

Congressional Oversight of Homeland Security

By Thomas M. Susman¹

If we were to take a page from the Department of Homeland Security's Threat Advisory System, with green being exemplary and red counterproductive, the consensus would likely be that congressional oversight of homeland security rates an Orange: it is at the same time both duplicative and inadequate; in a word, a failure.

This essay addresses three points: First, I provide some background on congressional oversight generally, distinguish oversight from investigation, and suggest a set of criteria against which effective oversight should be measured. Second, I describe what is going on today in the area of oversight of Homeland Security, along with some characterizations by others of the process and committee activities. And third, I take a stab at looking to the future: I describe what has been proposed, what is needed, and whether these objectives might be attained.

Importance of Oversight

Congressional oversight of the executive branch is integral to our system of government. It is an essential element of the basic checks and balances that help maintain fairness, honesty, openness, and balance in all branches of government. One of the best arguments for vigilant oversight from the legislative branch was advanced by John Stuart Mill, who wrote in 1875, addressing parliamentary oversight, that “the proper office of a representative assembly is to watch and control the government; to throw the

light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable; to censor them if found condemnable.” CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 42 (1875). Woodrow Wilson a decade later echoed those views when he wrote that in a system based on separation of powers, “quite as important as legislation is vigilant oversight of administration.” CONGRESSIONAL GOVERNMENT 195 (1885).

Basis for and History of Modern Congressional Oversight

Oversight is inherent in Congress' powers to carry out its legislative activities. Courts have recognized the power of Congress to investigate in furtherance of “legislative purpose” and have broadly interpreted what falls within that definition, showing a readiness to imply valid legislative purpose in the face of challenge. Grabow, CONGRESSIONAL INVESTIGATIONS § 4.1[a].

Modern oversight began with the 1946 Legislative Reorganization Act, authorizing permanent, nonpartisan professional staff for all committees, consolidating overlapping and conflicting committee jurisdiction, and reducing numbers of committees. The law directed that committees shall—

Exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which in within the jurisdiction of such committee . . .

The Act created roughly parallel committees in each of the chambers, with a goal of having joint meetings of corresponding committees whenever possible to reduce duplication of efforts. See 2 Byrd, THE SENATE 253 et seq. (1991).

Investigation Versus Oversight

Congress may carry out *investigations* to advance its oversight function, but they have other objectives as well. One is to serve personal or partisan interests, such as attacks on an executive of a different party or advancement of the re-election goals of the Member. A second is simply to inform the public. The final two are more central to the oversight function: one, to inform and advance legislative objectives—that is, to obtain information to enable Congress to develop legislation. And, two, to improve the administration of programs by the agencies themselves. In many ways, this last one is the key feature that distinguishes oversight from investigation.

Before we can confidently make judgments about the quality of congressional oversight, we need to identify what constitutes effective oversight. *Effective oversight* has a number of characteristics:

1. It is directed at Executive agencies, although it can target private actors to assess effectiveness, honesty, propriety, etc. of executive action.
2. It is routinely carried out, with continuity and follow-through, but is not duplicative or unreasonably burdensome or trivial.
3. It is pursued professionally and fairly.
4. It assists agencies in shaping priorities, policies, and procedures.
5. It uncovers inefficiency and waste, as well as corruption.
6. It lays the foundation for appropriate congressional direction through legislation

You will notice that I say “pursued professionally and fairly”—this does not suggest that effective oversight must be *nonpartisan*. Unquestionably, many of the notable oversight hearings during the past 4 decades were carried out by a congressional committee overseeing an executive of the opposite party. John Moss, John

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Dingell, Gaylord Nelson, and Frank Church were hardly nonpartisan, but they conducted classic oversight hearings that were important and effective.

Based on the six characteristics of effective oversight listed above, oversight of Homeland Security so far would not receive a passing grade.

Organization of Congressional Oversight of Homeland Security

Today, responsibility and oversight of the Department of Homeland Security in Congress is fragmented and incoherent. In the Senate, the Committee on Governmental Affairs provides nominal oversight; in the House, there is a temporary Select Committee.

In the Senate, the Governmental Affairs Committee retains jurisdiction over everything from the District of Columbia to the Postal Service. Focus and continuity has not been its strength over the past two decades. And it has no plans to develop reauthorization legislation for DHS.

The House Select Committee has no real jurisdictional authority. On that committee sit 9 chairmen of other panels with jurisdiction, several of whom have expressed the view that the committee should not exist. And, in fact, it is slated to disappear at the end of this session. Little wonder, according to some commentators, DHS treats the committee “with indifference or contempt.” Ornstein, Roll Call (July 28, 2004). While the House Committee has developed a reauthorization bill, it does not even mention important agencies like the Coast Guard and Transportation Security Administration—a deliberate omission, made to avoid turf battles with other committees. Chairman Chris Cox may get an “E” for effort, but not for effectiveness so far.

In reality, jurisdiction in both chambers remains allocated to dozens of committees and subcommittees. From January to June 2004, DHS officials testified before 126 hearings, or about 1½ per day of legislative session, not including briefings or other meetings. Secretary Ridge estimated that he has been called to appear before 80 different committees and subcommittees on the Hill; appar-

ently he missed a few, since 88 have been said to have oversight over foreign intelligence and homeland security. Epstein, San Francisco Chronicle (July 25, 2004). (Although the number 88 was advanced by the Administration, it clearly overstates things, since most committees have limited jurisdiction, bicameralism automatically doubles any number, there have always been dual roles for authorizing and appropriations committees, and subcommittees are less a sign of fragmentation than specialization. Nonetheless, the number is far more than needed or desirable.)

A couple of examples will illustrate the problem. For one example: The Faster and Smarter Funding for First Responders Act (H.R. 3266) was introduced in the House Select Committee to bring discipline and focus to state and local HS grants. But both Judiciary and Transportation Committees offered competing bills, leaving the House Rules Committee to decide which bill and which amendments should be considered by the full House. Carafano, Heritage Foundation Web Memo # 528 (July 7, 2004). Another example comes from Congressman Jim Turner, Ranking Democrat on the House Committee: While DHS’s “one face at the border” initiative attempts to merge Customs and INS functions at the point of entry, the Department faces 4 different congressional committees asserting jurisdiction over this program.

Despite the large numbers of appearances and committees with jurisdiction, oversight of intelligence and homeland security has been characterized as “feckless and episodic.” Priest, Washington Post (May 27, 2004). And the 9/11 Commission Report (p.420) found that the congressional committees, as a general proposition, “lack the power, influence, and sustained capability to meet” the challenge.

Current Oversight Assessed

In an exchange of letters with the Chairman of the House Government Reform Committee chairman Tom Davis, Ranking Democrat Henry Waxman highlighted what he characterized as a double standard that applies to oversight

where the executive branch and Congress are under the same political party. Waxman called for a more balanced approach, observing: “Excessive oversight distracts and diminishes the executive branch. But absence of oversight invites corruption and mistakes. The Founders correctly perceived that concentration of power leads to abuse of power if unchecked.” Waxman, Washington Post at A19 (July 6, 2004).

It can be accurately observed that Mr. Waxman is a fierce partisan who may have more than a small amount of political motivation for urging greater oversight of the Bush administration. Nonetheless, the final report of the 9/11 Commission stands as an apolitical document that reaffirms Waxman’s assertions. The Commission’s conclusion:

Of all our recommendations, strengthening congressional oversight may be among the most difficult and important. So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need. 9/11 Report at 419.

A Brookings Institution Report, (Daalder et al, July 2002), agreed that many of the promised benefits of the executive branch reorganization on homeland security are likely to be lost unless Congress revamps its oversight structure. As that Report observes, Congress “can hold agencies accountable and reflect public concerns about priorities and trade-offs, both for resources and for sensitive issues such as the appropriate balance between security and civil liberties.” Thus, the consequences of failed congressional oversight of homeland security are likely to include not only poorer performance by the agency, increased opportunities for waste, priorities that may be less likely to have public imprimatur, and conflicting or at best uncoordinated signals from Congress; they also will include the tilt of the balance of institutional power toward the White House.

What is Next?

There is no dearth of recommendations to increase congressional oversight of homeland security. We need to keep in

mind the observation made by the Brookings Report that a formal structure for oversight is least necessary when the subject is in the headlines. “The challenge is to create institutional arrangements that will assume sustained responsibility even after the issue area slips from the front pages . . .”

The 9/11 Commission had two proposals for oversight of intelligence—The creation of a joint committee or creating House and Senate combined committee with authorizing and appropriating powers. That proposal has already drawn a great deal of criticism on Capitol Hill. As to homeland security, the Commission proposes “a single, principal point of oversight and review for homeland security,” leaving it up to Congress to select which committee “should have jurisdiction over the Department and its duties,” so long as it is a single, permanent standing committee with a nonpartisan staff. The House Temporary Committee’s chairman Chris Cox believes that creation of a permanent House Committee on Homeland Security is indispensable; others have urged creation of a comparable permanent standing committee in the Senate. The benefits of eliminating duplication and focusing expertise are obvious. 88 committees and subcommittees with some jurisdiction over DHS are just too many for any one to be expected to do a competent job.

Some overlap, and even competition among committees, can be valuable, however. First, the tendency for hostages to identify with their captors illustrates the problem of too much long-term coziness between committee and agency; remember, the transportation deregulation movement was brought about in the ’70s despite, not because of, the

Commerce Committees. Second, it is always useful to have a second voice on issues like civil liberties, freedom of information, privacy, and even administrative procedure from a committee with special expertise in these areas. Hermetically sealing off oversight may be worse than uncontrolled overlap.

Some proposals call for continuing a Select Committee composed of committee chairs, similar to the structure of the current Select Committee in the House. This is not a good idea. We cannot expect different oversight results in the future from continuing the same structure we have had in the past. Another proposal is to create focused appropriations subcommittees while leaving existing authorization procedures in place. I view that as another bad idea; it simply does not solve the problems of overlap and duplication of the substantive committees and fails to recognize the narrower focus of appropriators.

Another idea is to create more traditional Select Committees without legislative authority over the underlying programs. And it has even been suggested that jurisdiction over DHS be vested in a Subcommittee of the House Reform Committee. Neither proposal rises to the challenge our nation faces today. The Brookings Report observes that the “ideal structure for congressional oversight” involves creation of both new appropriations subcommittees and new authorizing committees. Needless to say, key congressional leaders—not coincidentally committee chairs—have voiced opposition to these suggestions.

In the early 1970s, 83 congressional committees and subcommittees had jurisdiction over some aspects of energy policies and programs. Consolidation

occurred with a congressional reorganization—the last one we have seen. Can Congress rise to the challenge of reorganizing again now, with terrorism surely posing a greater threat today to our nation than the energy crisis of the ’70s?

Explanation and Outlook

One final question merits discussion: Why has congressional oversight of homeland security been so lacking? The absence of effective oversight in general has been attributed to a sharp decline in “institutional patriotism” in Congress—the belief that the independent role and function of one’s institution transcended individual ideological or partisan interests. As Norman Ornstein puts it:

Twenty years ago, you could find tons of Members in both houses who cared about their own institution. Now, care about or identification with the institution is a waning quality. Most sadly, that is true for leaders as much as followers, and especially for those in the majority. . . . Even where there is committee oversight in these areas, there is no will on the part of the majority leadership to use the findings to promote reform or change—especially if the findings are critical of the administration. Roll Call (Jan. 28, 2004).

Not until Members of Congress see their own legislative role as transcending their partisan loyalty or personal ambitions is there likely to be serious change. Unfortunately, this may not occur without another catastrophe—one for which Congress will have to share any blame. If Congress does not rise to the occasion, our nation, as well as the Department of Homeland Security, will be the worse for it. ○

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