

Politics Surround Intelligence Reform **Hasty Action Leaves Too Many Gaps and Problems**

By U.S. Senator Robert C. Byrd

Wednesday 08 December 2004

U.S. Senator Robert C. Byrd, D-W.Va., delivered the following remarks as the Senate prepared to vote on the conference report on the National Intelligence Reform Act. Byrd criticized the hasty passage of the most significant reform of the nation's intelligence agencies since 1947, with Senators having less than 24 hours to review the final legislation.

Byrd also was critical of many of the provisions within the legislation. For instance, Byrd noted a provision requiring the new National Intelligence Director to submit any testimony before Congress to the White House Office of Management and Budget (OMB) for approval prior to delivery. Byrd is concerned that requiring OMB approval can prevent Congress from receiving non-partisan intelligence analysis.

Overall, the West Virginia lawmaker believes that such substantial legislation deserves a higher standard of consideration in the world's foremost deliberative body. Senator Byrd was one of two Senators to vote against the bill.

Senator Byrd's Remarks:

When the elected representatives of the people allow themselves to be coerced into a process that encourages the abdication of our responsibility to understand and thoroughly review legislation, the people are robbed of their voice in their government.

Senators take an oath to defend the Constitution, and common sense suggests that that means reading and studying the legislation before the Congress. We are duty bound to explore the opinions on all sides of an issue, and to work toward a process that does not exclude opponents or silence the opposition.

In its heyday, the Senate was known as the greatest deliberative body in the world. What we have seen in recent times, however, is a hollow shell of that noble tradition. Time after time, the Senate forgoes its responsibility to deliberate and carefully review legislation, and even defers to others to craft legislation for it.

Legislation is passed by the Senate, and then, too often, hastily rewritten in a conference committee behind closed doors marked, "no minority view admitted." All too often during the 108th Congress, the party leadership has held bills until just before a recess, and then employed disingenuous rhetoric about last opportunities to get something done. Senators preoccupied with holiday schedules and travel plans, for example, timidly roll over and accept whatever is placed in front of them. They do it time and time again.

I anguish about the eroding character of the Senate, and the message it sends to the American people, when this body allows itself to be stampeded into passing legislation without thorough examination. We congratulate ourselves on a job well done, and vote overwhelmingly in support of legislation, and yet we cannot even be bothered to ask questions about the changes made in conference. Like pygmies on the battlefield of history, we cower like whipped dogs in the face of political pressure when it comes to issues like intelligence reform.

I do not claim to know as much about this legislation as the managers of the bill, but I do know about process, and it galls me that the Senate has allowed itself to be jammed against a time deadline in considering this conference report.

This is the most far reaching reorganization of our intelligence agencies since 1947. These changes will remain for decades, and they will impact the security of our nation at countless levels. Such matters ought to

be held to a higher standard of consideration by the Congress than is the case here.

This conference report has been reworked and redrafted over the course of two months in a closed door conference, and the Senate has only received a printed copy of the conference agreement less than 24 hours ago. As late as yesterday, the conferees were making changes. It is outrageous to expect Senators to read and understand a 600-page bill in less than 24 hours.

This conference agreement is very different from the legislation that was passed by the House of Representatives and the Senate two months ago. For example, a number of provisions related to the Patriot Act and law enforcement powers have been inserted into this bill, which, again, have never been considered on the Senate floor.

This legislation has encountered virulent opposition since the time of its conception, and while it may enjoy the support of a majority of members here today, nobody can say with any confidence or certainty as to how this new layer of bureaucracy will affect our intelligence agencies or the security of our country. We don't know if it will enable them to better guard against a terrorist attack or whether it will cause a host of unforeseen problems. And we are failing, in yet another misguided rush to judgment, to take the time and effort to find out.

The Senate barely understands how the experts line up on this bill. The 9-11 Commission is for it, that much we know. But former CIA Director George Tenet said last week that he opposes this bill. That is sobering criticism from someone who, having left government months ago, no longer has any turf to protect.

A distinguished group of national security experts wrote in September that they oppose any intelligence reform this year. That group included former Senate Intelligence Committee Chairman David Boren; former Senator Bill Bradley; former Secretary of Defense Frank Carlucci; former Secretary of Defense Bill Cohen; former CIA Director Robert Gates; former Deputy Secretary of Defense John Hamre; former Senator Gary Hart; former Secretary of State Henry Kissinger; former Senate Armed Services Committee Chairman Sam Nunn; former Senator Warren Rudman; and former Secretary of State George Schultz.

We do not know how these experts regard the bill today. Why should Senators forgo the valuable insight of almost every public figure who may actually be able to assess what is in this new version of intelligence reform?

I say again, let us not believe that we understand what has been included in this conference report. It is, in effect, a new bill that is very different from anything the Senate has considered to date. Common sense suggests that the Congress ought to hold hearings on the contents of this new bill, so that we may be informed by experts about its benefits and defects.

There is no reason why the Senate cannot proceed in this prudent manner early next year. Instead of viewing this conference report as the final stage of the process, we ought to consider it the starting point for debate next year. We ought to invite witnesses back to testify on it, and then allow the process to begin anew, outside the election cycle and built on the foundation of knowledge acquired this year.

Instead, we are allowing ourselves to be lulled into the fallacious belief that we must accept this bill or risk its not passing next year, with some even suggesting that a terrorist attack could result without it. That's nonsense, and don't you believe it. No legislation, alone, can forestall a terrorist attack on our country.

The momentum is strong now to reform our intelligence agencies, and I submit that the greater risk is not that the momentum will dissipate next year if this bill does not pass this week, but that the passage of this bill will remove any incentive to focus on the broader intelligence failures that have occurred outside the war on terror.

This legislation is appropriately focused on the failings of 9-11, but oblivious to the many other glaring deficiencies in our intelligence community. Our country went to war in Iraq on the shoulders of false claims about weapons of mass destruction, but this bill dances around that issue on tippy-toes. It is as though Congress is too afraid to mention the fact that faulty intelligence claims deceived the public into believing

that there was an imminent threat from Saddam Hussein.

Why is Congress avoiding that critical issue? Is it because some do not wish to expose the role of the White House in feeding bad intelligence to the American people? The Founding Fathers intended Congress to be a check on the power of the Chief Executive, but increasingly Congress appears content to be merely a cheerleader for the president, depending upon which party might be in control at a given moment.

The intelligence bill fails to address the unfolding prison abuse scandals in Iraq, Afghanistan, and Guantanamo Bay. The Armed Services Committee has held six hearings on the abuse of prisoners in U.S. military jails. There is mounting evidence that the CIA had some hand in the mistreatment of detainees. The Red Cross has reported on the illegal practices of U.S. intelligence agencies holding "ghost detainees" in secret prisons. Why is this intelligence bill silent on such outrageous policies? How can Congress claim to fix what is wrong with our intelligence agencies if this major piece of legislation doesn't even address such colossal intelligence failures?

The only way to reduce the risk of such failures is to ensure the accountability of this new Intelligence Director to the people's representatives in the Congress. It is Congress that must make the decision to declare war, and it is the Congress that is responsible for the oversight of this new Intelligence Program to help guard against future intelligence failures. It is paramount that the Congress do everything possible to ensure itself access to timely, objective intelligence. Yet, that is not what we see in this legislation.

The conference agreement eliminates provisions to ensure that the Congress receives timely access to intelligence, and it also allows the White House's Office of Management and Budget to screen testimony before the Intelligence Director presents it to the Congress. Whistle blower protections for intelligence officials who report to the Congress also have been stricken from the Senate-passed bill.

The conference agreement creates senior intelligence positions, but exempts many of them from confirmation by the Senate. It eliminates the privacy and civil rights officers included in the Senate-passed bill, and it strips 18 pages of legislative text that would have created an Inspector General and Ombudsman to oversee the Intelligence Director's office. That language has been replaced with one paragraph, authorizing the Intelligence Director, at his discretion, to create or not to create an Inspector General, and provides the Director with the power to decide which, if any investigative powers, to grant the Inspector General.

That means the new Intelligence Director could exempt his office from Inspector General audits and investigations, and that the Congress would not receive reports from an objective internal auditor. The Congress is limiting its own access to vital information within this new Intelligence Office, and it will have, thereby, compromised an essential mechanism for identifying potential abuses within the new Intelligence Program.

Given the dark history of abuses of civil liberties and privacy rights by our intelligence community, I had hoped that the Congress would exercise more caution, but it has not done so in this legislation.

The 9/11 Commission recognized that its recommendations call for the government to increase its presence in people's lives, and so it wisely endorsed the creation of an independent Civil Liberties Board to defend our privacy rights and liberties. The Senate-passed bill embraced this recommendation and included additional protections to help ensure that executive agencies could not exert undue influence on the Board. This conference agreement scuttles those protections by burying the Board deep inside of the Office of the President, subjecting Board members to White House pressure.

The conferees included language making changes to the 1978 Foreign Intelligence Surveillance Act (FISA), the law that blurs the rules on electronic surveillance and physical searches by the U.S. government. This conference report states that the Intelligence Director shall have authority to direct or undertake electronic surveillance and physical search operations pursuant to FISA if authorized by statute or executive order. This is dangerous ground to walk when the president, through executive order, and, without the authorization of the Congress, can direct this new Intelligence Director to undertake electronic surveillance and physical search operations.

Yet another provision would make terrorist crimes subject to a rebuttable presumption of pretrial detention, which means that prosecutors won't be required to show a judge that the defendant is a flight risk. Instead, the defendant will be presumed to be a flight risk. Are Senators sure we are not trampling on the civil liberties of the American people with the hasty passage of this conference report?

Again, few, if any, Senate hearings have been held on these provisions by the full Senate Judiciary Committee. The inclusion of these provisions in Title VI, with so little examination of their real meaning, reminds me of how the Patriot Act itself was enacted: in haste, with insufficient review, and with no real understanding of its true consequences.

These are unsettling provisions, and the Senate ought to insist on its rights to consider them more carefully. The Senate has not had enough time to understand this legislation or its implications. This new Intelligence Director has been granted significant authorities, and the Congress has not done enough to ensure adequate checks on the actions of the Intelligence Director.

With regard to homeland security, the bill authorizes a significant increase in the number of border patrol agents, immigration investigators, and a significant increase in the number of beds for immigration detention. The bill also authorizes increased funding for air cargo security and for screening airline passengers for explosives. All of these are worthy goals, but the provisions are just empty promises. Last September, when I offered an amendment to the Homeland Security Appropriations bill to fund these precise activities, the White House opposed the amendment and my Republican colleagues lined up and voted against it. Today, members will line up and vote for more empty promises.

President Bush had the opportunity to support Congressman Sensenbrenner and insist on tougher immigration reforms in this bill, but he wretched. Senators talk about reforms needed to protect against terrorism, and the fact is that this bill is a hodge podge of empty border security promises that the Administration has no intention of funding, and that will only encourage the kind of illegal immigration that leaves our country wide open to terrorists.

It may well be that the only problem that this bill will actually fix is one of politics. Passing this bill in the waning hours of the 108th Congress means that, for all intents and purposes, intelligence reform will be removed from the agenda of the next Congress. By passing this bill today, the Senate will be giving political cover to those who wish to dismiss calls for more thorough reform of intelligence agencies to fix problems that are not addressed in the legislation, including the Iraq WMD fiasco and the abuse of prisoners in secret detention facilities.

Intelligence reform should be done right the first time. But the actual implementation of this bill will be shrouded in secrecy and hidden from public scrutiny. Under this conference report, the total amount of intelligence spending will remain classified, so the American people may never know if the President is short-changing the reform effort that this bill requires. Senators ought not be so willing to rush this bill through, knowing that it may serve as political cover for an Administration that has a sorry history of promising big reform efforts that it never funds.

The 9/11 Commission's endorsement of this legislation will mean nothing if these so-called reforms lead to future intelligence failures.

What the American people will remember is that the Congress abdicated its role to protect their security interests. The American people will remember that the Congress empowered an unelected bureaucrat while doing little else to protect against future intelligence failures.

This process has been hurried and rushed from the beginning, and it has been tainted ever since the decision was made to tie its consideration to a political schedule.

When the 9/11 Commission needed more time to conduct its investigations into the September 11 attacks, the Congress acted magnanimously in granting a two month extension. Senators said at the time: "It would be counterproductive to deny the commission the extra two months it now says it needs to complete its investigations...we cannot feel we are successfully prepared to fight and win the war on terrorism and to

protect the American people at home..."

The Founding Fathers would be ashamed of the notion that time is a luxury reserved for the unelected members of independent commissions. What about the Senate, and the elected representatives of the people that serve in this Body? The Framers of the Constitution conceived a Senate that would resist the forces that urge us to bend with each change in the political breeze. To the contrary, the Constitution binds Senators to serve the greater causes of the Republic, and reserves the power of each member to demand more time for debate and thoughtful consideration.

Shame on us for not invoking that wisdom in claiming the additional time we need to better assess this legislation.

