statements had generally been brief or informal comments to reporters in the hall. Senator Rockefeller was aware of the complexities of dealing with Iran through his work on the Intelligence Committee, but he was also deeply aware that such diplomatic opportunities are infrequent, and that in this case it might be the best chance of avoiding a military conflict with Iran. He was determined to give the U.S. negotiators the space they were asking for. After speaking with Majority Leader Reid, on December 11, 2013, Senator Rockefeller went to the Senate floor and delivered a strong rebuttal to proponents of new sanctions legislation. He argued that the interim deal that the Administration had reached was a good one, and that it significantly set back Iran’s nuclear program while still keeping our most powerful

sanctions in place. Senator Rockefeller also argued that it was clear that if Iran reneged on the agreement, the Senate could quickly pass powerful new sanctions at that time, and in turn there was no need to risk thwarting a possible diplomatic solution. He challenged his Senate colleagues to speak up if they had reservations, and asked:

> If there is *any* chance at all that new sanctions right now might disrupt that agreement, or jeopardize a future agreement – why on earth would we risk it? Why would we risk an opportunity that may well be the only chance we have to resolve this without using military force? If we lose this diplomatic opportunity, then the use of force will be the only option to stop Iran's path to a nuclear bomb. All of us have lived with war for the past 12 years. We have seen up close the incalculable financial and human cost that has come with these wars, and the burden that the wars now put on our troops, their families, and our economy. This has only hardened my resolve to ensure that this immense sacrifice never happens unnecessarily – that we take great care to exhaust every possible avenue to diplomatic resolution.

It was the first full, and powerful, articulation of the case against new sanctions made by any Senator on the floor, and after Senator Rockefeller's speech the White House Chief of Staff, Dennis McDonough, called to thank him on behalf of the President.

Following that speech a number of other Members, including Senators Feinstein and Levin, joined Senator Rockefeller in formally voicing their opposition on the Senate floor and through

op-eds. From those statements came a public letter to Majority Leader Reid, which Senator Rockefeller joined, from the Democratic Chairmen of 10 Senate Committees, stating that it was not the right time to move forward with new sanctions legislation. It was, according to the New York Times, the first time a major AIPAC legislative initiative had been stopped in nearly 30 years.

Clearly the future of negotiations over Iran's nuclear program remain uncertain, but nearly one year after Senator Rockefeller's floor speech there is broad agreement that Iran's willingness to adhere to and implement the Joint Plan of Action has exceeded expectations, and that Iran is further from a nuclear weapon because of it.