REMARKS OF L. BRITT SNIDER*

Among democracies, the United States is to my knowledge unique in terms of how intelligence oversight is carried out. There are other countries which have parliamentary committees that oversee certain aspects of intelligence, such as Canada and the Federal Republic of Germany. But no democratic country has legislative oversight quite the way we do; in most countries, the executive largely oversees itself.

In our system, not only is oversight a shared responsibility of the executive and legislative branches, but Congress, represented by its Intelligence Committees, plays an integral role in the operations of the intelligence community. Indeed, under the rubric of oversight, the committees have become deeply involved in such things as monitoring covert actions; assessing the effectiveness of collection capabilities as they relate to particular national security requirements (both in crises and over the long term); assessing the performance of the intelligence community in terms of analyzing information; seeing that intelligence information is provided in an effective and timely manner to policymakers. Indeed, the Intelligence Committees receive, on a daily basis, much of the same finished intelligence that goes to policymakers in the executive branch. In short, the committees are kept apprised of the entire breadth of intelligence activities undertaken by the United States Government in a manner which probably exceeds the awareness of most officials in the executive branch—even the responsibilities of those in the intelligence community are typically confined to particular segments of the whole. To be sure, there is not the depth of knowledge, nor involvement with operational details that exists within the executive, but congressional oversight today cuts a very broad, if not a very deep, swath across the intelligence community.

I would also point out that oversight is by no means a static concept, but rather one which is continuously evolving. The oversight statute provides only that the Intelligence Committees be kept "fully and currently informed" of intelligence activities, including "significant anticipated intelligence activities." Neither of these phrases is defined in the statute, leaving it up to those in both branches to work out a mutually

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satisfying *modus vivendi*. Over time, expectations have grown, on both sides, in terms of what the Intelligence Committees want and need to know about, and what they don't. Generally, these understandings keep things on an even keel, although occasionally the lack of definitive standards lead to confusion and recriminations.

In any case, the point of our discussion is not so much how well the current system works, but whether it represents the optimum way oversight should be carried out in view of the larger needs of government and the interests of the American people. In our experience there have been two basic models for congressional oversight of intelligence—representing polar extremes: the pre-Church committee model and the post-Church committee model.

The pre-Church committee model was essentially a "hands-off" style of oversight. Congress was content, at least from the end of World War II until the mid-1970's, with a very minimal role in the intelligence business. Attempts to establish a stronger role, like Senator Mansfield's proposal in 1956 to establish a committee on intelligence, and similar proposals offered by Senator Proxmire in the 1960's, were rejected by large margins. Oversight was handled by the Armed Services Committees and Appropriations Committees, usually limited to small subcommittees of each and not the committees as a whole, and consisted largely of ensuring that funds were authorized and appropriated within the Defense bill to carry out such activities. Staff involvement was limited to a handful of people for whom intelligence was a minor part of their responsibilities.

In this model there were no oversight statutes, no reporting requirements. Indeed, it is interesting to note that in the intelligence agency statutes which Congress passed after World War II,[1] there is no mention of reports to Congress or congressional oversight at all. Oversight rested solely upon the leverage Congress held by virtue of the appropriations process. Rarely was it necessary to bring this into play, since the oversight committees were not interested in being deeply involved. Intelligence in these early days was equated to "spying," and the less Congress knew, the better it liked it. Intelligence agencies, like the CIA, made relatively few appearances before their oversight committees, and then usually to advise of successes and breakthroughs. Intelligence product itself occasionally was shared with Congress, but was not left with Congress—there was no place to store it which met the security requirements.

1. *See, e.g.*, the National Security Act of 1947 (which established the CIA); the CIA Act of 1949; the National Security Agency Act of 1959.

The post-Church committee model is essentially the system we have today: broad, "hands-on" involvement by two committees and their staffs, all of whom are dedicated solely to the intelligence function, who operate under a statute that mandates cooperation by the executive. While the statute does have language which conditions the provision of information by the executive on the need to protect intelligence sources and methods, as well as upon the "mutual responsibilities" of both branches under the Constitution, it does not in and of itself recognize any particular category of information as being off-limits to the committees as a matter of law. As a practical matter, executive branch objections to the committees' access are worked out on a case by case basis. Normally, the committees have not insisted on sensitive information, such as the identity of agents or the operational details of technical collection, because such information is not needed for oversight. But they have always resisted absolute restrictions on their access. To satisfy the legitimate concerns of the executive branch that such information be protected, the committees have established stringent security controls over the information given them. They also operate under resolutions passed by their respective Houses which explicitly establish controls within each House of Congress to control access outside the committees themselves.

This, then, is today's model contrasted with yesterday's. There are, of course, variations in between the two that one could postulate, both in terms of the organizational structure and in terms of limitations upon the committees' access to sensitive information.

The organizational alternative that most readily comes to mind is the recurring proposal to create a single joint intelligence committee, rather than having two, to do intelligence oversight. The argument for a joint committee is usually based on security grounds, rather than improvement of the effectiveness of oversight, and to date has never gained the requisite support in Congress. Another alternative would be to create intelligence subcommittees of the Armed Services and/or Appropriations Committees, along the lines of the pre-Church committee model, although, again one would envision a loss of effectiveness. Given the costs, the complexity, and the pitfalls inherent in the conduct of intelligence activities today, one wonders whether Congress would ever be willing to return to a more dissipated form of oversight.

There is also the possibility of altering the current model by circumscribing the functions or access of the existing committees in some manner. An example would be to limit as a matter of law the notice to the committees of covert actions undertaken by the executive branch when the President so directed. This is, in fact, the central question posed with respect to S. 1721, the oversight bill which recently passed the Senate and

is pending in the House. Another example would be to preclude the committees from access to information concerning agent identities or information relating to the cooperation of third countries with U.S. intelligence agencies. As I mentioned earlier, the committees themselves are already sensitive to the concerns involved here, but have resisted absolute limitations of this sort. Congress itself has never considered imposing such limits on these two committees.

As I mentioned earlier, I do not see the inclination at present to change the existing oversight arrangements, either through organizational changes or by changes to the functions or access of the oversight committees. Unless the committees were to be found guilty of some egregious misconduct in the future which caused Congress to reassess its role, a return to the "good ole days of yesteryear" seems unlikely.

That still leaves us with the question we started with: Is the present system the one which best satisfies the overall interests of the United States?

Some would say not. They would argue that the current system of congressional oversight is too intrusive and penetrating, inevitably handicapping the President in carrying out intelligence activities. The greater the committees' knowledge, the greater is their ability to micromanage. The more they know, the more likely they are to place legislative restrictions on the intelligence activities concerned. Giving the committees access to sensitive information inevitably increases the possibility that it will be leaked, thereby discouraging individuals and governments from cooperating with us, or worse, jeopardizing the safety of those involved.

To some degree, all of these points have validity. Undoubtedly, the more people who know something, the greater the risk of disclosure. There are some who choose not to cooperate with U.S. intelligence because they fear their cooperation being disclosed. It is also true that the more Congress knows, the more likely it is that it will want to exert its influence. But, after all, ours is a government of checks and balances—it is not a monarchy. The Constitution itself "inevitably handicaps" the President in the execution of his responsibilities. It says that Congress will appropriate money for executive branch activities. It says that Congress has the sole power to declare war, to raise and maintain the armed forces, to regulate commerce between nations. It gives the Senate the power to advise and consent to treaties, and importantly, it vests the sole power to legislate in the Congress.

Each of these prerogatives of the legislative branch comes into play in the oversight of intelligence activities. From the point of view of Congress, if the executive branch is able to deny it information on intelligence

matters, then it is effectively denying it the ability to carry out its constitutional functions in this vital area. Congress has been willing to accommodate the executive branch to the extent it is able by attempting to minimize the perceived "downside" of its involvement in these sensitive matters through imposing tight security, by denying itself sensitive data unrelated to its needs, and by resisting the urge to micromanage. But Congress has been unwilling to accept the notion that the executive branch has the discretion to keep it in the dark in the name of either constitutional prerogative of the Chief Executive, or some higher concept of the public interest. Nor, in all fairness, has the executive branch historically asserted such a right as a matter of law (until the Iran-Contra Affair). This is what has the committees upset, directly motivating the recent effort to revise the intelligence oversight statute.

To be sure, the existing system entails certain costs and certain risks; it can hardly be described as a model of efficiency. However, the strength of a democracy lies not in its efficiency, but in ensuring appropriate checks and balances are applied to the exercise of governmental power. As Justice Brandeis so eloquently put it in his dissenting opinion in *Myers v. United States*:

> The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[2]

Oversight by the Intelligence Committees provides the sole opportunity for representatives elected by the people, other that the President, to participate in matters which are vital to the nation's security. History tells us intelligence capabilities can be abused, and history tells us they can result in serious damage to U.S. interests and credibility. The conduct of these activities is solely within the hands of the executive branch. Most have undergone extensive review internally, but some, often those which are the riskiest, may have received relatively little review, particularly from a policy standpoint. The involvement of Congress in the process does not mean there will never again be abuses or damage to U.S. interests, but it does provide greater assurance that such pitfalls will be avoided. Indeed, simply the fact that Congress is there, waiting in the wings, results in more thoughtful consideration of intelligence activities within the executive branch.

In conclusion, the current oversight framework has, in my view,

2. 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

produced many positive benefits for our form of democracy. Unfortunately, however, the specifics which underlie this judgment have not been, nor can they be, fully made public. The public's perception of the framework for oversight, therefore, is particularly important. It must provide the assurance, which cannot come from knowledge of actual results, that such oversight is effective and comprehensive.