# INTELLIGENCE OVERSIGHT IN A DEMOCRACY

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The purpose of my talk today will be to describe the oversight process as it affects one of the nation's principal intelligence agencies. In doing this, I will begin with my views on the need for intelligence oversight—both theoretically and in terms of recent legislative enactments. I will then offer my comments on how the process works in practice. Let me emphasize that my remarks today are my own and not intended to represent the views of the National Security Agency (NSA) or the Department of Defense. Instead, I will speak as a lawyer who happens to have had the opportunity of participating in oversight first hand and who has, as a consequence, given some thought to this general subject.

First, what is the basis for oversight of intelligence activities? The concept of legislative oversight is not new. Fundamentally, it derives from the structure of our democratic form of government set forth in the Constitution itself. The Constitution distributes power among three branches, but the distribution is not always precise. In some instances, the branches appear to share responsibility for a sphere of activity; in others the Constitution achieves a more distinct separation. In the words of Justice Holmes, "The great ordinances of the Constitution do not establish and divide fields of black and white."[1] But in any case, some form of "oversight"—broadly defined to include all reviews of executive branch activities when conducted by the legislative branch—is the natural, even inevitable, result of this separation. Some amount of oversight or information exchange is also essential if Congress is to understand the purposes for which it alone appropriates funds. My conclusion is that congressional oversight is generally not a surprise, but a logical consequence of our constitutional structure of government.

The conduct of intelligence activities by the executive branch is no exception to this proposition, but an additional reason supports the need

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1. Springer v. Government of the Philippine Islands, 277 U.S. 189, 209 (1927) (Holmes, J., dissenting).

for oversight of intelligence functions. Intelligence functions are of necessity conducted in secret, yet the principles of our democracy require an informed populace and public debate of national issues. These two diametrically opposed principles—secrecy on one hand, and open debate on the other—can be reconciled successfully only by appropriate use of the oversight process. Moreover, this approach is ideally suited to the structure of our government where power is exercised "by the people," not directly, but instead through their chosen representatives. Those representatives, in turn, select certain of their number to sit on House and Senate Intelligence Committees. Through the auspices of the committee structure of our national legislature, fragile intelligence programs can be reviewed, yet sources and methods may be safeguarded without abandoning our democratic principles. The question therefore is not whether there should be oversight, but instead how that oversight is best conducted.

These comments about the basic need for intelligence oversight may belabor the obvious. However, the means by which our democracy manages its intelligence programs do not seem to be widely understood. The need for greater understanding of intelligence oversight is illustrated by the relatively recent reaction (1986) of a newspaper reporter who expressed amazement upon learning that oversight committees existed to review and approve intelligence programs and budgets in detail.[2] Ignorance about the intelligence oversight process, especially in the case of members of the press, tends to lead to erroneous public perceptions as to how effectively the rule of law applies to our activities. It also fosters the self-defeating view that the press has the principal role in this oversight process and that a "town meeting" approach is appropriate for reviewing intelligence decisions.

Having identified the basic need for legislative oversight, which is inherent in the structure of our Constitution, let me step back a moment and define what I understand the term "oversight" to mean. Any basic operating definition of oversight must include three broad areas. First, a programmatic planning function, by which Congress considers the executive's requests to fund new programs and continue ongoing ones. Second, an evaluating function, by which Congress determines whether these appropriated funds have been effectively spent; and finally, a policing function for determining whether the agency's program has been appropriately conducted within the applicable legal and regulatory framework. While this panel is focusing on "oversight" as a congressional responsibility, the other branches of government also conduct

2. Conversation with the author.

oversight, if less conspicuously. Here I refer to entities within the executive branch like individual agency inspectors general, or the President's Intelligence Oversight Board, or even the general counsels or comptrollers of executive branch agencies.

A brief review of the history of congressional oversight activities provides a useful perspective for the discussion of current issues. Congress has exercised its power to review executive actions since the beginning of the Republic, and these historical oversight activities manifest patterns recognizable today. The first such congressional hearing was held in March of 1792 to question General Arthur St. Clair concerning the defeat of his unit by warring Indians.[3] Again in 1861, Congress made a broad inquiry into the conduct of the Civil War.[4] Significant investigations in this century include those concerning the Money Trust in 1912,[5] the Teapot Dome Scandal in 1923,[6] and the attack on Pearl Harbor in World War II.[7]

After World War II, Congress supplemented its historical approach of sporadic investigations with a better organized and more active approach to oversight. It established standing committees responsible for the continuous review of programs in different areas of government activity. Since the seventies, Congress has expanded the authority of those committees, and created special standing House and Senate committees to handle its intelligence oversight responsibilities. Throughout this evolution, congressional staffs have grown providing the necessary resources to handle these expanding oversight duties.

The initial catalysts for increased congressional scrutiny of the executive branch were the Vietnam War and Watergate. This heavy scrutiny of the activities of the executive branch did not spare the intelligence agencies. In particular, the involvement of the CIA in various covert activities received considerable attention. Congressional reaction was an attempt to assert control. In December 1974, it adopted the Hughes-Ryan amendment to the Foreign Assistance Act of 1961.[8] This legislation prohibited the CIA from using appropriated funds for covert actions "unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operations to the appropriate committees of the Congress."[9] Two things are noteworthy about this

3. W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 226 (1978).
4. *Id.*
5. *Id.*
6. *Id.*
7. S. REP. No. 111, 81st Cong., 1st Sess. 2 (1949).
8. Pub. L. No. 87-195, § 662 (1974) (codified as amended at 22 U.S.C. § 2422 (1988)).
9. *Id.*

provision. First, Congress selected its fiscal power as its means of control. It did not directly attempt to criminalize the action it sought to control. Second, Congress—correctly in my view—did not seek to exercise *prior* approval of executive branch action, but only to be advised of it.

In 1975, unprecedented levels of publicity surrounded the intelligence community as both the House and Senate launched investigations into its structure and activities. The final report of the Church committee concluded that "intelligence activities have undermined the constitutional rights of citizens and that they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied."[10] In part, the Senators blamed themselves, finding that "[m]echanisms for, and the practice of, congressional oversight have not been adequate."[11]

Congress began almost immediately to redress these problems. Both branches of Congress created intelligence committees to perform the kind of detailed oversight which requires the resources of a full committee. In 1976, the Senate established the Select Committee on Intelligence with full authority to oversee the activities and funding of the intelligence agencies. The House later followed suit with its Permanent Select Committee on Intelligence. Fiscal year 1979 saw these congressional committees take firm control of the purse strings with the first separate and identifiable Intelligence Appropriation and Authorization Acts.[12] In 1978, as a key feature of these oversight initiatives, Congress passed the Foreign Intelligence Surveillance Act (FISA), which established procedures for judicial regulation of certain intelligence activities.[13] In its own way, the FISA provides an oversight mechanism to insure that the executive branch makes appropriate use of its foreign intelligence powers. I will say more about this later.

Two years after enactment of the FISA, continuing concerns of Congress over its role as a check on the executive branch in the intelligence arena led to the passing of another important piece of "oversight" legislation, the Intelligence Oversight Act of 1980.[14] This Act included

10. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess. 289 (1976).

11. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th Cong., 2d Sess. 425 (1976).

12. AMERICAN BAR ASSOC., WORKING GROUP ON INTELLIGENCE OVERSIGHT AND ACCOUNTABILITY, OVERSIGHT AND ACCOUNTABILITY OF THE U.S. INTELLIGENCE AGENCIES 8 (1985).

13. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-11 (1988)).

14. Pub. L. No. 96-450, § 501, 94 Stat. 1975, 1981 (1980) (codified at 50 U.S.C. § 413 (1988)).

more specific directions about what intelligence activities must be reported to Congress, and set forth how this was to be accomplished. In summary, this Act requires that the Director of Central Intelligence and the heads of agencies involved in intelligence activities keep the two Intelligence Committees "fully and currently informed" of all United States intelligence activities, including "any significant anticipated intelligence activity," which it specifically defined to include covert actions. Although the definition of "significant anticipated intelligence activity" was never intended to be limited to covert action alone, no further formal definitions expanding it had been agreed upon by 1986. At that time, Congress enacted section 415.[15] This provision expanded the definition of "significant anticipated intelligence activity" to include any transfer of defense articles of one million dollars or more by an intelligence agency outside of the government, *unless* that transfer was explicitly included under certain statutory authority and was not done in conjunction with intelligence activities. Even as we discuss these matters today, further oversight legislation is being considered in Washington.

Our current congressional oversight structure, consisting of select committees in the House and the Senate, was born out of an atmosphere of perceived or, in some cases, actual wrongdoing, mistrust and suspicion. Regrettably, these origins sometimes color the way we work together today. Even more unfortunate, however, we have again seen in recent months how easy it is to forget the reasons which originally provoked some of the mistrust that continues today.

Let me now turn to the second part of my talk: How the oversight process works today at one intelligence agency. My conclusion may surprise you, for I believe that the three aspects of intelligence oversight—that is: planning, auditing and policing—work extremely well, and constitute a comprehensive and thorough intelligence oversight process that is both necessary and useful.

The planning and auditing, or evaluating, aspects satisfy the goal of keeping Congress "fully and currently informed" of NSA's intelligence activities. This objective is significant, notwithstanding the statutory mandate, because it works to ensure efficiency and effectiveness in the conduct of our nation's intelligence business. It also provides the factual basis for presenting and justifying budgetary requests, since no money can be spent without congressional authorization and appropriation. Formal responsibility for NSA's funding rests with several committees.

15. Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 602, 100 Stat. 3190, 3203 (1986) (codified at 50 U.S.C. § 415 (1988)).

The Intelligence and Armed Services Committees produce the intelligence-related authorization bills; the Appropriations Committees produce the appropriations bills. NSA provides the Intelligence Committees with lengthy and detailed budget justifications each year, and each year the committees hold closed hearings at which these funding requests are explained and defended. These submissions provide a major source of information and review for the programs being conducted.

What I have described is far from a "rubber stamp" process. All year round, the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence conduct continuous review of NSA programs and activities. They are especially inquisitive if they have any doubts about how effectively NSA is administering a program. If they think NSA is not making effective use of a program budget, they can and will reduce it. They constantly monitor NSA's rate of spending to ensure that funding requests are not more than the agency really needs. Moreover, the committees and their staffers do not limit themselves to "paper reviews." Their frequent on-site inspection trips allow them direct access to the people and systems they fund. This careful scrutiny not only facilitates appropriate funding levels, it also works to ensure efficient and effective use of intelligence community resources.

There is an additional benefit derived from this oversight process. Informed as they are about the needs of the intelligence community, the two Intelligence Committees can, and often do, assist NSA in obtaining needed additional legislative authorities or, in contrast, protect NSA from the often unintended effects of legislative initiatives sponsored by other parts of the Congress. Over the years this role as "broker" has been a great benefit to NSA.

The professional stature of the staffers who guide the details of this review process should be noted at this point. They are, virtually without exception, individuals well versed in intelligence issues with significant years of experience working within the intelligence community. Typically, they have had prior experience in the intelligence community itself—experience which serves not to dampen their ardor for review, but to make their reviews more focused and effective. For their part, the members of the two committees themselves are also well versed. In a word, they are "select": chosen by their colleagues for their stature and ability.

Moreover, the presence of not one, but two oversight committees—one in each branch of Congress—actually expands the number and scope of reviews conducted. The committees conduct their business separately,

and while they will certainly overlap in some significant areas, it is incorrect to say they duplicate each other. These comments should not necessarily be seen as an endorsement of the two committee system—many urge a single committee in order to reduce the number of members and staffers exposed to sensitive information. Nevertheless, a consolidation must certainly consider whether a diminution of oversight would be the unintended result.

The third major objective of congressional oversight activities is the policing goal—to ensure that constitutional and legal limitations on the conduct of intelligence activities are observed. To be sure, this is the area that captures the most public attention; yet it constitutes by far the smallest part of NSA's involvement with the Intelligence Committees, perhaps because NSA's work is not as controversial as that of other agencies. As I mentioned earlier, the seventies were a watershed for the intelligence community with respect to this policing function. The revelations of the Church and Pike committees resulted in new rules for United States intelligence agencies, rules meant to inhibit abuses while preserving our intelligence capabilities. NSA was no exception to this development. The result today, at least at NSA, is an intelligence gathering system that operates within detailed substantive and procedural limits, under the watchful eyes of Congress, numerous institutions within the executive branch and, through the FISA, the judiciary. Let me say a bit about the FISA since I believe it may offer some interesting lessons.

The FISA is described as "an Act to authorize electronic surveillance to obtain foreign intelligence information."[16] But I believe this statement belies the true oversight purpose of the Act. Even during the Church and Pike period, it was widely recognized that the executive branch possessed broad constitutional power to conduct such foreign intelligence activities as might be necessary for the well-being of the nation. Concern arose, however, when such activities threatened to encroach upon domestic activities, the rights of the "U.S. persons" protected by the Constitution and, especially, the fourth amendment. Congress recognized that the distinction between foreign intelligence, on the one hand, and domestic political surveillance, on the other, was often difficult to establish. In some instances, the two were simply different points of a continuum. Congress wanted a means of overseeing this process of line-drawing by the executive branch on a more immediate basis than would be possible using the usual congressional oversight process. To achieve this, it turned to the court system and created a procedural structure for considering and approving certain surveillances which occur in the

16. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C. § 1801 (1988)).

United States and thus have a high potential to affect rights guaranteed by the Constitution. Herein lies the oversight purpose of the FISA. The Act regulates four types of electronic surveillance, which it also limits to two permissible categories of "targets": "foreign powers" and "agents of a foreign power."[17] The responsibility for approving these electronic surveillances rests with the Foreign Intelligence Surveillance Court (which was created by the Act) and the Attorney General.[18] But an elaborate set of reviews and certifications are required prior to the court's approval. To protect against invasions of privacy, the Act also establishes limits on the use of information obtained from the surveillances, and requires minimization procedures to eliminate nonpertinent "U.S. person" information.

The FISA is unusual among intelligence oversight statutes in that it involves the judicial branch in the oversight process. Specifically, a Foreign Intelligence Surveillance Court, composed of seven federal district court judges, which reviews executive branch applications for court orders authorizing specific foreign intelligence surveillance activities. The process can be analogized to judicial review of requests for warrants authorizing the surveillance for law enforcement purposes, although the specific factors to be considered under the FISA are of course unique. Judicial review of proposed foreign intelligence surveillances for compliance with specific substantive requirements allows these necessary activities to be conducted within an established legal framework in a manner which protects the constitutional rights of "U.S. persons."

In my judgment, the FISA has been a highly successful oversight vehicle. It has kept pertinent intelligence activities well within legal limits, yet has not impeded the underlying intelligence gathering it supported. In fact, by removing questions which arose in the early seventies about the legality of these operations, the FISA has enhanced the ability of the executive branch to collect vital foreign intelligence information. Moreover, I believe there are useful lessons to be learned from the success of the FISA.

First, the FISA is procedural in nature. It does not deal with the substantive intelligence gathering questions which underlie applications to the Foreign Intelligence Surveillance Court. The basic question of whether to pursue a given source of intelligence is determined by the executive branch, not the judicial or legislative branches. Only the *means* by which intelligence will be collected is reviewed, not why there is a need to collect the information in the first place. But the fact that the

17. *Id.* at 1786-87 (codified at 50 U.S.C. § 1802 (1988)).
18. *Id.* at 1788 (codified at 50 U.S.C. § 1803 (1988)).

FISA is essentially a procedural, rather than a substantive, statute does not diminish its utility. Much can be gained by achieving procedural regularity in the processes used by the executive branch to authorize intelligence activities. Indeed, many of the problems revealed by investigations into activities which occurred during the Iran-Contra Affair would not have occurred had procedures been in place and observed. At a minimum, such procedural regularity makes it probable that sufficient review will occur to insure that rogue operations are identified early on so that they can be controlled before damage occurs.

Second, the FISA strikes a good balance in the respective roles of the three branches of government. It does not place Congress in the position of back-seat driver to the executive branch. Congress does not become involved in the day-to-day operation of approving FISA applications, nor should it. Its role, like that of any supervisory body, be it a corporate board of directors or an appellate court, is not to execute or to second guess; but instead, to receive reports and consider broader term implications. The fact-specific role of the Foreign Intelligence Surveillance Court would be inappropriate for Congress. Instead, its oversight role is appropriately defined by section 1808 of the Act where semi-annual reports are required.[19]

My conclusion, based on this FISA experience, is that oversight works only where there is consensus among or between the branches. Thus, oversight will perform best when it is confined to easily defined, essentially procedural matters. In contrast, oversight works least well, and perhaps not at all, when it impinges directly on significant issues of policy which lack consensus. It follows that while I do not believe it is justifiable to violate principles of oversight in service to foreign policy, neither do I think oversight laws should be amended to serve as tools to control or monitor the execution of foreign policy.

Let me finish my remarks with a final comment about techniques for handling oversight requests when consensus is lacking. As I have said, it has been my experience at NSA that oversight works smoothly until contested policy issues infect the oversight process. It is only at such times, when congressional requests that do not properly qualify as oversight are received, that we in the intelligence community may be hard-pressed to protect our fragile techniques—that is: sources and methods—from inadvertent damage in the course of a heated policy debate. But we take such steps as we can. Such requests are carefully scrutinized to make certain they reflect a purpose that is appropriate and within the law. We

19. *Id.* at 1795 (codified at 50 U.S.C. § 1808 (1988)).

also employ procedural requirements on the manner in which the information is produced for review. Thus, we avoid relinquishing control of "intelligence product" at all costs, for experience has shown that we cannot protect "product" unless we also control it. Similarly, we severely limit access to our "intelligence product" by requiring that it be reviewed only by members of Congress themselves, or by properly cleared staffers in special secure areas, such as those available at the offices of our two oversight committees, if not in our own facilities. These procedural precautions can produce their own tension, but in the last analysis they are essential to reconciling oversight and intelligence production, especially in the context of heated policy debates. Moreover, despite initial objections to these requirements, the vast majority of those we deal with have come to understand, and even welcome, the restrictions we employ when granting access to intelligence. They recognize that such procedures can assist them with the heavy burden of protecting intelligence sources and methods. I credit such procedures with the small measure of success we have achieved in recent months in protecting our activities from disclosure as an unprecedented array of public servants visited our offices in search of data for various investigations. I believe both we in the intelligence community and our many visitors learned something quite different than what any of us expected: the intelligence community can take seriously the need to protect its sources and methods and still respond to proper oversight requests without compromising either goal, but only if both sides show trust, patience and cooperation.