CONGRESSIONAL OVERSIGHT: IMPEDING THE EXECUTIVE BRANCH AND ABUSING THE INDIVIDUAL

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After wearing hats in both the legislative and executive branches—as Chief Counsel for Senator Barry Goldwater for the Senate Select Committee on Intelligence for three years, and as Deputy Assistant Attorney General for the Criminal Division, Department of Justice, where we were subject to much oversight—but not quite as much as the intelligence agencies, at least not yet, I speak as an individual with personal exposure to the perspectives of both branches.

Let me begin by saying I do not see oversight as evil *per se*. First, because Congress has the power of the purse, it makes good policy sense that one who dispenses money should know where that money goes. As the parent of two college students and the holder of a purse, I make the same inquiries from time to time. Second, the executive branch, as does Congress, needs prodding to get certain tasks accomplished. Elections prod Congress, and Congress prods the executive branch. Allowing an interested other party to apply pressure responsibly works positively to reach the desired results.

But having said that, I want to express and discuss in depth my concern for what I perceive as increasing abuses of the oversight system. These abuses are seriously affecting two areas: (1) They are impeding the executive branch's constitutional requirement to carry out its functions, particularly in foreign affairs and national security; and (2) they are, most clearly, depriving individuals of certain protected liberties.

I. THE EXECUTIVE BRANCH

When members of Congress impose so many rules for the Executive to follow when carrying out foreign policy and national security functions that they make it difficult, if not impossible, for these functions to be performed, there is a grave problem. For instance, there has been much consternation over the proposed legislation that any covert action

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must be reported to the Congress within forty-eight hours after the President signs his approval or finding. The concern exists because there are situations when crucial governmental responsibilities cannot be satisfied if certain activities are revealed to Congress. Usually this problem occurs due to the insistence of a foreign country, even other democracies, which do not understand or appreciate the United States unusual openness in foreign operations. From time to time in particularly sensitive operations when they request our assistance or we request theirs, foreign countries require, as the price of cooperation, no notification be given to anyone outside the executive branch agencies necessary to the mission. One example drives the point home most decidedly. During the agonizing months that our Embassy personnel were being held hostage by the Iranians, five Americans were being hidden in the Canadian Ambassador's residence in Tehran. The Canadians carried out this brave feat on one condition: that knowledge of this protection be shared by only a very few persons; Congress was not one of the chosen few. This was not an idle penchant for secrecy by Canada, a strong democratic neighbor. It was, in fact, a well-founded concern that if the harboring of the Americans were revealed before the Canadians and Americans had devised and carried out an escape plan, they would all be subject to kidnapping and perhaps death at the hands of embarrassed Iranians. A nation's first duty is to protect the lives and safety of its citizens. If such legislation becomes law, must a future President decide between that duty and the possibility of impeachment because of "breaking the 48-hour" law?

There is, however, a related congressional practice that immobilizes the executive branch even more: obfuscation of legislation. Let me explain. Because Congress is composed of 535 voices, it has an understandably hard time speaking with one voice. That cacophonous trait is the nature of the beast living in a political arena where every member feels he or she is always up for reelection. It is not uncommon for Congress to make certain legislative clauses murky so that more members can vote for a bill and later go back home to the voters touting individual interpretations of his or her vote. As a result, the executive branch receives mixed signals and truly does not know where the fine line is drawn between acts that are required and acts that are prohibited. The executive branch gradually but ultimately becomes inert. Let me cite two examples of obfuscation: the first, one of the Boland amendments; the second, the definition, or lack thereof, of covert action.

Senator Barry Goldwater in the spring of 1983 succinctly discussed how Congress purposefully passed compromising language in the December 1982 Boland amendment:

Let's get straight what we are talking about. We are discussing whether our government is breaking the law—the Boland Amendment adopted last December.

. . .

Mr. President, let's look at the facts: Our Committee has met for three years on this matter starting back when Carter was President. Since I've been Chairman we have spent 25% of our time on the Intelligence Committee on this—and we never said "close down—you are violating the law." Now, all of a sudden, statements are made to the press by a few—thank God, just a few—of my colleagues—mostly in the other body, but some of them here—and they are suggesting there's a violation of the law.

To find out whether any law was broken we should decide what it specifically prohibits. This is not the clearest law in the way it was written. Our legal system demands that criminal laws tell people *exactly* what they cannot do. So if our government accuses anyone of a violation, it must have stated the prohibited act clearly. This amendment was a compromise. It is my understanding that it was meant to be flexible—to provide some latitude. That's the only reason it passed and we all know that. Maybe some of my colleagues are trying to take political advantage that flexibility was written into this amendment.

Mr. President, the legislative history of this law is very clear regarding two proposals which were more restrictive and which were voted down by the [House of Representatives].

It voted down the first Harkin proposal which would have denied funds for the purpose of carrying out military activities in or against Nicaragua.

Next the other body voted down a second Harkin proposal which would have denied funds to groups or individuals *known* by the U.S. to have the *intent* of overthrowing the Nicaraguan government. So a prohibition of funds based on the *intent* of the groups or persons receiving the funds was *clearly rejected.* The Senate acted along the same lines. We rejected the Senator from Connecticut's amendment which would have prohibited funds "in support of irregular military forces or paramilitary groups operating in Central America." In fact, we tabled the whole thing. After conference, we adopted the Boland Compromise.

In December of 1982, we gave our President a law which said *our Government* could not have the *intent* to overthrow—and now there are people criticizing the President for not interpreting it in a way which both Houses have overwhelmingly rejected.[1]

1. Senate Floor Speech by Barry Goldwater, 98th Congress, 1st Session, April 1983.

The second example, regarding the meaning of "covert action," also illustrates how Congress does not definitively spell out certain terms, but nevertheless holds the executive branch responsible for them. Congress requires specific information and procedures regarding "covert actions." But what is covert action? Is it really providing an election day ink stamp for El Salvador to determine whether someone voted, an act that has been interpreted to be covert action? Why should the President's knowledge of Canadians hiding Americans during the Iran hostage siege be an activity Congress must be informed about if, in the President's good faith view, the protection will be stopped if Congress is informed? If the CIA participates in any way with an overseas law enforcement capture of a terrorist, is a finding required that then forces two committees to be briefed on the plan? Ask individual members and you will get as many different answers. The term "covert action" has not been specifically defined and yet the executive branch is held responsible for knowing, or anticipating, its exact meaning.

Ironically, the situation can be even worse when Congress writes specific legislation and the executive branch follows the letter of that law. The rub comes when a member later chastises the executive branch for following only the specific letter of the law and not "the spirit." For example, the 1976 Mansfield amendment stated that U.S. law enforcement could not "engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts." Query, could Drug Enforcement Administration (DEA) agents merely be present during an arrest? There are good policy reasons for their being present, such as protecting U.S. money in a set-up buy. But should the administrator of DEA have to worry about being indicted if he asks his agents to do an act not specifically prohibited by law but which later could be interpreted as having violated the "spirit of the law," like the accusations hurled during the Iran-Contra hearings? In 1985, Congress attempted to correct the problem by permitting U.S. law enforcement to be "present during direct police action" if the Secretary of State and government of such country agrees and the agreement is "reported" to Congress before it takes effect. Not many countries wanted such an agreement revealed; besides, Congress did not specify how it should be "reported." To a chairman? To a committee or committees? To both Houses? Publicly? Secretly, in executive session? The questions are endless and not resolved. Another fix was needed.

On a third try in 1986, Congress used such incomprehensible language that, two years later, agencies are still trying to decide what it means. The only posture for the executive branch to take now is to write

its own interpretation of the "fix," notify Congress of this position, and move on.

After Irangate, the concern that the executive branch will become inert increases. The reason is that now the executive branch person who does not appropriately interpret these statutes can go to jail. Consider this: the legislative branch passes civil laws, like the Boland amendments, where the language is not crafted with the specific culpable intent required in criminal laws, and where the language also contains the murkiness and obfuscation permitting a broader political spectrum to vote for them. Next, a few members accuse the executive branch of violating these laws according to each member's personal interpretations of those laws and, accordingly, request the Attorney General to appoint an independent counsel to investigate the "wrongdoing." Who wants to stick his or her neck out to take creative initiative in the executive branch? More importantly, one does not want to do so if one is a person covered by the independent counsel law—because there can then be an outcry and a request to the Justice Department for an independent counsel investigation based on only a scintilla of evidence. The attorney's fees for that preliminary review alone can be more than executive branch employees earn in a single year.

As a participant in the planning of some initiatives where we took the offensive, like snatching the terrorist hijacker Fawaz Younis from the Mediterranean to stand trial in the United States, I can tell you there is great concern about being a decisionmaker in these high visibility projects. What if something goes wrong? What if one lower echelon person inadvertently, negligently, or even purposely violates a noncriminal law—is the policy maker who directed the operation going to be congressionally strung up? If you are a key planner or a participant in a well thought-out program which nevertheless goes awry, you may find your rear and career on the line and in front of a congressional committee and the television kleig lights. I see fewer and fewer government personnel willing to be creative because it is far safer to do nothing. An individual will not get criticized or fired for doing nothing; the entire executive branch or a particular agency may be criticized, but not a specific person and not by name.

II. INDIVIDUAL RIGHTS

A mounting concern has developed in the last decade about what happens to individual rights during congressional oversight. When I began working for the Senate Select Committee on Intelligence, I had been a federal prosecutor for five years, guided by federal and constitutional concerns to protect certain rights of criminal defendants. I can remember

my first congressional investigation when some people wanted an individual's tax returns for the last two decades—"just to see what's there." Fortunately, prudent judgment prevailed and the request was limited substantially.

I was testifying recently when a Member specifically named a Department of Defense employee and declared on a public record such named person should be indicted. The Member was ignorant of the fact that this individual had only been following contracting procedures approved by Congress, but which had only recently fallen into disrepute.

During Irangate, I personally experienced congressional intrusiveness when because of my one meeting with Ollie North, unrelated to anything about Iran-Contra, the committee demanded my appointment calendar and all my phone call logs for three years. There was no relevancy to any of this. A federal judge would have thrown out this request in two minutes on a claim of relevancy. But Congress has no rules whatsoever for putting on the brakes.

Congress has no rules for providing basic fairness to individuals during any of its hearings. These matters are left to the individual chairs of committees as to what they want to do. Some chairs provide fairness; others do not. So while we observed members gradually retreat from their initial hostility to Ollie North because of public reaction, for those who appear often, there is no such pressure for retreat. Brendan Sullivan was painfully aware of this fact when he shot back with "I'm not a potted plant," a declaration based on his knowledge that too often that is all Congress allows attorneys to be.

It has become particularly chilling for prosecutors. In the last three to four years almost every time we have made a decision not to prosecute a defense contractor and/or an employee of the defense contractor—we have all been hauled up to the Hill to answer for declining to prosecute. It is particularly troublesome that Congress, absent any allegation of wrongdoing, investigates the prosecutor about a decision whether to prosecute either an individual or a corporation.

Congress should not be pressuring a prosecutor to indict anybody. This pressure is bound to affect some who are concerned about declining to charge an individual, fearful that their whole legal career will be ruined by innuendo that there was something fishy about a decision not to prosecute.

Who among us wants a political body to decide whether we are charged with a crime? Today it may be defense contractors; tomorrow it could be insurance companies, movie moguls or whoever certain Members decide is the next group of bad guys. This practice by Congress

should be stopped immediately, otherwise in every potentially high-publicity case, we will find prosecutors feeling it easier to send a case to the grand jury rather than to make the call to decline. Of course, if the putative defendant is a member of Congress, he or she will have been hoisted on his or her own petard.

III. CONCLUSION

One should not criticize without offering suggestions for improvement. I make the following:

1. For purposes of congressional intelligence oversight, both Intelligence Committees should attempt to be as bipartisan as possible. A good start would be for the House to follow the Senate's already established procedure to make the number of members on the committee nearly equal. In the Senate, the party in control has only one more member than the minority party no matter what the overall party composition of the Senate. The House Intelligence Committee makes appointments according to the ratio of the entire body's membership, thereby allowing one party to be on the short end of an 11-6 ratio. This structure does not promote a framework for consensus in oversight, but rather sets up a partisan approach to very sensitive issues. Better yet, Congress should set up one joint committee with an equal number from each political party.

2. When obfuscated legislation is passed, the executive branch must learn to "just say no" and establish its base line interpretation beyond which it will not acquiesce. Now, as in the past, the executive branch has been reluctant to do so because of the power of the purse, and also, as in the days of Boland, because it thought the process was complete by passing compromise words which did not alter the members' different understandings or interpretations of the legislation. Now that criminal sanctions are possibilities, the executive branch must take a clear stand on its interpretation of a murky statute early in the process and announce it publicly.

3. Congress frequently breaks its own laws and is never subject to jail. For example, Congress never meets its own imposed deadlines set out in the Budget Act. Therefore, if Congress wants to apply criminal sanctions to the executive branch for not following the laws as provided by Congress, the procedure should require passing criminal laws that include specific language and specific culpable intent provisions.

4. Congress as an institution must develop certain basic rules setting out protection for individuals who appear as witnesses, such as having effective assistance of counsel of their choice and the right to judicially recognized privileges, such as the fifth

> amendment privilege against self-incrimination. The American Bar Association House of Delegates at the recent annual convention in Toronto unanimously approved a resolution calling for such revisions of the congressional rules. Individuals' rights and reputations cannot be cast aside in the oversight process.
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> 5. Absent an allegation of wrongdoing by the prosecutor, Congress should not question a prosecutor's decision to prosecute or not to prosecute.
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> 6. Most important, there must be a process, short of criminal proceedings, to challenge legislation that prohibits or requires the executive branch to act in a manner which the executive branch considers unconstitutional. In other words, the executive branch should not be caught in the conundrum of committing a criminal act or violating the Constitution.

The essence of Congress' role in our governmental system is to consider legislation. I hasten to point out that members who vote for legislation later declared unconstitutional do not go to jail for having voted for an unconstitutional bill. All members are protected from criminal liability while performing legislative acts by the Speech or Debate clause.

The executive branch likewise should be protected from criminal sanctions while carrying out its fundamental duties. Except for a criminal prosecution, there is presently no legal proceeding for challenging legislation concerning executive action considered unconstitutional by the President. A member of the executive branch should not have to face jail to bring that issue before the courts.