

LEGISLATIVE OVERSIGHT OF THE FBI IN THE UNITED STATES

(CONTROL Y SUPERVISION LEGISLATIVA DEL FBI EN ESTADOS UNIDOS)

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This paper describes the system of legislative control and supervision as it is practiced in the United States, focusing on the Federal Bureau of Investigation (FBI). I do not pretend that the U.S. system is perfect. In fact, there are several respects in which it should be improved. Nonetheless, I hope that other nations can learn from the U.S. experience.

I. Overview of Control and Supervision

The legislature cannot be the only source of control and supervision of police and security services. A democratic society should also establish and strengthen other elements of control: Government powers should be limited and human rights should be protected by the Constitution. In particular, the rights of association and freedom of expression should be protected; these should include the right to engage in peaceful opposition to government policies and to work peacefully for political and economic change. The functions and authorities of police and security agencies should be specified in legislation adopted publicly by the people's representatives. Crimes should be narrowly defined, and punishments should be imposed only under standards of due process. Police agencies and security services should be subject to control and oversight by independent officials within the Executive Branch and by an independent judiciary committed to the protection of human rights. Citizens should have access to information about what their government is doing. Government agencies and officials

should be accountable to individuals harmed by their misconduct. The media and non-governmental organizations should be free to monitor and expose governmental abuse.

The system we have in the United States to control the FBI incorporates all these elements. Our Constitution's Bill of Rights protects the freedoms of association and expression, prohibits unreasonable searches and seizures (*registros y capturas*), and guarantees due process (*debido proceso*) in criminal proceedings. Freedom of the press is especially strong in our system. Statutes define the criminal jurisdiction of the FBI. Other statutes limit the use of investigative methods that infringe on privacy. In particular, legislation requires the approval of both a senior official of the Department of Justice and of a judge before the FBI can use a wiretap or a hidden microphone. There are offices of control within the Executive Branch, including an Inspector General within the Justice Department who can investigate wrongdoing by the FBI, and an Office of Intelligence Policy and Review which must approve the opening of international terrorism investigations. Guidelines promulgated by the Attorney General limit certain investigative methods, such as the use of informants and undercover operations, and set standards for the initiation of investigations. The Freedom of Information Act, with some limits, gives individuals a right of access to government records. The courts, with limits, can issue injunctions against the FBI and can award damages against the agency or individual officers for violations of constitutional rights.

Even in the U.S., none of these controls is fully developed. Recent problems with the validity of evidence examinations by the FBI laboratory and continuing questions about the FBI's investigations of Arabs and Muslims in the U.S. demonstrate that the FBI still operates without sufficient control. Nevertheless, an effective system of control and supervision can be constructed from the elements summarized above.

One of the most important roles of the control and supervision committees in the legislature is to ensure that the laws of the nation give the other branches of government and civil society effective authority to exercise control and supervision of the security services: laws such as a Freedom of Information Act that allows NGOs and individual citizens to obtain the information necessary to monitor the activities of the police and internal security services, including a provision so that the judiciary can compel the government to disclose files; laws giving the judiciary control over searches and seizures, wiretapping, and other intrusive techniques, including very clear standards for using these techniques; and laws giving the judiciary authority to receive complaints from citizens who feel their rights have been violated and giving the judiciary authority to investigate such cases and to issue injunctions and award monetary damages when they find abuse. The legislative oversight committees should examine how these laws work in reality, and strengthen them if necessary.

II. Legislative Control and Supervision -- General Observations

In the U.S., the legislative control and supervision function does not reside only in one committee. In each chamber, there are three committees that have some responsibility for FBI oversight. There is some rivalry among these committees, but that can be a good thing.

(1) The Judiciary Committees in each chamber write the federal criminal statutes. They define the rules for intrusive techniques such as wiretapping. They could change the structure of the FBI or the Justice Department. They could also participate in setting the budget of the FBI, although they have not exercised that power.

(2) The Appropriations Committees set the budget for the FBI, and can use the power of the purse to control what the FBI does.

(3) The Intelligence Committees oversee the foreign counterintelligence activities of the FBI. These are the activities of the FBI within the United States directed against the intelligence activities of foreign governments and international terrorist organizations.

Under the U.S. system, there are three key principles of legislative control and supervision: (1) The Congressional committees responsible for supervision are entitled to complete access to information from the FBI, with only very narrow exceptions in practice. (2) The committees, and individual members of the committees, have opportunities to expose illegal or inappropriate behavior by the agencies. (3) The legislature defines the missions and authorities of the FBI by statute and by control over its budget. The FBI cannot operate except pursuant to a Congressional grant of authority and funding.

While the roots of legislative control are in the Constitution, the practice as applied to the FBI began less than 30 years ago. Before 1971, the Senate rarely held hearings on the FBI budget. The House appropriations committee routinely approved the FBI without change, except on some occasions when it provided more funds than had been requested. The first public Congressional investigation of FBI activities began in 1975, when the Senate established the Church Committee. That same year, the House Judiciary Committee ordered an audit of the FBI's domestic intelligence-gathering activity by the General Accounting Office. So the system of legislative control and supervision of the FBI is relatively new.

III. Congressional Access to Information from the Executive Branch

Access to information is the lifeblood of oversight. The oversight committees receive information through a variety of means, including statutes that require reporting, regular appearances of FBI officials at both open and closed meetings of the

committees, and access when necessary to agency files.

Congress's power of oversight and investigation is implied from the Constitution. It stems from the authority to "make all laws" and from the power of the purse. Since the earliest days of the republic, it has been assumed that the legislative branch has a broad power of inquiry related to its legislative function. There is no statute to supplement these Constitutional principles, requiring the FBI to report to Congress on all its activities. There is a statute, the Intelligence Oversight Act, expressly requiring the CIA and the other foreign intelligence agencies to report to Congress. Some of the provisions of that law may be useful models for drafting legislation for domestic security and police agencies. The Intelligence Oversight Act requires the President to keep the Congressional Intelligence Committees "fully and currently informed" of the foreign intelligence activities of the United States, including any significant anticipated intelligence activity, any significant intelligence failure, and any illegal intelligence activity.

There is a statutory requirement that the federal judiciary issue publicly an annual report on the number of wiretaps conducted in criminal cases by the FBI and other federal, state and local law enforcement agencies. This report does not name the targets of wiretaps, but states for each wiretap detailed information including the name of the approving judge, the name of the prosecutor, the type of offense being investigated, the duration of the intercept, the number of persons whose conversations were intercepted, the cost of the intercept, and the numbers of arrests and convictions that resulted from the investigation.

There is also a section in the law governing electronic surveillance in foreign intelligence, counterintelligence and international terrorism cases that requires the Attorney General to submit a report twice a year to the Intelligence Committees

concerning all national security cases in which electronic surveillance is utilized. The report is not public. It describes each subject of surveillance in general terms, and normally does not contain the names of subjects, although in some cases the committees may ask for names or other details.

Other legislation requires the FBI to submit to Congress annual reports on the number of undercover operations (these reports do not name the targets of the operations) and audit reports on closed undercover operations.

Officials of the FBI appear regularly to testify in public before the oversight committees and answer questions. In 1995, for example, the Director of the FBI testified before Congressional committees on approximately 20 separate occasions. Other senior officials of the FBI testified at approximately 20 other hearings. The Director and senior officials also come to Congress frequently for what are called "briefings," which are private meetings with members of the committees or the staff, focusing on specific subjects of immediate concern.

Oversight of police and security agencies should be conducted in public to the maximum extent possible. Hearings by the Judiciary Committees in the House and Senate are almost always open to the public. The Intelligence Committees, which conduct oversight of the counterintelligence activities of the FBI, hold most of their hearings in closed session, but public hearings are more appropriate for oversight of police and internal security activities. Both the Judiciary Committees and the Intelligence Committees hold hearings in public when they are considering draft legislation.

IV. Investigations -- Discovering and Disclosing Illegal or Improper Behavior

The oversight committees in Congress conduct investigations in response to a

variety of circumstances: allegations in the news media; unofficial communications by employees or former employees of the Executive Branch; complaints by non-governmental organizations or private citizens; matters reported to them through official channels; or matters that Senators or Congressmen raise because of their own interest or because of complaints from constituents. The most frequent source of congressional investigations is media reporting, illustrating the vital role of a free media in the oversight process.

Investigations by the oversight committees normally begin with investigation by the committee staff members, who are usually lawyers with expertise in human rights, law enforcement or financial accounting. The staff are authorized to receive the most sensitive information. They conduct interviews of agency officials, review documents, and visit law enforcement agency facilities.

Staff inquiry may be followed by testimony from agency officials, presented to the Senators or Congressmen themselves in public hearings. For example, a Senate inquiry in 1995 into a shooting incident involving the FBI and a right-wing suspect resulted in 14 days of hearings, with testimony from 62 witnesses, including the Director of the FBI and numerous FBI agents and supervisors.

The power to investigate carries the power to compel testimony. Congress can issue subpoenas to Executive Branch officials. Congress also has the power of contempt, so it can seek criminal charges against Executive Branch officials who refuse to testify. Almost always, the Congress and the Executive Branch negotiate and compromise about how much information will be provided to the oversight committees.

The committees of course may receive information that should not be disclosed publicly. They are careful not to harm ongoing investigations or legitimate operations.

Usually, there is a way to talk publicly about a problem without harming legitimate operations. For example, the committee members can state publicly that have "concerns" about agency practices, such as concerns about political spying or improper wiretapping, without disclosing secret information., and thereby put pressure on the agencies to justify their conduct publicly. If the Executive Branch refuses to respond in public, the Congress has the power to release confidential or classified information. In practice, the committees and the Executive Branch have almost always reached compromises on how much information to disclose publicly.

One advantage of holding frequent hearings in public is that members of the committee have regular opportunities to ask law enforcement officials questions like, "Do you believe you have the authority to monitor radical or ethnic groups that are not engaged in violent conduct?" These questions focus on policy. They do not ask for details of actual investigations.

What happens when an individual legislator who is a member of an oversight committee learns through secret information that a government agency is engaged in illegal or improper behavior? What avenues does the individual legislator have to stop the behavior? First, of course, the legislator can go to his colleagues on the committee and urge them to join with him in opposing the action. The Member may bring pressure on the committee by making a speech to the chamber in which he announces publicly, in general terms, what his concerns are, stating that he believes there are abuses, without providing the details. The Member can ask questions about the issue every time the agency head appears before the committee and can discuss the problem every time a budgetary or legislative matter arises involving the agency, thereby keeping the issue in the public eye and trying to generate broader public concern. The Member can also urge the media to investigate, again describing the issue in general

terms.

If these efforts fail, and the Member of Congress feels that he must go forward alone, in the United States he can disclose privileged or secret information on the floor of the House or Senate. Members of the U.S. Congress have immunity from prosecution for the statements they make in the chamber of either House. Since there is a verbatim transcript of the proceedings, and since reporters attend each session and the sessions are televised live, saying something in the chamber results in its public dissemination. A Member of Congress who takes the extraordinary step of disclosing secret information cannot be criminally prosecuted, but he may face other severe consequences. For one, his colleagues may remove him from the oversight committee, thereby ending his access to secret information. At the extreme, the Member could be expelled from the body (that is, turned out of office), but that requires a two-thirds vote of the chamber.

-- **Details of Pending Investigations or On-going Intelligence Operations**

The oversight committees do not exercise daily control over individual criminal investigations or intelligence gathering operations. They do not approve or disapprove individual investigations. Indeed, the committees normally do not receive information about pending criminal investigations, or the identities of informants or details concerning intelligence collection operations. There are several reasons for this practice of not trying to control active cases: First, the committees are worried that information shared with them might be released by a member to the media, even accidentally, hurting the investigation. Second, close supervision of pending cases could degenerate into efforts by the committees to start or stop investigations for their own political reasons. Proper legislative oversight does not mean substituting the political agenda of the legislature for the political agenda of the Executive Branch. Rather, the objective of

oversight should be to protect the operations of the FBI from any political influence, from either Congress or the President. Third, there is a concern for individual rights. The existence of an investigation is treated as confidential not only to protect the integrity of the investigation but also to protect the subject of the investigation; a person's reputation can be gravely damaged by the public disclosure of the fact that a person is under investigation. Finally, the oversight committee members believe they can fully address any policy questions after an FBI investigation is closed.

However, the oversight committees may inquire into pending cases if there is reason to believe that the government is conducting investigations for political purposes, or is engaging in favoritism, or is using improper techniques. The Executive Branch will be reluctant to describe pending investigations in detail, but especially if the targets of investigations are willing to publicly state that they are being surveilled and harassed, the committees can press the agency to justify its actions. After an investigation is closed, there are no practical constraints on the committee's inquiry.

-- **Audits**

The Congress has created the General Accounting Office, to assist Congress in ensuring that public funds are properly spent by the executive agencies. The GAO is an arm of Congress. It also evaluates how well an agency is performing -- whether the achievements it claims are genuine, whether a program is effective, and whether the program is adequately controlled by agency management. The GAO has performed numerous audits of FBI programs. For many years, the GAO actually had an office inside FBI headquarters.

V. Legislation -- Control over Missions and Authorities

Congress defines by statute the missions and authorities (powers) of the security

services. Even though there is no general statutory charter for the FBI, the role of the FBI is defined largely by the federal criminal code. The FBI cannot investigate unless there is reason to believe that the subject is involved in criminal conduct (or is the agent of a foreign power). By passing a new criminal statute, the Congress expands the mission of the FBI. (The counterintelligence mission of the FBI is not defined by statute, but rather by presidential order and guidelines issued by the Attorney General.) The FBI has no authority to investigate non-violent efforts to bring about political or economic change domestically.

Also, Congress has set the standards for use of certain intrusive investigative practices. Most notably, Congress has passed legislation defining the standards for use of electronic surveillance. These statutes require the FBI to obtain the approval of a judge to conduct electronic surveillance, they define the level of evidence that the FBI must bring forth to obtain approval, and they specify how the wiretap must be conducted. Congress could legislate standards on other techniques, such as the use of informants or the conduct of undercover operations, but it has examined the administrative guidelines issued by the Attorney General and concluded that they are adequate.

VI. Budgetary Control -- El Poder Del Bosillo

Control over the budget of the FBI is one of the most important forms of legislative control in the United States. The Congress has the authority to appropriate funds for the activities of the Executive Branch, including the FBI. The Constitution provides that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law." Each year, the Appropriations Committees of the House and Senate review the accomplishments and resource needs of the FBI. Congress enacts

yearly funding measures, in which it can define the exact purposes for which money may be spent and may prohibit expenditures for certain purposes.

Every year, typically in February or March, the President submits his budget request to Congress. (The fiscal year starts on October 1). The President's budget requests are very detailed. Amounts are specified for each investigative program, such as organized crime, public corruption, and drugs, and for each support program, such as training, laboratory, and record-keeping. The budget justification includes a review of current activities and a description of planned changes. The budget for the FBI is public, although the specific funding and staffing level for counterintelligence is hidden by combining it with criminal investigative matters. (The budget for the CIA is not public, but again this degree of secrecy is not appropriate for internal security agencies.)

The Appropriations Committees review the administration request through public hearings, confidential staff investigations and briefings, and by submitting questions to the FBI for written response. Based on this review, the Appropriations Committees can rewrite the budget, to redefine the priorities of the FBI and other agencies. Congress can block the agencies from certain activities by denying funding for those activities, or Congress can impose conditions and limitations on the expenditure of funds.

VII. Confirmation of Senior Officials and Impeachment

A very important Congressional power, held only by the Senate, is the power of confirmation. This power, which is specified in the Constitution, requires a majority vote of the Senate to confirm the president's choice for top positions, including the Director of the FBI. In practice, the Senate rarely rejects a President's choice, but the Senate routinely uses the confirmation power to extract information from the FBI and

promises from the nominee to develop a certain policy. A Senator can refuse to vote, and can block the full Senate from voting on a nomination until certain questions are answered. The oversight committees use the confirmation process to obtain promises from the nominees that they will fully cooperate with the oversight process if confirmed. The Congress also has the power of impeachment, a process by which Congress can remove from office executive (and judicial) officers.

VII. Examples of Congressional Oversight

The House Judiciary Committee has announced that its oversight agenda for the FBI in 1997 and 1998 will examine expansion of the FBI's offices overseas, its new organizational structures to enforce anti-terrorism laws, and the need for additional wiretap authority.

In 1995 and 1996, the House Judiciary Committee held at least 17 days of public hearings on the FBI. These included 10 days of hearings on the disastrous stand-off in 1993 between the FBI and a group of religious zealots who were suspected of possessing illegal weapons. This incident ended tragically when the FBI used tear gas against the compound and the compound caught on fire and burned to the ground, killing over 80 people inside, including several children. The incident raised serious questions about the FBI's ability to resolve stand-offs of this nature. These hearings were devalued by partisan bickering, but perhaps the FBI learned its lesson, for in 1996 the FBI used patience and negotiation to successfully resolve a similar stand-off in Montana, convincing all the suspects to surrender without the use of force. The Judiciary Committee in 1995 and 1996 also held 5 days of hearings on terrorism and several days of hearing on anti-narcotics programs.

One of the more noteworthy examples of oversight occurred in 1995 before the

Senate Judiciary Committee, which examined with great seriousness and without partisanship a 1992 confrontation in Idaho that left two civilians and one law enforcement officer dead. Note that there was a three year delay between the incident and the Congressional hearings. During that time, the suspects were tried in federal court and found not guilty of most of the charges, including the charge of murdering the federal officer. This trial was closely followed in the media, and the acquittal showed that the jury did not accept the government's version of the case. The media followed the trial closely. The Department of Justice created a task force to investigate the FBI's conduct. The task force report was not published, but the FBI Director imposed minor discipline on 12 FBI employees. However, one of the agents involved was dissatisfied with the outcome and he complained to the Department of Justice internal affairs office. This led to further investigation, the discovery that a senior FBI official had destroyed a key document, and criminal investigations, including a criminal investigation against the FBI agent who shot and killed one of the individuals. Only after these developments were reported in the press, did the Committee begin its investigation. Once it became involved, however, the Committee did a very complete job. As I noted above, it conducted 14 days of hearings with 62 witnesses. At the end of its inquiry, the Committee issued a report with many recommendations, which it has continued to press the FBI to adopt. The Committee did not draft any legislation, however.

VIII. Conclusion

The constant question facing the oversight committees is whether they will be advocates for the agencies they oversee or watchdogs. They try to be both. They are not always effective in preventing abuses, but they almost always are aggressive in

investigating scandals after they come to light. If citizens are concerned and alert and if journalists are free to report of government abuse, it is usually impossible for the intelligence or law enforcement agencies to cover-up wrongdoing forever. Once part of the story emerges, the oversight committees almost always obtain and publicize the full story.

In the United States, legislative oversight operates within a broader context of limits on governmental power and protection of human rights. Legislative oversight is not a substitute for other elements of democratic governance; oversight works effectively, we believe, only in combination with other forms of accountability and control. Vital roles are played by a free media committed to investigating and reporting abuses of power, watchdog non-governmental organizations devoted to human rights, and an independent judiciary with the power to serve as a check on legislative and executive actions.

Protecting civil liberties against the claims of the government is, of course, a never-ending task. The mechanisms of accountability and control are not self-enforcing. To the extent that the system works well, it is in large part because responsibility for accountability and control is lodged in all branches of the government and in the private sector.