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# ARTICLES

## BALANCING LAW AND POLITICS: SENATE OVERSIGHT OF THE ATTORNEY GENERAL OFFICE

JOSEPH R. BIDEN, JR.\*

### INTRODUCTION

My responsibility is to speak of Congress' oversight function — and specifically that of the Judiciary Committee's oversight of the Attorney General's office. I can sum up my thoughts by just suggesting that with the Attorney General office's progression and the additional duties and employees it has taken on, the evolution of congressional oversight has also progressed. That is, congressional oversight grew as the office's importance and scope grew. When there was an Attorney General working out of his own private law office with no secretaries, no clerks, and no salary, there was very little oversight. Now, when there is an Attorney General that has close to 80,000 employees under his direct control and the responsibility for enforcing, honestly and vigorously, the volumes of new laws that were passed since 1789, there is considerably greater oversight. I could end by saying that the degree to which the Senate has engaged in vigorous oversight relates less to the vigor possessed by the chairperson of that committee — the Judiciary Committee — than to the degree to which the Attorney General and the President conclude that they are going to politicize the office. Politicize it ideologically, by deciding that they are going to see their social agenda passed through the office of Attorney General rather than through the legislative process, or politicize it by using the judicial nominating process to remake the Judiciary in the President's own image. That is when sparks begin to fly.

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With that broad overview in mind, I will generally speak to the question of congressional oversight and the Attorney General. As should be pointed out, this is a subject that has received little scholarly attention relative to other significant offices of the government. This lack of attention is odd because the separation of power issues that are raised by this oversight are more controversial, deeply rooted, and confused when pertaining to the Attorney General than they are for any other government official. This symposium's willingness to focus on these issues, and hopefully to help illuminate some of the points and issues that have been left in the darkness for some time, will serve us all well.

I have been in the United States Senate since 1973. In my seventeen and a half years we have had ten Attorneys General. It has been somewhat tumultuous from 1973 through 1990 in terms of the relationship of the Attorneys General to the Congress generally, and the American people even more generally. There has perhaps never been a period with as much consistent controversy over such a long time.

In the last seventeen years, there have been moments when the relationship between the Attorney General and the Senate Judiciary Committee could best be described by making a comparison to the relationship that existed between the woman who won the Lottery and her husband. As Senator Strom Thurmond tells the story, a woman won the Lottery for a million dollars in South Carolina and immediately, in her exultation, she called her husband and said, "Honey, I won the Lottery for a million dollars. Pack your clothes." And he said, "Winter or summer?" She said, "Both." He said, "Where are we going?" She said, "I don't know, but just get the hell out."

That is a little bit like the relationship between the Senate and the Attorney General's office in the ten years that I have had the pleasure of serving on the Judiciary Committee. With that introduction, let me now elaborate.

## I. EARLY HISTORY OF CONGRESSIONAL OVERSIGHT

Accepting the invitation to contribute to a law school publication named after John Marshall is in and of itself daunting. Marshall's greatness can be measured in many ways, but one of the best ways to size him up is to think about the jobs that he turned down. In 1795 George Washington asked John Marshall to be Attorney General, and Marshall declined. He wanted to concentrate on his work at the bar in Virginia. Three years later President Adams offered him a place on the Supreme Court, and again Marshall said no. You will not believe why he refused his seat on the Supreme

Court. He refused his seat on the Supreme Court because he wanted to run for the House of Representatives. How times have changed.

Marshall went through a very muddy and dirty campaign, but he came out a winner. Eventually Marshall agreed to go and serve on the Court, for what ultimately turned out to be thirty-five years. John Marshall set not only the tone, but the direction of the Supreme Court and its basic relationship with the Congress as well as the President — a direction which has been followed for the past 200 years. I suspect that there hasn't been another man who has been offered as many jobs in high public office, or served with more distinction.

The point I would like to make is that just as political priorities have changed since Mr. Marshall refused to take a seat on the Court because he wanted to run for Congress, so too have the responsibilities and the involvement of the Attorney General in the affairs of the American people changed. Many of the concepts underlying the notion of civil rights, antitrust law, tax law, environmental law, criminal law, and civil law did not even exist in Marshall's day, let alone the specific statutory laws which now exist. The concepts didn't even exist when the early Attorneys General took on the responsibility of being "somebody's" lawyer.

It has never been completely clear who the Attorney General represents.<sup>1</sup> This is one of the reasons why there is such tension. Whose lawyer is the Attorney General? Is he the President's lawyer alone? Does he have a relationship with the bench which requires him as an officer of the court to in fact take positions different than those which are being fostered by the President of the United States, if the Attorney General disagrees with them or believes them to be unconstitutional? Is he, as he was in the early days, "the people's lawyer" as well as a legal advisor to the United States Congress?

In some ways, as I said, the topic that I have been assigned, "The Oversight Function of the Senate Judiciary Committee," tracks this debate and the changes related to the power that has been ceded by Congress to the administration, to the executive branch, and to the Attorney General. We have directed the Attorney General and the administration to do a lot of things over the intervening 200 years. I think that if we could transport John Marshall and the other founding fathers to the late twentieth century, they would not recognize much of what is now the office of Attorney General other than possibly one piece, and that is, believe it or not, the

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1. Meador, *The President, the Attorney General, and the Department of Justice*, in *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 1* (1980).

concept of the Congress' oversight function.

It is interesting to think about. The original and early Attorneys General had but five employees until roughly 1865.<sup>2</sup> The way things were done then, in terms of oversight, was that the chairperson of the Judiciary Committee or the leaders of the Congress, would have dinner with the Attorney General. They would sit down, and they would talk about what the Attorney General was and was not doing and what they would like or not like the Attorney General to investigate. This personal relationship served an oversight function.

One of the earliest committees set up in the United States Senate was the Judiciary Committee. The notion that this Committee was to undertake a more formalized oversight responsibility evolved as changes took place in terms of population, size of the government, and the responsibilities that were delegated to the Attorney General. However, what would probably strike our founding fathers most starkly, if they came back today, would be how different the world of Washington, D.C., is from the world that they left behind — a world where a handful of gentlemanly friends ran all the branches of government. Moreover, they did it in a very informal way, notwithstanding some of the very formal requirements set out in the Constitution.<sup>3</sup>

As our system has evolved, however, the interdependence between the Congress and the Executive, and between the Judiciary Committee and the Attorney General, has taken many forms. On one level, executive branch officers are obligated to enforce the laws written by the United States Congress, signed by the President of the United States, and enacted into law. Congress then is required to watch over and see that the law's intent is in fact carried out by the Executive. On another level the Congress exerts leverage on the Executive Department thanks to its control over the purse strings.<sup>4</sup> Sometimes Congress has done it responsibly; sometimes it has done it irresponsibly. The Attorney General has to listen to Congress because it is Congress who writes the check the Attorney General

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2. H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* 219-33 (1937).

3. I might note parenthetically almost all the important powers that are granted to this government are shared and ill defined. I sit on the Foreign Relations Committee, and have had the privilege and honor of being involved in the debates on the War Powers Act. As we learned in these debates, the power to make war is not clearly defined in the Constitution — which is why it is still being debated to this very day. Think about it: we have not even figured out, to this day, what the precise relationship is between the Congress and the Executive in terms of the power to make war. For a more detailed discussion on the confusion generated over this subject, see Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 59-60 (1988).

4. See, e.g., Stith, *Congress' Power of the Purse*, 97 *YALE L.J.* 1343 (1988) (examines Congress' constitutional authority to regulate and appropriate federal spending).

needs to get the job done. To put it in very crass terms, that is the ultimate power. The Attorney General also has to listen to Congress at the outset because he must be confirmed. Most Attorneys General are honorable men and women — in this case all men, and I look forward to the day when it is a woman — and most will not say under oath at their confirmation hearing something that in fact they will not uphold. So, the confirmation process is another example of oversight because the Attorney General must speak to the members of the Congress and the Committee during the confirmation period.

On a less formal level the Attorney General and the Senate Judiciary Committee have to practice the give and take of politics with one another, because if we don't, nothing gets accomplished. No one's agenda is satisfied. Through the media, through budgetary politics, through nomination reviews, through speeches to interest groups, leaders of each of the branches of government can make the lives of their counterparts very difficult if they are not willing to share power. This is how the system of checks and balances works and how it has evolved. I would respectfully suggest, moreover, that it is not likely ever to be perfected. The system does not lend itself to being perfected.

Finally, through this evolutionary process we get to the point where we can speak specifically of the Senate Judiciary Committee's oversight function of the Attorney General. Now, having said that the Congress does properly share power with the Executive, let me suggest that oversight is not the most appropriate term in my view to describe the function, although that is the term always used.

Oversight connotes that Congress sits over and above the Attorney General in a position of greater authority. In my view the better description of the relationship would be "sidesight" rather than oversight. Congress and the Executive are equal actors operating on the same plane, checking and balancing one another in a dynamic give and take of power in a three-part government. I have no illusions that "sidesight" is a phrase that will be coined or minted very soon, but it does more fully suggest the shared power relationship between the Congress and the Executive.

## II. CONGRESSIONAL OVERSIGHT OF THE ATTORNEY GENERAL

If the Senate does properly keep watch on the Attorney General, the degree of vigilance and the amount of interaction depends largely on the actions and agenda of the Attorney General. In my view the Attorney General has some duties that make him unlike any other cabinet officer. He or she is obviously a political actor; it is in the first instance only an ally of the President who gets appointed Attorney General. The President expects the Attorney General to

further an agenda — and as our new Attorney General has made very clear — it is in most cases the Attorney General's intention to carry out the administration's political agenda.

There are, of course, rare exceptions — men of such independence, power, esteem, and integrity — that they can protect the independence of their office. I would argue that one is from this very city of Chicago. Former Attorney General Edward Levi is one of these true exceptions, because of his character and the moment at which he arrived in office, Levi remained appropriately independent in his tenure. But unlike Attorney General Levi, most Attorneys General are not possessed of that strength — nor are they given that opportunity. To state it bluntly, Levi could have said or done anything he wanted to and the President of the United States could not have done a thing about it without guaranteeing that he would no longer be President.

Even in the more common situation, though, the Attorney General is unlike other cabinet officers. The Attorney General is an officer of the court, and in many ways represents the integrity of the legal system. To the extent that officers of the court are to be above partisan politics, the Attorney General is expected to work on a non-partisan plane. The Attorney General is also the nation's chief law enforcement officer. To the extent that our law enforcement officers are a threat to all of us, as well as a protection for all of us, the Attorney General is expected to apply the laws equally and fairly. The Attorney General cannot appear to play favorites for any purpose; politics, ideology, or other.

When the Attorney General appears to be playing favorites — whether or not he actually is — that is when things begin to take flight. Indeed the American legal system is dedicated precisely to promoting, for all of us as a society, the notion of justice. This requires the Attorney General to have a sense of balance and proportion that we expect from no other political appointee.

The special nature of the Attorney General's office is recognized by many of the scholars contributing to this symposium. Other scholars have also written on the subject, as have those individuals who have occupied the office in the past. Griffin Bell, who became the Attorney General at the time when the office had been tattered by the scandal of Watergate, describes the tension of being immersed in the Executive Branch on the one hand and on the other hand having to remain independent from it with this quote: "The Attorney General wears so many hats that his independence is difficult to establish or to sustain."<sup>5</sup> A very distinguished scholar, Daniel

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5. G. BELL, TAKING CARE OF THE LAW (cited in *Legal Times of Washington*, August 2, 1982, p. 1).

Meador also said:

As a member of the bar and an officer of the courts, the Attorney General is bound to act in accordance with the professional canons of ethics and the rules of the court. At the same time, however, he serves at the pleasure of the President who has an enormous array of political and public concerns. These concerns, coupled with the subordinate position of the Attorney General, can and do influence, for better or worse, the opinions and actions of the Attorney General in his role as an attorney.<sup>6</sup>

Consequently, the Attorney General is an individual who frequently feels pulled in several directions, and in my view the tension is normal and not problematic. It is to be expected. I know of no way to do away with that tension, and I would respectfully suggest if we found a way, the cure would probably be much worse than the present disease which occasionally inflicts the office.

What is a problem is when the tension gives way to slack, as happens in the tug of war when the rope breaks. Then the Attorney General falls backward into the mud pit of narrow partisan politics or extreme ideology. When this happens, when the Attorney General loses his balance and begins to serve only his political masters at the expense of his special duties as the nation's chief law enforcement officer, the Congress has an obligation to step in and attempt to restore the balance. In other words, the Senate Judiciary Committee's oversight function is to ensure that the Attorney General balances his responsibilities in ways which preserve the integrity of the legal system which he represents. When the Committee or others in Congress feel that the balance has been lost, we are duty-bound to act. Our purpose in these instances must be to check and balance unhealthy forces within the Executive Branch, recognizing that the Attorney General's office is truly unique and potentially in need of special care from the outside.

One way to bring to life this notion of the Attorney General's special duties, and Congress' corresponding oversight responsibilities, is to review a few cases when the Attorney General's actions grossly violated the norms of the office and the Senate employed its oversight power with unusual vigor. From such instances, we get a practical sense of where the lines are drawn.

But before I revisit some of those moments of extreme conflict between the Attorney General and the Congress, let me touch briefly on an episode that occurred during World War II when Franklin Roosevelt put the Attorney General of that day, Francis Biddle, on the rack, pulling him, for political reasons, in one direction while Biddle's commitment to the first amendment as he saw it, pulled

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6. Meador, *supra* note 1, at 1.



him in another direction.<sup>7</sup> The episode, I think, is instructive precisely because I think it shows how hard it is to achieve balance in the real world.

The issue was this: Should the Justice Department go after and prosecute wartime radicals who were making and printing "seditious utterances?" These "radicals" were critiquing America's participation in war or even taking sides with the Fascists. The Congress, as you might expect, and the President, who you would hope ideally would not be in this case, were asking for something to be done. Biddle, a devout civil libertarian, was opposed to prosecutions. He cited Justice Holmes' opinion after World War I that, "We do not lose our right to condemn the measures of men because the Country is at war."<sup>8</sup> Roosevelt, however, was outraged by the seditionists and insisted that Biddle go after them aggressively. Congress also weighed in, decrying the administration's failure to silence these radicals.

Roosevelt and the Congress on one side, and Biddle on the other, were both motivated by good reasons and good intentions. What ensued was a six-month behind the scene struggle between Biddle and Roosevelt with the President urging a roundup of the seditionists and Biddle trying to preserve first amendment protections.

As it turned out, Biddle decided he would have to compromise and prosecute more than two dozen of the most offensive seditionists in order to satisfy Roosevelt and the Congress, and I might add, the press at the time. He sought thereby to abate the pressures to engage in more wholesale suppression of dissident speech as happened in the Red Witch Hunt during and shortly after World War I.

Was Biddle wrong? Did Biddle compromise on his principles? Or did Biddle deal with the tensions that are inherent in the office, faced with a particular critical political decision, and do what was right for the Constitution as well as faithfully serving the office of Attorney General? Should he have resigned instead of compromising his principles as he understood the first amendment? Were Roosevelt and the Congress and much of the press right in saying Biddle was too much of a Civil Libertarian? I think it is an incident which demonstrates just how difficult it is for the Attorney General to balance his political loyalties to his employer the President, and his loyalties to the law as he understands it.

As Chairman of the Senate Judiciary Committee, I would like to think that were such a scenario to repeat itself today, we would be

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7. Washburn, *FDR versus his own Attorney General: The Struggle over Sedition, 1941-42*, *JOURNALISM Q.*, 717-725 (Winter, 1985).

8. *Frohwerk v. United States*, 249 U.S. 204, 208 (1919).

able to consider the Attorney General's actions and the pressures affecting him as judiciously as the complexities of the event warrant. But I am a politician, in addition to being a lawyer, and I understand how things grip the nation.

Just look at what happened after one individual burned the United States' flag on the steps of a building in Texas. We then had, pending in the Senate, a Constitutional Amendment; the first one ever offered in the history of the United States of America that would amend the first amendment. This amendment would have given the states a constitutional right to determine; what a flag is, what constitutes desecration, and what actions they selectively wish to outlaw. Under this Constitutional Amendment, the State of Illinois could have passed a law saying that when the Socialist Convention meets next wednesday, it is against the law for them to display the American flag. And this law would be constitutional.

Well, I conclude the Senate acted responsibly. The Senate Judiciary Committee turned down the Constitutional Amendment, and the amendment was also rejected by the full Senate.<sup>9</sup> At any rate, the point is we have these sort of occasions, and the Attorney General is going to be faced with the same kinds of pressures.

Other cases have not been so tough to call. I am thinking here of the Nixon Administration and the numerous moral, political, and legal transgressions that occurred in the Attorney General's office in those infamous days. It is a familiar history, and I will not take the time to go over it. Instead, let us turn our attention to the particulars of the congressional oversight function.

#### *A. Senate Oversight: Confirmation*

I would like to suggest to you a few of the numerous occasions when the oversight function takes place. It seems to me, as a member of the Senate, that we obviously have an oversight function as it relates to, in the first instance, confirming or not confirming an Attorney General. We are required to look into his or her background. We are required to make judgments. Nowhere is it defined precisely how we should go about making those judgments, except to suggest that it is a decision to be made by each individual Senator. We are required to responsibly look into the background and get commitments from an Attorney General as to how he or she would enforce the law. The relationship of the Attorney General to the President versus his role as the chief law enforcement office is also, always a subject of discussion. This is because we have had so many exper-

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9. On October 19, 1989, the U.S. Senate rejected the Constitutional Amendment by a 51-48 vote. See *Cong. Rec.* at 513733 (Oct. 19, 1989).

iences with Democratic as well as Republican presidents who have, in fact, decided that the Attorney General's office is a political instrument to be used either as a scalpel or a bludgeon.

So we debate the subject among ourselves, and we raise the questions at confirmation. But in terms of the oversight, we never resolve it, except in our own individual minds. We have not come forward — nor, I would respectfully suggest, will any Judiciary Committee ever come forward — with a clearly defined basis upon which you are going to be able to question a nominee for Attorney General on precisely how he or she would act relative to his or her precise responsibilities which are still ill-defined, to the President, to the Congress, to the Court, and to the American people.

### *B. Senate Oversight: Ethics*

The other area of oversight is when, as in the case of the Nixon administration and others, ethical conduct is in question. The oversight function of the Senate Judiciary Committee is then brought in full force, rightly or wrongly.

For example, when you can establish that a corporation was not prosecuted under the antitrust laws because they gave a big contribution to a President's campaign — that is an ethical question. In such cases, it seems fairly clear as to what the oversight responsibility is of the United States Senate Judiciary Committee. It has at a bare minimum the responsibility to attempt to determine whether or not that action took place.

### *C. Senate Oversight: Attorney General's Role in Judicial Appointments*

There is also the circumstance, as was mentioned earlier, relating to judicial appointments. Initially, the Attorney General did not have the primary responsibility of deciding who would be on the bench and shepherding that person through the confirmation process. However, now the Attorney General is deeply involved in that process. I would note parenthetically that at this very moment there is still a great debate going on over who is in charge. Is it the Attorney General or White House Counsel C. Boyden Gray, who runs the selection process? This confusion is one of the reasons why, I respectfully suggest, we currently have more than fifty judicial vacancies without nominees pending before our Committee.

Now, when it is decided by the President — as it has been by Democratic as well as Republican presidents — that it is his intention to remake the Judiciary in his image, the Senate says, "We have as much right to do that as you do, Mr. President. And we are

going to measure much more clearly the ideology of the nominee.”

Basically, there exist unwritten rules when, as in the Eisenhower days, ideology is not put front and center. Consequently, the Senate did not get involved in ideology. So, the oversight function as it relates to another one of the responsibilities of the Justice Department is engaged or disengaged, is intense or not intense, depending upon what the motivation is of the Attorney General and the President at the moment.

#### *D. Senate Oversight: Law Enforcement*

A fourth area of oversight concerns the question of impartial and vigorous enforcement of the laws. We have had presidents — Democratic as well as Republican — over the years who have decided that notwithstanding Congress’ passage of certain laws, and notwithstanding these presidents’ signatures on the law, these presidents have had no intention of enforcing the law, for political or ideological reasons.

For example, there is some argument to be made that the anti-trust laws of this nation warrant revamping. That is a debate beyond the scope of this article. Regardless of one’s views of current antitrust law, however, the laws remain on the books and the Attorney General continues to have a duty to enforce them. So when the Reagan Administration argued that they would not enforce current antitrust laws because, from their ideological perspective, the anti-trust laws are inimical to America’s capacity to compete in the world economy, the Senate got interested. We had debates. The Judiciary Committee heard the head of the antitrust division, say, “The law, is in fact, anticompetitive.”

“Do you doubt, prospective Deputy Attorney General, that it is the law?” — we asked.

“No, I don’t doubt that it is the law. You have read the law correctly. But we don’t think that it enhances economic growth. Therefore we are not going to enforce it.”

This dialogue engages the interest of Congress. This perspective interests the Judiciary Committee.

I should add that this same engagement occurs in other areas. When Congress passes a law establishing a Department of Education — rightly or wrongly — and the President signs it, we expect the leaders of that department to take its mission seriously. So when a prospective Secretary of Education comes to the Senate to be confirmed, and we ask, “What is your priority,” and he says, “My priority is to eliminate the Department of Education” — that engages the Senate.

Similarly, the Senate Judiciary Committee is engaged when the Attorney General or a nominee interprets the law in a way that the vast majority of Congress thinks is incorrect; or does not interpret the law at all but instead ignores it. Some would argue that during the last eight years, this is what the Reagan Administration did relative to civil rights laws in this country. They made a fundamental, ideological decision that the civil rights laws were in fact anti-civil rights — the laws violated the civil rights of the majority of American people. The Administration would not seek repeal of laws, which is what they should have done given their views. Instead, they decided not to enforce those laws, or at least not enforce them vigorously. That engages the interest of the Congress.

To this point, I have talked about transgressions of Attorneys General. There are equally as many transgressions of the Congress. In the past, Congress has used its oversight power to constrain or influence the legitimate functioning of the Attorney General's office. Because we are never going to be able to define precisely what the power of the Attorney General is, and because ultimately, the ability of the Attorney General's office to function rests upon the Congress appropriating the money to allow that to be done, you find there is usually compromise, in the name of oversight.

This kind of give-and-take oversight is occurring right now, in the drug policy area. We — Congress and the administration — are now trying to put together a drug strategy. I should accept some blame in that. I wrote the law to set up the so-called "drug czar." I believe it is the only hope we have to abate the drug crisis. It took me eight years to get the law passed, and guess what, the Attorney General doesn't like it a little bit. Not even a tiny little bit. Nor would any Attorney General, Democrat or Republican, because it in effect takes power from the State Department, the Treasury Department, and the Attorney General, among others. This is why President Carter didn't want my bill. It's why President Reagan vetoed my bill. It requires the Attorney General to yield on the strategy and management of an issue that falls in part under the aegis of his office.

Looking at it another way, however, this is a case of where Congress, in its oversight of how the drug laws are being enforced, has stepped in and said, "We are, in effect, going to reorganize you." And ultimately Congress is able to do that. The Attorney General is, as has been pointed out, a creation of Congress. Once again, oversight is murky.

### CONCLUSION

The last point I would make is that ultimately we are never going to be able to clearly define what is the proper role of oversight. It is a little bit like the way the Court describes pornography. You know it when you see it. When the public knows and reacts against Congress for overstepping its bounds, that is the only thing that fundamentally keeps the Congress from engaging in excesses — an excess of micro-managing, being unfair, overseeing in a way that prevents the department from being able to function. Similarly, when the Senate feels the Attorney General is operating outside the broad dictates of the office, it will react. Fortunately, and finally, the genius of our system provides a third branch of government that can call the close ones; the Supreme Court. It is left to the wisdom of the Court to say ultimately who is right and who is wrong in the dynamic, evolving process of oversight.

