

***Sed Quis Custodiet Ipsos Custodes:* The CIA's Office of General Counsel?**

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After 9/11, two officials at the Central Intelligence Agency (CIA) made decisions that led to major news. In 2002, one CIA official asked the Justice Department's Office of Legal Counsel (OLC) to clarify how aggressive CIA interrogators could be in questioning al Qaeda operatives held overseas.¹ This request led to the August 2002 memorandum, later leaked, in which John Yoo argued that an interrogator crosses the line into torture only by inflicting pain on a par with organ failure.² Yoo further suggested that interrogators would have many defenses, justifications, and excuses if they faced possible criminal charges.³ One commentator described the advice as that of a "mob lawyer to a mafia don on how to skirt the law and stay out of prison."⁴ To cool the debate about torture, the Bush administration retracted the memorandum and replaced it with another.⁵

The second decision was made in 2003, when another CIA official asked the Justice Department to investigate possible misconduct in the disclosure to the media of the identity of a CIA employee. The employee was Valerie Plame, a covert CIA analyst and the wife of Ambassador Joseph Wilson.

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1. Timothy Flanigan so testified during his confirmation hearings for the position of Deputy Attorney General. See Andrew Zajac, *Bush Nominee Frustrates GOP Senator at Hearing; Specter Says Support May Be in Jeopardy*, CHI. TRIBUNE, July 27, 2005, at C18; see also Press Release, Senator Patrick Leahy, Judiciary Democrats Seek Second Hearing on Department of Justice Nominee (Sept. 29, 2005), available at <http://leahy.senate.gov/press/200509/092905a.html>.

2. See Office of Legal Counsel, U.S. Dep't of Justice, *Memorandum for Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A*, Aug. 1, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/SAEBB127/02.08.01.pdf>. Although signed by Asst. Attorney General Jay S. Bybee and often referred to as the "Bybee memo," this document is widely understood to have been authored by then-Deputy Asst. Attorney General John Yoo.

3. *Id.*

4. Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, July 15, 2004, available at <http://www.epic-usa.org/Default.aspx?tabid=386>.

5. See Office of Legal Counsel, U.S. Dep't of Justice, *Memorandum for the Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§2340-2340A*, Dec. 30, 2004, available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

Plame was mentioned in a Robert Novak article.⁶ Her husband had been selected by the Bush administration to determine whether there was any truth to allegations that Iraq had obtained “yellow cake” from Niger for use in building nuclear bombs. After a visit to Niger, Ambassador Wilson wrote an op-ed piece that criticized the Bush administration’s case for war against Iraq.⁷ When the Justice Department acted on the CIA’s request, Attorney General Ashcroft stepped aside from the investigation.⁸ Patrick Fitzgerald, United States Attorney for the Northern District of Illinois, was then appointed as special counsel to investigate the “outing” of Plame as possible retaliation against Wilson.⁹ As a result of the Fitzgerald investigation, in 2005 a federal grand jury in Washington, D.C. indicted I. Lewis “Scooter” Libby, the Vice President’s chief of staff, for perjury, false statements, and obstruction of justice.¹⁰ Libby was subsequently convicted of making false statements and obstructing justice.¹¹ For a while, even Karl Rove, President Bush’s chief political adviser, was in the investigation’s cross-hairs.¹²

The CIA officials involved in the two decisions to request assistance from the Justice Department were, respectively, John Rizzo and Scott Muller. Rizzo was Acting General Counsel of the CIA at the time of the first decision. Muller was General Counsel, Rizzo his deputy, when the second decision was made.

Muller, a political appointee, resigned from the CIA in 2004, leaving career lawyer Rizzo at the helm. The reason Muller offered for his departure was a desire to remodel a home in Connecticut with his brother.¹³ Lawyers at the CIA, accustomed to elaborate cover stories, thought that story sounded too much like the generic explanations that so often accompany firings in the nation’s capital.

6. Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31. For many CIA officers, the outing conjured up nightmares from the 1970s, when disgruntled former CIA case officer Philip Agee and others embarked on a hateful crusade to reveal CIA identities.

7. Joseph C. Wilson IV, Op-Ed., *What I Didn’t Find in Africa*, N.Y. TIMES, July 6, 2003, §4, at 9.

8. Attorney General Ashcroft’s recusal came only after three months of protest over his involvement. See Dan Eggen & Mike Allen, *Ashcroft Recuses Self from Leak Case; U.S. Attorney To Oversee Probe*, WASH. POST, Dec. 31, 2003, at A1; Eric Lichtblau, *Special Counsel Is Named To Head Inquiry on C.I.A. Leak*, N.Y. TIMES, Dec. 31, 2003, at A1.

9. See Lichtblau, *supra* note 8.

10. See Eric Lichtblau, *The Leak Inquiry: The Former Aide: Ex-Aide Enters Not Guilty Plea in Leak Charges*, N.Y. TIMES, Nov. 4, 2005, at A1; David Montgomery & Mark Leibovich, *Movers and Shakers: On the Day of the Indictment, Shifting Furniture and Choreographing Steps*, WASH. POST, Oct. 29, 2005, at C1; Jim VandeHei, *Libby May Rely on Faulty-Memory Defense*, WASH. POST, Oct. 30, 2005, at A14.

11. See Carol D. Leonnig & Amy Goldstein, *Libby Guilty on 4 of 5 Counts*, WASH. POST, Mar. 7, 2007, at A1.

12. Rove will not be indicted. See David Johnson & Jim Rutenberg, *No Rove Charges over Testimony in C.I.A. Leak Case*, N.Y. TIMES, June 14, 2006, at A1.

13. Muller has joined the New York office of Davis Polk & Wardwell.

Years later, it is difficult for anyone outside the CIA to assess with confidence the actions of these two officials. No doubt the CIA's General Counsel has the discretion to request further guidance from the Justice Department about the propriety of planned activity, as well as the authority to make a criminal referral. Below the surface of these incidents, however, something deeper is at stake for all Americans: understanding the role of a secret organization in our democracy. Since the CIA controls most of the facts underlying these two decisions, any direct criticism seems presumptuous. A critique must instead be indirect.

Although the names of individual General Counsels are virtually unknown to the public, those holding the position have made and continue to make decisions with immense consequences. If Muller and Rizzo had not acted as they did, the Justice Department might have stayed out of the torture maelstrom and refrained from triggering a criminal investigation of the President's men. The consequences of these two decisions show the broad influence of the CIA's General Counsel.¹⁴

Despite the importance of the CIA's General Counsel, little scholarship has addressed the role of that official or the activities of the many other lawyers employed by U.S. intelligence agencies. Very few are aware of the pressures and temptations experienced by Agency counsel, and fewer still are aware of the complexities of the General Counsel's role in helping the secret organization follow the rule of law.

Some checks on the CIA are external – congressional oversight committees, court cases, articles and stories in the media, and an engaged public. To analyze these checks, a scholar does not need inside access. But other checks are internal – controls within the CIA's Directorate of Operations (DO),¹⁵ review by the President's Foreign Intelligence Advisory Board, and the efforts of the CIA's Office of Inspector General (OIG) and the CIA's Office of General Counsel (OGC) – and in analyzing those checks, a scholar without inside access is at a severe disadvantage.

14. A likely third important decision that has not played itself out in the news is the advice the CIA's Office of General Counsel must have provided about the CIA's program of secret prisons to detain and interrogate high-level terrorist suspects. President Bush acknowledged the existence of the program in a high-profile press conference on September 6, 2006, in connection with the transfer of fourteen prisoners from the secret program to Guantánamo Bay, Cuba. See Sheryl Gay Stolberg, *Threats and Responses: The Overview; The President Moves 14 Held in Secret to Guantanamo*, N.Y. TIMES, Sept. 7, 2006, at A1.; see also Jane Mayer, *The Black Sites: A Rare Look Inside the C.I.A.'s Secret Interrogation Program*, NEW YORKER, Aug. 13, 2007, at 46.

15. The DO was renamed the National Clandestine Service on October 13, 2005. Central Intelligence Agency Press Release, DNI and D/CIA Announce Establishment of the National Clandestine Service (Oct. 13, 2005), available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2005/pr10132005.html>. I refer to the directorate here by its name during my tenure at CIA. Similarly, I will refer to the Director of the Clandestine Service as the DDO. Old habits die hard. I am told that many current case officers also still call their directorate the DO.

Especially important are internal checks on officers who operate on the dark side. Lurking in the shadows, spymasters convince people from other countries – clerks, diplomats, soldiers, and hostile intelligence officers – to commit espionage. The challenge for U.S. clandestine operators is to induce and facilitate such lawbreaking despite the great risks that it involves.

This article focuses on the CIA's OGC, its lawyers, and their role in ensuring the Agency's compliance with the law. I begin with the question "*Quis custodiet ipsos custodes?*," a query formulated in ancient Rome that remains pertinent today.

Decimus Junius Juvenalis (known to us as "Juvenal") lived in Rome toward the end of the first century and into the second century, writing satires in Latin while Nerva, Trajan, and Domitian ruled the world. In one satire, *On Getting Married*, Juvenal discusses whether chastity can return to marital relations.¹⁶ From the male perspective – sexist if judged by modern sensibilities, but an accepted viewpoint then – Juvenal was more concerned with a wife's fidelity to her husband. The sexual urge, Juvenal realized, was strong, and the tendency to stray in a marriage was always there: "And all the time I hear my friends advise:/ My friend, lock your wife in./ And who will guard the guard? His lips are bought./ Either a tryst or money keeps them mum./ The wife arranges and begins with him./ And eunuchs are preferred by some girls yet."

For some, Juvenal's concern about marital fidelity is closer to home than any worries about internal oversight of intelligence activities. The two concerns are not radically different, however. They are variations on a theme, an unresolved tension that affects both domestic relations and constitutional systems. Whether one is concerned about personal behavior or institutional conduct, one might call on an outsider or another institution to serve as a check on misbehavior. In the household, the outsider might be called a watchman. In constitutional government, it might be another branch of government.

But the watchman or the other branch of government cannot solve all problems. The watchman may keep the wife faithful. A second branch of government may keep the first in check. Yet the presence of an outsider may undermine the relationship between husband and wife, between citizens and sovereign. The losses in trust may be greater than the gains in compliance. The watchman or the other branch may itself take on too much power. So the watchman may need another watchman, and the second branch of government a third. The potential for endless replication, appealing in an Escher drawing or a Bach fugue, is less attractive in family politics or statecraft.

Juvenal's predicament was having to choose between an unattended wife and a wife guarded by possibly untrustworthy eunuchs. Today we face the predicament of having to choose between an unfettered intelligence

16. DECIMUS JUNIUS JUVENALIS (JUVENAL), SATIRES 74 (Jerome Mazzaro trans., 1965).

community and an intelligence community monitored by layers of possibly ineffectual oversight.

For centuries, satirists, philosophers, and citizens have tried to break out of such dualities, struggling for win-win solutions, for outcomes that resolve paradoxes into unity. Without claiming to have all the answers, this article proceeds in the hope that asking some of the right questions will at least help to lead us toward a resolution.

Part I of this article sketches possible models for lawyers at the CIA. Part II considers regulations that apply to government lawyers generally and the rules that apply to CIA lawyers specifically. Part III gathers and assesses differing views of the General Counsel's role. Part IV discusses how CIA lawyers are selected. Part V discusses rotation and advancement for CIA lawyers, with special attention to differences in culture between the analysts in the Directorate of Intelligence (DI) and the case officers in the Directorate of Operations (DO). The conclusion (Part VI) attempts to describe the qualities of a General Counsel who will best be able to guide the CIA deeper into the 21st century.

I. OF WATCHDOGS, LAPDOGS, AND MUTTS

The CIA is officially the nation's guardian against external threats. Leaving aside questions of philosophy and psychology, some members of the public may doubt whether the CIA really qualifies as a guardian. In light of the CIA's failures in counterterrorism before and after September 11, they might also challenge the usefulness of the Juvenal comparison. Any such doubts probably stem more from a perception that the CIA is ineffective against threats from states such as Iran, Libya, and North Korea, and organizations such as al Qaeda and Hezbollah, than from a fear that the CIA is untrustworthy. The United States needs someone to warn of terrorist attacks and to disrupt such attacks before people are murdered. Yet concerns abide not only about the CIA's ability to protect the United States from terrorist threats but also about its fidelity to law.

Lawyers at the CIA could play several roles. First, for the benefit of the American public and the rule of law, they could provide vigilant oversight. They could be pure watchdogs. Webster's dictionary defines a watchdog as "1 : a dog kept to guard property 2 : one that guards against loss, waste, theft, or undesirable practices."¹⁷ Watchdogs could guard against the intelligence agency's undesirable practices. Second, for private benefit, the lawyers could facilitate and enable the whims of political masters. They could be pure lapdogs. The Webster's definition of this type of dog is not as detailed: "1 : a small dog that may be held in the lap 2 : a servile dependent or follower."¹⁸ Lawyers as lapdogs could follow, in the most dependent way, the lead from

17. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1334 (10th ed. 1993).

18. *Id.* at 655.

the White House and the senior officers at the CIA.¹⁹ Third, the lawyers could play a combined role. Somewhere between the extremes, between watchdogs and lapdogs, they could be hybrids or mutts.

OGC at CIA could act as a pure watchdog if it operated as an extension of congressional committees, playing a special role in external oversight made internal through OGC's location at CIA headquarters. This role could be expanded by assigning OGC lawyers to other CIA locations to watch over CIA officers in the field.

OGC would represent another pure breed if it were slavishly loyal, not to the public interest, but to the specific interests of the Agency. Its lawyers would behave like in-house counsel at corporations where, consistent with the law and the rules of ethics, company lawyers work with business people to facilitate deals and comply with regulations.

Because pure breeds are more for show than for tramping through the brush, however, CIA lawyers most often are mutts. At the CIA, the mutts display their versatility through the work of individual General Counsels and the Office of General Counsel as a whole.

With the creation of the position of Director of National Intelligence²⁰ and the demise of Porter Goss as Director of the Central Intelligence Agency (DCIA), the CIA has lost its preeminent role in the U.S. intelligence community. The CIA has become one among many rather than one over many. CIA analysts are being transferred to the Office of the Director of National Intelligence, and the traditional rivalry between law enforcement and foreign intelligence, between the FBI and the CIA, continues to sap the CIA's energy. Competition comes from other agencies, as well. Dwarfed in budget and personnel by the Department of Defense, the CIA has nothing close to the technical capabilities of the National Security Agency, the puzzle palace that scoops signals from the skies. In addition, with the Department of Defense intent on operating its own networks for tactical intelligence, the CIA is no longer even assured of preeminence in running human sources.

Just as the dominant position of the CIA has been eclipsed, so the legal advisors to the CIA have lost some of their luster. The main recipient of OGC's legal advice, the DCIA, is no longer the king of the intelligence hill. The Director of National Intelligence, not the DCIA, now gives the President his daily intelligence briefing.²¹ With the loss of access, the CIA and its lawyers have also lost power.

19. Away from intelligence agencies, the lapdog has a grand place in literary tradition. See, e.g., ANTON CHEKHOV, *LADY WITH LAPDOG AND OTHER STORIES* (David Magarshack trans., 1964).

20. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §1011(a), 118 Stat. 3638, 3643-3644.

21. See Douglas Jehl, *Early Clues to a New Spy Chief's Muscle*, N.Y. TIMES, Feb. 20, 2005, §1, at 22; Douglas Jehl, *Intelligence Briefing for Bush Is Overhauled*, N.Y. TIMES, July 20, 2005, at A18.

Nevertheless, lawyers and spymasters at the CIA and other U.S. intelligence agencies face similar challenges, and all need to be guided by the rule of law. The acronyms change, but the challenges remain very much the same.

Americans trust intelligence operatives to use some intrusive means. We expect that these operatives will not abuse this trust, however, in part because they receive legal advice, and in part because lawyers have been placed at the headquarters of intelligence agencies. The lawyers are supposed to be better guardians than Juvenal's eunuchs.

II. REGULATIONS AND RULES

Numerous statutes, regulations, and executive orders govern the activities of the intelligence community.²² Some of these rules are available to the public. Perhaps the most important rule is the statutory pronouncement that "the Director of the Central Intelligence Agency shall have no police, subpoena, or law enforcement powers or internal security functions."²³ When the CIA was created, this so-called internal security proviso was designed to allay concerns about a potential American Gestapo. Even so, under certain circumstances the CIA is allowed to gather intelligence and to perform counterintelligence within the United States. Thus, the line between permissible and impermissible domestic activities is just one of many things that CIA lawyers must patrol. As with most legal analysis, that patrol requires a careful application of facts to legal standards.

Most of the statutes, regulations, and executive orders concerned with the CIA have classified supplements. Only intelligence community lawyers with security clearances, including OGC lawyers, are allowed to review these classified rules. The CIA provides a general repository of these rules for its lawyers on an internal computer system.

Other rules are even more closely held. One rite of OGC assignment to the DO is receipt of a binder of classified material. This binder is not given to regular OGC lawyers. The secret binder includes CIA guidelines on recruiting and maintaining human sources. Those guidelines, in part, explain to field officers and to headquarters how to balance a potential asset's human rights abuses or other wrongdoing against the asset's access to important information. DO lawyers, if they are trusted, also participate in the CIA's "asset scrubs" or inventories of existing and potential human sources. For those scrubs, the secret binder guides CIA lawyers through the intersection of law and espionage. Finally, if the DO division in which the lawyer serves is involved in any covert action (separate from the routine gathering of foreign intelligence), the lawyer might assist division managers in complying with the

22. See, e.g., National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended in scattered sections of 10 & 50 U.S.C.); Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

23. 50 U.S.C. §403-4a(d)(1) (Supp. V 2005).

CIA's internal guidelines and in obtaining approval by the inter-agency process that runs through the National Security Council. The end of this process, whether for overseas paramilitary actions, propaganda, or political action, is the President's signature on a "finding" for covert action.

A. *Who Is the Client?*

One challenge for all lawyers at CIA's OGC is determining who the client is. Is it the CIA as an organization? The executive branch? The three branches of the federal government? Our constitutional system? The public interest?

The answers to these questions are fundamental. But to my knowledge neither OGC nor the Justice Department's Office of Legal Counsel has examined the attorney-client relationship at CIA in depth. There is some scholarship about the general role of government lawyers,²⁴ but it does not resolve the debate and does not address the specifics of legal advice to the intelligence community.

In day-to-day conversations at OGC, the farthest any analysis about the client's identity goes is to recognize that the Agency lawyers' loyalty does not, strictly speaking, extend to individuals at the CIA. At the other extreme, if these lawyers' loyalty extends to the public interest, subsidiary questions arise. To what extent should the interests of governments and people outside the United States be considered? Does international law matter? What about a lawyer's personal sense of morality?

At a minimum, it is clear that if a conflict exists between the interests of an individual within the CIA and those of the Agency, Agency interests prevail. The General Counsel is not, after all, the personal lawyer to the DCIA. Most of this is easy to state on paper, but it is people, not a government agency or the embodiment of some broader principle, that walk into the General Counsel's offices on the seventh floor in Langley.

It is important that the General Counsel be physically present at Langley. With access comes at least the potential for oversight. Nonetheless, lawyers have not always had easy access. During the Reagan administration, under

24. See, e.g., Dorian D. Greene, *Ethical Dilemmas Confronting Intelligence Agency Counsel*, 2 TULSA J. COMP. & INT'L L. 91 (1994) (explaining the ethical dilemmas intelligence lawyers face, the intrusions into a lawyer's personal finances, and the morals and ethics imposed upon a lawyer by the particular presidential administration, the intelligence agency, or even the public); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991) (contending that government lawyers have the same duty that other lawyers do to be zealous advocates, provided that the adversarial system is in place); Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269 (1999) (arguing that the public good trumps all other concerns of the government lawyer); Note, *Rethinking the Professional Responsibility of Federal Agency Lawyers*, 115 HARV. L. REV. 1170 (2002) (criticizing traditional views of the responsibilities of government lawyers and proposing instead a critical model that emphasizes public values).

DCI William Casey, the lawyers were relegated to separate buildings in Virginia.²⁵ It was not until 1989 that DCI William Webster brought the lawyers back to headquarters.²⁶

Today the General Counsel's visitors include the DCIA, the Deputy Director (DDCIA), the Deputy Director of Operations (DDO), other lawyers in OGC, and other officers in the directorates of operations, intelligence, science, and support. None of these people, even the DCIA, embodies the entire Agency. Yet the General Counsel develops meaningful relationships with them all – dines with them, plays tennis with them, smokes cigars with them, and pushes paper with them.

It would be surprising if under these circumstances the General Counsel did not develop at least some conflicting loyalties. Such conflicts can be seen in the advice Scott Muller gave the CIA concerning its interactions with the 9/11 Commission.²⁷ Through the Commission, the U.S. government sought to understand and learn from the greatest intelligence failure since Pearl Harbor, and the American public sought to learn more about its government – what went right, what went wrong. The soundness of the Commission's conclusions depended on access to all the relevant facts, and so the CIA made many documents and persons available to the Commission.²⁸

The CIA was not always helpful to the 9/11 Commission, however. Although Commission members and their staff had the highest security clearances, the Agency sought to protect its sources and methods from the Commission. Behind the classified screen are the liaison services that have shared information with the CIA in confidence, as well as the lives and well-being of human beings who have entrusted their secrets to U.S. case officers. It was only under pressure from the Commission that the executive branch decided to acknowledge, for the first time, that it had custody of ten al Qaeda detainees.²⁹ Yet the Commission was not allowed to see or to question them.³⁰ The secret facilities where the detainees were held and the CIA's covert interrogators were also off limits.

If the interests of the CIA and the 9/11 Commission sometimes seemed to diverge, it is also quite likely that the interests of the CIA and of DCI George Tenet did not always coincide. Tenet, a former Senate staffer, no doubt wanted to protect his reputation in the intelligence community, his ability to charge high fees for speaking after retirement, and his ability to line up a lucrative book contract. Tenet and his staff interacted with OGC to decide what could be turned over to the bipartisan commission. Even if Muller had been aware of the diverging interests between the Agency and Tenet, how

25. RONALD KESSLER, *INSIDE THE CIA* 238 (1992).

26. *Id.* at 241.

27. Other examples are discussed in Part V *infra*.

28. See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* 449-450 (2004).

29. See *id.* at 146.

30. *Id.*

could he be sure that his advice was not affected, consciously or unconsciously, by a desire to curry favor with the boss? George was Muller's friend. And George was the one who talked about Scott downtown.

Conflicting loyalties exist for general counsels at other agencies besides the CIA. But most other agencies lack such power to cover up their activities with a classifier's stamp. Because of secrecy, the issue of conflicting loyalties is accentuated for intelligence agencies like the CIA.

In a practical sense, the CIA's General Counsel works for the DCIA. As a political appointee, the General Counsel is loyal to the President and to his political party. Thus, his potential as a pure watchdog is lessened. Unlike the Director of the FBI, the CIA General Counsel is not appointed for a term that lasts longer than one presidential election cycle. The General Counsel is not elevated above the political fray.

Although General Counsels come and go, OGC is populated with career lawyers. From top to bottom, lawyers at the CIA are less exposed to public scrutiny than their counterparts at, say, the Justice Department. The practice settings for the two agencies are different, as well. To enter the CIA compound, OGC lawyers pass through checkpoints in a fence. They drive toward the central parking lot and show their blue badges to security officers armed with machine guns. After they park, to get deeper into the building they swipe their badges and enter code numbers on an electronic turnstile. Miles away, the Justice Department has its own barricades and identity checks, but the security there is not as robust.

In comparison to the Justice Department, CIA's OGC has little experience insulating its lawyers from conflicts of interest or from situations that have the appearance of impropriety. The Justice Department has direct experience with recused parties in litigation and with independent counsels and special prosecutors. The Justice Department also has an active Office of Professional Responsibility to monitor the conduct of its lawyers and a Public Integrity Section to prosecute corruption cases. Lawyers in the "field" (at the United States Attorneys offices) are often in contact with lawyers at headquarters (Main Justice). Over at Langley, lawyers at the CIA are all at headquarters. These are only some of the reasons, however, that the CIA and the Justice Department are very different places for lawyers to work.

B. Whistleblowers

The CIA's General Counsel not only provides legal advice to senior officers, she also serves as a sounding-board for employees who believe misconduct has occurred. Agency regulations, in fact, require CIA employees to report to the General Counsel or the Inspector General if they believe an Agency rule, executive order, or the Constitution has been violated. Posted on bulletin boards, in handbooks, and on the Agency's computer system are the numbers for hotlines to report fraud and other misconduct. The General Counsel, along with the Inspector General, is supposed to provide a safe haven for employees with complaints.

If the General Counsel receives a complaint from an employee, she should consult the Inspector General. The Inspector General will transmit the complaint to the DCIA, who must send it along with comments to the congressional oversight committees, or the employee will be allowed to appear before the committees directly.³¹ A direct appearance, however, must be coordinated with senior officers at the Agency; a CIA employee cannot go straight to Capitol Hill.³² This coordination is designed to reduce unwitting compromises of sources and methods and to prevent interference with counterintelligence and criminal investigations.

To require a whistleblower to coordinate with senior officers at the Agency is not unreasonable. Even the Inspector General consults with the DCIA before reporting allegations of misconduct to the oversight committees, except when the DCIA herself is the subject of an investigation or in other extraordinary circumstances.³³ In other words, even the watchdogs are put on a leash at the CIA. That holds true for case officers, analysts, the Inspector General, and the General Counsel. No one at the CIA is completely free to roam.

C. Senate Confirmation

Appointment of the CIA's General Counsel has required Senate confirmation since 1996.³⁴ Before that, the CIA resisted Senate confirmation for its General Counsel. In 1994, for example, Director of Central Intelligence James Woolsey attempted to convince the Senate Select Committee on Intelligence that Senate confirmation would make the General Counsel more political.³⁵ This, he suggested, would undermine the tradition of having non-political lawyers at the CIA.³⁶ In further support of his position, Woolsey noted that the CIA is much different from the regulatory agencies whose general counsels are subject to Senate confirmation.³⁷ Finally, he suggested that an increasing number of political appointments was related to a decreasing length of service by those appointed. In the end, Woolsey's arguments did not prevail, and Senate confirmation is now required.

Senate confirmation suggests not only the General Counsel's importance but also Congress's preference that the General Counsel serve interests

31. See 50 U.S.C. §403q(d) (2000 & Supp. V 2005); 5 U.S.C. app. 3 §8H (2000 & Supp. V 2005).

32. See 50 U.S.C. §403q(d)(5)(D)(ii); 5 U.S.C. app. 3 §8H(d)(2).

33. See 50 U.S.C. §403q(d)(3). The DCIA may even prohibit the Inspector General from "initiating, carrying out, or completing any audit, inspection, or investigation, or from issuing any subpoena . . . if the Director determines that such prohibition is necessary to protect vital national security interests of the United States." *Id.* §403q(b)(3).

34. See 50 U.S.C. §403t(a) (2000).

35. *Hearing on S. 2082 Before the H. Select Comm. on Intelligence*, 103d Cong. (1994) (statement of R. James Woolsey, Director of Central Intelligence).

36. *Id.*

37. *Id.*

broader than the predilections of the President, the DCIA, or the Director of National Intelligence. Senate confirmation can thus be tied to a desire for increased oversight of intelligence activities.

Until recently, the CIA's General Counsel was almost always selected from outside OGC, whether from private practice, the Justice Department, or another government agency.³⁸ This tradition, which valued independence over experience in intelligence matters, was not incorporated in any Senate rule or executive order, but was consistent with the notion that the General Counsel plays an oversight role. Having a "fresh" perspective in the top legal job trumped the benefits of having prior experience as a CIA lawyer. An outsider, it was thought, would be in a better position to keep everyone honest. Robert McNamara and Scott Muller were both part of this tradition.

After those two General Counsels went through the process of Senate confirmation, however, the selection of the CIA General Counsel broke with tradition when the White House nominated Acting General Counsel John Rizzo to take the full title.³⁹ Rizzo was on watch during the September 11 era, and he spent many years as a lawyer at the Directorate of Operations. He is therefore a consummate insider.⁴⁰ From Lawrence Houston to John Rizzo, from the CIA's first General Counsel to the CIA's current top lawyer, from insider to insider, the position almost went full circle. But Rizzo's confirmation ran into problems. More than a year passed after the White House first nominated him in 2005, and his confirmation hearing was scheduled and postponed more than once. The Senate Intelligence Committee, perhaps because of disputes about classified correspondence between the Justice Department and the CIA, was unwilling to give Rizzo the quick change in status that was sought, and the nomination that would have conferred on him the formal title of General Counsel was eventually withdrawn.⁴¹

For a General Counsel who, unlike John Rizzo, lacks prior experience with intelligence activities, the learning curve can be steep. Being "read into" various classified compartments and learning how to handle classified information takes time. Understanding "cables," the communications between headquarters and field offices, which include codes to protect sources, "tear-lines" to break up packets of information, and cross-references to other cables,

38. Even so, Lawrence Houston, the CIA's first General Counsel, was the ultimate intelligence insider. He provided legal advice to the Office of Strategic Services before the CIA was created in 1947. He was literally present at the creation, serving the CIA as General Counsel from 1947 until 1973. *See generally* Central Intelligence Agency, DCI Statement on Death of Lawrence Houston (Aug. 16, 1995), *available at* <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-1995/ps81695.html>.

39. Presidential Nomination of John A. Rizzo, to be General Counsel of the Central Intelligence Agency, PN1397-109, Rec'd by the 109th Congress, Mar. 15, 2006, *available at* <http://thomas.loc.gov/home/nomis.html> (search "John A. Rizzo" within 109th Congress).

40. *See* Dana Priest, *Covert CIA Program Withstands New Furor: Anti-Terror Effort Continues To Grow*, WASH. POST, Dec. 30, 2005, at A1.

41. Mark Mazzetti, *Nominee for C.I.A. Counsel Withdraws*, N.Y. TIMES, Sept. 26, 2007, at A21.

is a skill that takes time to develop. More important for the CIA's General Counsel, sizing up the staff is not as easy as it might be at, say, the Department of Education. Many of the people she deals with, particularly the case officers in the DO, are masters of deception.

Before the position of Director of National Intelligence (DNI) was created at the end of 2004, the DCI wore two different hats. First, he was head of the CIA. Second, he was head of the intelligence community, including the tactical intelligence arms of the military services, the National Security Agency, the Department of State, and the FBI. To advise the DCI about "community management," OGC used to have a special group of lawyers who helped the DCI keep his two hats straight. Since the DCI no longer wears the second hat, which is now worn by the DNI, OGC's special group on "community issues" has been assigned to other duties. Now the DNI has the coordinating role and a legal staff to advise him. Now the DNI will try, where the DCI failed, to convince various intelligence agencies to work together in the common cause.

Even with the 2004 legislative changes, the CIA did not lose positions in OGC. Moreover, the DNI has his own General Counsel, creating new jobs for lawyers on intelligence matters. Some OGC lawyers may transfer on their own to assignments at the Office of the DNI or in other intelligence agencies. Their security clearances give them a significant advantage over applicants from outside the intelligence community.⁴²

III. DIFFERING VIEWS ON THE ROLE OF OGC

Not much has been written in law reviews about the CIA's General Counsel, yet a number of scholars, General Counsels, and commentators have expressed their views about this office and its holder in other fora.⁴³

42. See Walter Pincus, *Increase in Contracting Intelligence Jobs Raises Concerns*, WASH. POST, Mar. 20, 2006, at A3 ("[A] security clearance in the Washington area means money.").

43. Ryan Check, who assisted with this article, canvassed a range of views about the lawyers' function in the intelligence community. See Ryan M. Check, *Who's the Boss?: The "Public Interest vs. Agency Interest" Balancing Act of Intelligence Agency General Counsels* (Apr. 23, 2007) (unpublished manuscript on file with the author). Mr. Check posed three questions about the role of intelligence community general counsels: (1) Should GCs lean toward protecting the agency's interest or the public interest? (2) To what extent should GCs alter their counsel based purely on the interests of those outside the agency? (3) Can the GC perform an internal oversight function while retaining the confidence of agency management? Experts who responded to these questions included John A. Rizzo (CIA Acting General Counsel), Jeffrey Breinholt (Deputy Chief, Counterterrorism Section, National Security Division, U.S. DOJ), Marion "Spike" Bowman (former Counsel, National Security Law, FBI), Dana Priest (National Security Correspondent, *Washington Post*), Paul Kelbaugh (former Chief Legal Counsel, CIA Latin America), Richard Cinquegrana (former Special Counsel, CIA DDI), Robert Delahunty (former Deputy General Counsel, White House Office of Homeland Security), Robert F. Turner (former Counsel to President's Intelligence Oversight Board), David Koplow (former Deputy GC, International Affairs, U.S. DOD), Dr. Dieter Fleck (former

A. *Scholars*

In the wake of the Iran-Contra scandal in the 1980s, several articles were written about the oversight of intelligence activities, but none of them focused on CIA's OGC.⁴⁴ More recently, Kenneth J. Levit, a former Special Counsel to the DCI, wrote an article that discusses CIA lawyers' role in aggressive interrogations since September 11.⁴⁵ Because Levit had more experience in the Director's suite than in the OGC trenches, however, he tends to concentrate on the work of CIA lawyers in the two-part approval process for covert action – approval first within the Agency and second at the National Security Council. He displays great confidence in that process: “If the President ordered actions that would violate the law, lawyers throughout the Agency, as well as those at the National Security Council, would be aware of it, and they would have the chance to voice strong concerns or to object outright.”⁴⁶ To Levit, this opportunity to object is significant. Implicit in his thesis is the conviction that 1991 amendments to the National Security Act, which provide more oversight for CIA activities, preclude Agency actions that are kept completely secret from the American public, from Congress, and even from parts of the CIA not directly involved. Moreover, in a footnote he observes, “The CIA's culture of fidelity to the law would at least guarantee that such problematic claims [the President directing the CIA to engage in torture] would be thoroughly vetted.”⁴⁷ In Levit's mind, the CIA is not a rogue elephant.

Not everyone shares Levit's faith. This article takes a position somewhere between the believers and the atheists, and seeks to provide enough facts and hunches for agnostics to decide for themselves.

B. *The Lawyers Speak About Themselves*

Self-reflections are often significant. But CIA lawyers, current and former, are shy about going on the record with examinations of their activities. Those who do go on the record tend to be General Counsels and former General Counsels. So far, we have had Senate hearings on the nominations of two General Counsel candidates, Scott Muller and John Rizzo. Each of the hearings provides clues about the role the nominee sees for himself, as well as

Director, International Agreements & Policy, Federal Ministry of Defense, Germany), Jonathan Landay (Senior National Security and Intelligence Correspondent, McClatchy Newspapers), Steven Aftergood (Director, Project on Government Secrecy, Federation of American Scientists), and Laura Hill (former counsel, CIA OGC). *See id.* app. at 15–29.

44. In 1994 Dorian Greene wrote a fine article that generally discusses lawyers in the intelligence community, but it does not dig into the specific dilemmas that lawyers face at CIA. *See Greene, supra* note 24.

45. Kenneth J. Levit, *The CIA and the Torture Controversy: Interrogation Authorities and Practices in the War on Terror*, 1 J. NAT'L SECURITY L. & POL'Y 341 (2005).

46. *Id.* at 352.

47. *Id.* at 352 n.42.

the role the Senators see. These congressional-executive exchanges, in open sessions of the intelligence committees, also provide important insights into the OGC's role in internal oversight.

Robert McNamara was the first nominee for CIA General Counsel who required Senate confirmation. Before his nomination on October 21, 1997, McNamara had extensive experience as a government lawyer, having served for sixteen years in the Treasury Department. He was also Deputy Director for Enforcement at the Commodity Futures Trading Commission, General Counsel at the Peace Corps, an Assistant United States Attorney, and a staffer on the Senate Watergate Committee.⁴⁸ McNamara's selection did not create any controversy. The Senate Select Committee on Intelligence, not interested in probing the nominee's views about the proper role of the General Counsel, chose not to hold a hearing. They voted in his favor on November 7, 1997.⁴⁹ The full Senate confirmed McNamara the next day.⁵⁰ He turned out to be a competent but distant leader, more inclined toward oversight than facilitation. Career lawyers found amusing the frequency with which McNamara reminded them that he was the first Senate-confirmed General Counsel.

The next nominee was Scott Muller. Before his nomination to be CIA General Counsel, Muller, like McNamara, had experience as an Assistant United States Attorney, and he had served on the Watergate prosecution team. For many years after that, he had worked as a criminal defense lawyer, focused on white-collar issues and regulatory enforcement matters.

Muller had a one-day hearing on October 9, 2002.⁵¹ Muller's friend, Senator Kit Bond from Missouri, introduced him to the Senate Committee. The only other Senators who attended were Bob Graham from Florida and Jay Rockefeller from West Virginia, both Democrats. As Muller admitted to the Senate Committee, he did not have much experience in the intelligence community. But that was a minor concern to the Senators. Senator Graham had a greater concern:

I know from my work on this Committee for the past 10 years that lawyers at CIA sometimes have displayed a risk aversion in the advice they give their clients, particularly some of the lawyers assigned to the posts in the Directorate of Operations. Unfortunately,

48. See Office of the Press Secretary, President Clinton Names Robert McNamara, Jr. as General Counsel at the Central Intelligence Agency (Oct. 21, 1997), available at http://fas.rg/irp/news/1997/97102103_tpo.html.

49. Presidential Nomination of Robert M. McNamara, Jr., to be General Counsel of the Central Intelligence Agency, PN792-105, Rec'd by the 105th Congress, Oct. 31, 1997, available at <http://thomas.loc.gov/home/nomis.html> (search "Robert M. McNamara" within 105th Congress).

50. *Id.*

51. Presidential Nomination of Scott W. Muller, of Maryland, to be General Counsel of the Central Intelligence Agency, PN2097-107, Rec'd by the 107th Congress, Sept. 3, 2002, available at <http://thomas.loc.gov/home/nomis.html> (search "Scott W. Muller" within 107th Congress).

we are not living in times in which lawyers can say no to an operation just to play it safe. We need excellent, aggressive lawyers who give sound, accurate legal advice, not lawyers who say no to an otherwise legal operation just because it is easier to put on the brakes. I also know that the lawyers assigned to the Directorate of Operations are not always perceived as part of a team by their clients but, rather, a hurdle that must be surmounted before the operators can do their jobs.⁵²

Senator Graham, a Democrat speaking to a Republican nominee, sought to ensure that Mr. Muller would not get in the way of the CIA's operators.

In a dig at those who came before Muller, Senator Graham continued: "The previous General Counsel came before this Committee . . . and asserted that the officers in the Directorate of Operations needed adult supervision by their lawyers. As you might imagine, that comment was not well received at the Directorate of Operations."⁵³ From the context, it was not clear whether Senator Graham was referring to the interim General Counsel, John Rizzo, or to the prior Senate-confirmed General Counsel, Robert McNamara. To those at OGC, the "adult supervision" line sounded more like McNamara than Rizzo. In any event, Senator Graham sought a facilitator, a company lawyer, for the post-September 11 era. He seemed to suggest that oversight, whether external or internal, needed to have appropriate limits, and the lawyers should not interfere with the guardians who protect the United States from suicide bombers and weapons of mass destruction.

In that environment, Muller said enough of what Senator Graham wanted to hear. At one point, Muller declared:

I believe that the job of General Counsel of the Central Intelligence Agency is to provide timely, objective and independent advice to assist the DCI, the Agency, and the community as a whole in accomplishing their missions effectively and doing so in a way that is fully consistent with the laws and Constitution of the United States.⁵⁴

Muller thus adroitly straddled two of the General Counsel's possible roles. He defied being labeled as either watchdog or lapdog. While he avoided the unfortunate "adult supervision" phrase, he included notes about independence and consistency with the laws. His view of the client included the head of the

52. *Nomination of Scott W. Muller to be General Counsel of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 107th Cong. 2 (2002), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname107_senate_hearings&docid=f:83725.pdf.

53. *Id.*

54. *Id.* at 6.

CIA, the CIA itself, and the rest of the intelligence community. Muller also hit company notes with the phrase about “accomplishing their missions.”

Later in his testimony, in response to a question from Senator Rockefeller, Muller scored more points with Senator Graham:

I view the lawyer more as a navigator who will help the captains of the ship steer it as best they can so it's not to hit shoals, to tell them where the water is deep and where it is shallow, and to give them their best judgment – my best judgment as to how the ship will fare in particular seas. But I will not be running it. I will not be the captain.⁵⁵

Here Muller revealed a lot. He would be on the ship to help the CIA navigate. He was not inclined to stay on shore, objecting on principle to any course the CIA had taken or would take. If the Committee did not seek too much supervision over the CIA, Muller was their man. On October 16, 2002, the Committee voted unanimously to confirm him.⁵⁶ The full Senate confirmed Muller by voice vote the next day.⁵⁷

From his days at Davis Polk, Muller knew how to keep clients out of trouble. As the Agency's General Counsel, he sought to keep the CIA out of trouble. During his tenure the CIA reportedly killed al Qaeda suspects through Predator strikes, interrogated al Qaeda prisoners more aggressively than allowed in the criminal justice system, and shifted suspects to secret prisons all over the world. It is impossible to know what advice, if any, Muller gave the Agency concerning these actions. But if he approved any of them, some might say he sought to protect the Agency more than the public interest. Others would argue that the public interest was well served. Whether or not Muller kept the CIA out of trouble remains to be seen.

Long before al Qaeda appeared on the scene, the United States faced serious threats. For much of the Cold War, the nation directly confronted a Soviet adversary that could assure its destruction. The United States fought long wars in Korea and in Vietnam. And it battled the Soviets through proxies in Africa, Latin America, and Asia. Even against these ultimate threats, not all General Counsels at the CIA were lapdogs.

The CIA's first General Counsel, Lawrence Houston, openly questioned whether the CIA's fifth function under the National Security Act of 1947⁵⁸ included paramilitary actions, separate from gathering foreign intelligence. That did not make him popular with all the operators bent on covert action. But even for a facilitator that was principled advice.

55. *Id.* at 11.

56. *Id.*

57. *Id.*

58. The so-called “fifth function” is described in §102(d)(5) of the 1947 Act, now codified at 50 U.S.C. §403-4a(d)(4).

More recently, Daniel Silver, the CIA's General Counsel from 1979 through 1981, held a reasonable view of what the CIA's top lawyer is supposed to do. Consistent with this article's interest in internal checks, he noted that "the first bastion of oversight is within the intelligence agencies."⁵⁹ As between the Inspector General and the General Counsel, Silver suggested that the General Counsel could do a better job of preventing misconduct.⁶⁰ Silver identified several requirements that must be met if lawyers are to be effective at CIA, criteria that are as relevant today as they were when Silver was writing in the wake of Iran-Contra. First, the lawyers must be "independent" and "strong-minded."⁶¹ Second, the Agency should respect the rule of law by keeping its lawyers involved in sensitive activities that have "flap potential."⁶² The lawyers should view themselves as more than the DCI's personal lawyers, but they should not go so far that the operators view them as "adversaries."⁶³ They need, in a word, balance.

Silver recognized that it is difficult for the General Counsel to maintain a proper balance. His views thus overlap mine. While Silver did not use this article's canine designations, he was optimistic that a General Counsel could be bred and trained who would be somewhere between a watchdog and a lapdog. He was all for hybrids.

In the aftermath of Iran-Contra, Silver was not analyzing the role of the CIA's General Counsel for pure academic pleasure. His goal was to head off what he considered overly intrusive proposals for congressional oversight. Back then, he had a vested interest, and, as a counter to proposals being considered on Capitol Hill, he may have exaggerated the effectiveness of internal checks on Agency misconduct. He was probably behaving more as an advocate than as a scholar. That is understandable, because the line between advocacy and scholarship, in his article as in mine, is not always clear.

In 2007, Acting General Counsel John Rizzo, in advance of public statements in a confirmation hearing, responded to questions about the lawyer's function in the intelligence community.⁶⁴ Rizzo said, optimistically, that he does not believe in a "disconnect" between the CIA's interest and the

59. Daniel B. Silver, *The Uses and Misuses of Intelligence Oversight*, 11 HOUS. J. INT'L L. 7, 13 (1988).

60. At that time, Silver was comparing the General Counsel to a prior version of the Inspector General. *Id.* Unlike the current Inspector General, the prior one was not created by statute and did not have a dual reporting line to the DCI and to the congressional oversight committees. In short, the Inspector General has changed since then. *See* 50 U.S.C.A. §403q (West 2003 & Supp. 2006).

61. Silver, *supra* note 59, at 13.

62. *Id.* at 14.

63. *Id.*

64. *See* Check, *supra* note 43, app. at 15, 21, 25.

public interest.⁶⁵ Further, he sees himself as a watchdog at the Agency. In fact, Rizzo claimed, “on those isolated occasions over the years” when the CIA’s management has criticized the General Counsel, “it was because of a perception that the GC was not being sufficiently rigorous in this oversight role.”⁶⁶ Rizzo believes the General Counsel must go beyond strictly applying facts to legal standards; he would counsel against something that is “strictly legal but nonetheless imprudent or untimely.”⁶⁷ He would factor in the reality of Washington politics. Whether Rizzo has actually lived up to his own declared standards is difficult to answer, especially for those who lack access to information about his earlier performance. All the same, his comments for public consumption give some sense of his ideals.

Rizzo finally had his confirmation hearing on June 19, 2007. Seven Senators attended this hearing, five Democrats and two Republicans, a better turnout than at Scott Muller’s hearing in 2002. Rizzo’s opening statement accepted the importance of external oversight, drawing lessons from Iran-Contra. But instead of exploring deep issues of internal oversight with Rizzo, the Senators spent much of their time during the two-hour open session posturing about extraordinary rendition and the CIA’s detention and interrogation program.

C. Other Views

Aside from the General Counsels themselves, senior officials at the CIA have not said much on the public record about OGC’s role in internal oversight. DCI Woolsey, as noted, lobbied against making the General Counsel subject to Senate confirmation.⁶⁸ Otherwise, internal oversight has not generated much commentary by the operators. Senior officials at the CIA, positioned somewhere between neglect and disdain, leave intricate legal issues to the lawyers. In a memoir of more than five hundred pages, former DCI George Tenet includes not a single page about OGC or the General Counsel; neither Scott Muller nor John Rizzo is named.⁶⁹

IV. GETTING IN AND STAYING IN

The CIA’s General Counsel is selected through a political process, while other lawyers in OGC are selected through a bureaucratic process. For both

65. *Id.* app. at 15. Rizzo further noted, “I have always felt as a CIA lawyer it is not only possible but essential to conduct oneself in a way that simultaneously protects the Agency’s and the public interest.” *Id.*

66. *Id.* app. at 25.

67. *Id.* app. at 21.

68. See *supra* text accompanying notes 35-37.

69. See GEORGE TENET (WITH BILL HARLOW), *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* (2007).

the General Counsel and her staff, staying in the OGC may be as difficult as getting in.

A. *The Application Process*

OGC employs about 100 lawyers. Entry-level lawyers are called Attorney-Advisors. The next level is Assistant General Counsel. The most senior level, aside from the General Counsel and her Deputy, is Associate General Counsel.

Applications for jobs at the CIA from lawyers and others have skyrocketed since September 11, 2001.⁷⁰ The tragic attacks on the American homeland caused a surge of patriotism and a renewed call to public service. An Agency that wondered what to do after victory in the Cold War now has a clear mission. No longer does Senator Frank Church display the Agency's misdeeds to the cameras. No longer does Senator Patrick Moynihan call for the CIA to be disbanded. Boycotts and protests against the CIA have, for the most part, disappeared. Americans are now more afraid of terrorists than of their own government.

As Sixties radicalism has been replaced by careerism, students apply to the CIA on-line and through the mail. They line up proudly for interviews with CIA recruiters on campus. The CIA is now part of their popular culture thanks to television programs such as *Alias* and *24*. Even Hollywood stars cannot resist the intrigue. Both Ben Affleck and Robert DeNiro have been to CIA headquarters, preparing for roles and doing research on film projects. Affleck was at Langley for *The Sum of All Fears*, and DeNiro was there for *The Good Shepherd*.⁷¹

CIA's OGC has benefitted from the surge in public support for activities on the dark side of American policy. The office has hundreds, if not thousands, of applications for a handful of openings each year. For the intelligence community, it is a buyer's market for legal talent.

1. *Honors Attorneys and Laterals*

OGC hires through two channels, an honors program and a lateral program. The honors program is open to attorneys with up to three years of experience, while the lateral program is open to those with more experience.

70. Douglas Jehl, *Abundance of Caution and Years of Budget Cuts Are Seen To Limit C.I.A.*, N.Y. TIMES, May 11, 2004, at A20; Dylan Loeb McClain, *Trends: Some Americans Rush To Fill Jobs To Root Out Terrorists*, N.Y. TIMES, Oct. 3, 2001, at G1; Eric Schmitt, *A Nation Challenged: The Intelligence Agencies; Job Seekers Flood Spy Agencies*, N.Y. TIMES, Oct. 22, 2001, at B7.

71. When a senior official introduced DeNiro to John Rizzo in a long hallway, the actor, shocked to find out that the CIA employed lawyers, could think of nothing more to say than to comment on Rizzo's "nice threads." Rizzo confirmed these details during a visit to my law school on March 28, 2007.

The honors attorneys, many of whom come to OGC straight from judicial clerkships, rotate among various OGC divisions during their three-year program. Most honors attorneys, if interested, are allowed to stay in OGC.

It is rare for OGC to hire a lateral attorney with more than five years of experience. Those who are hired with five or more years of experience usually come from other government agencies. Moreover, OGC is reluctant to hire attorneys who have been trained in a different professional environment, such as a legal services office or a public defender's office. If challenged about this, OGC might point to a steep learning curve about intelligence issues. Another reason may be the conscious or unconscious need for conformity in the ranks.

2. *The Advertising Campaign*

OGC has played up the cult of intelligence in its advertising. When I applied to OGC, the CIA's website and brochures had reprinted a section from a 1999 book called *America's Greatest Places to Work with a Law Degree*.⁷² This book quotes unnamed OGC lawyers who are proud of their work, which they describe in positive terms: "excitement," "cutting-edge," "fascinating," "nitty-gritty." While stirring up images of James Bond, the book half-heartedly advises candidates, "Don't get too carried away with the shoe-phone and lapel-camera stuff!"

OGC targets disgruntled law firm associates and law students whose summer experiences were not all thrills. OGC's website asked, "Who would you rather work for?" One side, we are told, has Mont Blanc pens. The other side has ballpoints. If the candidate is still interested, she is reminded that the normal place has 2600 billable hours. The special place has ten federal holidays and, depending on the employee's years of government service, between 13 and 26 days of annual leave.

Federal holidays may appeal to candidates who seek a gentler lifestyle, but the main attraction is the myth of James Bond. When I applied, the special place offered the possibility of "globe-trotting," being a "footnote in history," spending a "weekend in Paris," meeting a "contact late at night in unfamiliar surroundings," and having a "day measured in time zones visited." For candidates bored with marking up proxies and coordinating document production, the intrigue may be more than they can resist. If, during interviews at OGC, a current lawyer tells a candidate that the work is not so glamorous, she may consider this a trick to impede access to the inner sanctum. Once upon a time, they were lured by multi-million dollar deals and multi-district litigation. Now they are lured by espionage.

Only Madison Avenue would take pride in such advertising. The truth is that an OGC lawyer is more likely to spend a weekend in Paris on vacation

72. KIM ALAYNE WALTON, *AMERICA'S GREATEST PLACES TO WORK WITH A LAW DEGREE* (1999).

than on business. She must be willing to trade a high income in a law firm for work she hopes will be meaningful. She must want to do her part in making America safe. She needs to know that the CIA's General Counsel makes important decisions, and that OGC is important. In fact, OGC should not and need not perpetuate fantasies in order to attract good staff lawyers. It would still be able to recruit and retain good candidates if it told the truth.

Some OGC lawyers become disgruntled with the truth after a few weeks working on Freedom of Information Act requests. Even so, their dissatisfaction does not result in many defections from OGC's ranks. Both the candidate and the Agency have made substantial emotional and financial investments in their placement. The departures that do occur are often from the junior ranks, by lawyers frustrated by the slow progress toward increased responsibility and by the low pay.⁷³

3. *The Clearances*

Non-conformists need not apply to the CIA. To be eligible for employment, an OGC lawyer must obtain a Top Secret clearance. This clears the lawyer for information the disclosure of which might cause "exceptionally grave damage" to the national security.⁷⁴ In addition, the lawyer must be cleared for "sensitive compartmented information."⁷⁵

The cost of clearing a lawyer comes from OGC's own budget. Because the clearance is expensive, OGC weeds out candidates who are likely to use the lawyer's track to pursue other CIA opportunities. Of those not weeded out, a lawyer who transfers to other parts of the CIA is a tangible loss for OGC. Of those who do transfer, many go to the Directorate of Operations as intelligence officers. During my tenure at OGC, two junior lawyers transferred to the DO, only to be scolded by John Rizzo. Before that, another OGC veteran, also unpopular with Rizzo, had gone on to head the Special Activities Division and later the Counter-Intelligence Center. This veteran, later explaining his transfer out of OGC, said to me that he was "tired of handing out towels at the game." Nevertheless, most lawyers are content to work on the sidelines.

73. I took special notice of those who attended the same law school I did. One honors attorney who had clerked for a federal appellate judge left for a United States Attorney's Office. Another left to join a D.C. law firm.

74. Exec. Order No. 13,292, §1.2(a)(1), 68 Fed. Reg. 15,315 (Mar. 25, 2003).

75. SCI is not a higher clearance than TS. Imagine SCI as a folder within a filing cabinet labeled TS. A common example of an SCI compartment is a particular covert action. In order to receive information that is classified Top Secret and also designated SCI, the recipient would need to hold a Top Secret clearance and also any SCI clearances that are pertinent.

OGC uses a standard government form for security clearances.⁷⁶ The form is long, calling for details about prior residences, prior employment, academic credentials, financial history, and foreign travel. The CIA's background investigators, working from the applicant's completed form, will review, at a minimum, the applicant's credit history and will check to make sure that she does not have problems with the Internal Revenue Service. The background investigators, not necessarily revealing that they are checking a CIA applicant, will also interview the applicant's friends and acquaintances.

During the background investigation, the CIA takes an intimate look into the candidate's life. The anticipation of such an inquiry deters some people from even applying. Some candidates, who place a higher value on their privacy than they realized at the beginning of the application process, do not continue with the investigation. Of those who continue, some are cleared and some are not.

If a candidate has more than a casual relationship with any foreign nationals, she must list their names, addresses, and telephone numbers. This listing gives the CIA a chance to check the foreign nationals against various intelligence databases. If one of these names leads to a hit, for example, as a known intelligence officer, it will provoke additional questions during the security interview. Too many hits may doom the candidate's application.⁷⁷

In the old days of CIA recruiting, homosexuality served to exclude a candidate.⁷⁸ That has changed since one CIA employee, a covert electronics technician, was fired because of his homosexuality. Rather than go away quietly, the employee challenged the firing.⁷⁹ The Supreme Court held that "Mr. John Doe" presented a colorable constitutional claim that was not precluded by the DCI's prerogatives under the National Security Act. Partly as a result of this decision, the CIA no longer discriminates openly against homosexuals.

Whether there is hidden discrimination against homosexuals at the CIA is difficult to tell, since the background investigation remains a mystery even to those who receive clearances. What is clear is that I encountered a much smaller proportion of people at the CIA who were openly homosexual than I have seen elsewhere in my career as a lawyer.

76. U.S. Office of Pers. Mgmt., *Std. Form 86, Questionnaire for National Security Positions* (rev. Sept. 1995), available at [http://contacts.gsa.gov/webforms.nsf/0/67959D7F54B5826E85256A7200447F47/\\$file/sf86.pdf](http://contacts.gsa.gov/webforms.nsf/0/67959D7F54B5826E85256A7200447F47/$file/sf86.pdf).

77. Because of my contacts with Iranian officials while I ran the U.S. Chamber of Commerce's Iran Commercial Initiative, it took me more than two years to obtain a clearance.

78. See Christopher Marquis, *Gay Pride Day Is Observed by About 60 C.I.A. Workers*, N.Y. TIMES, June 9, 2000, at A24; Philip Taubman, *C.I.A.; Homosexuals Press Fight on Right To Be Agents*, N.Y. TIMES, Feb. 1, 1984, at B6; *Court Upholds Dismissal of Gay C.I.A. Employee*, N.Y. TIMES, Jan. 13, 1993, at A17; Editorial, *Finally, a Fairer Security Test*, N.Y. TIMES, Aug. 12, 1995, §1, at 20.

79. *Webster v. Doe*, 486 U.S. 592 (1988).

Whether there is hidden discrimination against other minorities – African-Americans, Muslims, or Jews – is also difficult to tell.⁸⁰ But my wife mentioned on her two visits to CIA headquarters, one on “family day” and another for my going-away party, that the place had the feel of a suburban shopping mall in her native Missouri. In addition, a former CIA case officer states that the CIA is not friendly to women.⁸¹

4. *The Polygraph and Other Tests*

All successful candidates must pass a polygraph examination. The CIA also uses the machine to update the security clearances of employees every five years or so. Although polygraph results are not considered reliable enough for use in federal courts, the CIA places great faith in them. The CIA’s confidence is so well known that Hollywood movies have noted an American penchant for “fluttering” people.⁸² Our British “cousins,” it seems, look to other signals in background investigations.

The more examinees believe in the machine, the more effective it is said to be. Presumably as a result, conversations between CIA examiners and subjects who are or who will soon be hooked up to the machine often produce more information than the machine’s readings. Because candidates believe in the machine’s ability to identify misstatements and evasions, they disclose information that they might otherwise withhold.

Not all agencies share the CIA’s faith in the machine. Use of the polygraph is not as prevalent in the Department of Defense, except within the National Security Agency. Within the Justice Department, the FBI, responding to the Robert Hanssen spy scandal, uses the polygraph to trim potential traitors from the mass of its applicants. In addition, the FBI sometimes uses the machine on informants and cooperating witnesses.

Besides passing the polygraph, OGC candidates, as potential watchdogs and lapdogs, must be in good health. Like all CIA candidates, they must obtain a medical clearance. The examination for a clearance includes blood work, a chest x-ray, a vision and hearing test, and an EKG. Some basic psychological testing, along with a short interview with an examiner, is also done to sort out the insane and the seriously troubled. (Candidates for the

80. Adam Ciralski, a former OGC staff lawyer, filed suit against the CIA, accusing OGC of discriminating against him because he is Jewish. *See* Vernon Loeb, *Back Channels: The Intelligence Community; Cold War Spies to Compare Notes in Berlin*, WASH. POST, Sept. 10, 1999, at A35; Janine Zacharia, *Fired Jewish CIA Man Asks Clinton, Gore to Intervene*, JERUSALEM POST, Sept. 3, 2000, at 5.

81. *See* MELISSA BOYLE MAHLE, DENIAL AND DECEPTION: AN INSIDER’S VIEW OF THE CIA FROM IRAN-CONTRA TO 9/11 (2004), at 124.

82. *See* THE RUSSIA HOUSE (MGM 1990). “FLUTTER” was a memorable element of the CIA cryptonym for the polygraph.

clandestine service undergo more detailed testing.⁸³) A candidate's urine is also tested for medical problems and for indications of illegal drug use.

One mysterious aspect of the background investigation is the question of what sort of illegal drug use is disqualifying. Dealing drugs is of course worse than using them. The more recent the use, the more it is a problem. Use of Yuppie drugs like marijuana and cocaine is less of a problem than heroin or LSD. In any event, the Office of Security keeps the candidates guessing, as "suitability" decisions are made on a totality of factors. That is part of the reason it is next to impossible for candidates to succeed in challenging denials of a clearance, whether through internal appeals or in the courts. The DCIA is charged by the National Security Act to resolve any doubts about a clearance against the candidate and in favor of national security.⁸⁴

By design, the Office of Security is risk averse. A security bureaucrat is not punished for turning away great candidates. On the other hand, a bureaucrat may suffer for being part of a process that approves someone who eventually turns out to be a traitor. Imagine the consequences for the examiner who let Aldrich Ames, the CIA turncoat, talk his way past indications of deception during a polygraph examination.

In my view, the CIA needs to break away from its traditional aversion to risk if it is to more effectively carry out its functions. Otherwise, fine lawyers, analysts, and case officers will continue to be turned away unnecessarily, and it will be difficult for OGC and the rest of the Agency to expand their perspectives. For the sake of national security, particularly in the battle against radical Islam, the CIA should open its doors to candidates who are immigrants and the children of immigrants, even those candidates who are more difficult to get through the clearance process. Learning a foreign language at a CIA training center is not the same as learning that language as a native. Learning a foreign culture in a U.S. school is not the same as living that culture. Only so much can be done to make Middle Americans fit into the Middle East and other hard-to-penetrate areas, making it imperative for the CIA to give fair consideration to capable candidates, even if they have backgrounds that traditionally have set off warning bells in the Office of Security.

5. *Inter-Agency Comparisons*

A revolving door exists between the military and the CIA, although more lawyers go from the military to the CIA than the other way around. Many at

83. I know this first-hand from my application for a position as an intelligence officer in the DO.

84. 50 U.S.C. §403-4a(e)(1) (Supp. V 2005) ("[T]he Director of the Central Intelligence Agency may, in the discretion of the Director, terminate the employment of any officer or employee of the Central Intelligence Agency whenever the Director deems the termination of employment of such officer or employee necessary or advisable in the interests of the United States."). The CIA has a corresponding internal regulation on security clearances.

OGC served earlier as military lawyers. While at the CIA, some of these lawyers are given paid leave for military training that keeps them in reserve status. Some retire from the military before joining OGC, enabling them to draw both an OGC salary and their military stipends and pensions.

The military influence at OGC leads to the use of expressions – such as “roger that” and “stand down” – that annoy some who have not worn a uniform. Other civilians, wittingly or not, adopt the military lingo. All in all, the military marks the CIA more than the CIA marks the military.

While the lawyers in OGC are qualified, they do not stack up against the Justice Department’s elite cadre of attorneys. Not many OGC lawyers come from Justice, although a few OGC lawyers eventually transfer there. Compared to the Office of Legal Counsel or to the Solicitor General’s Office, OGC has fewer lawyers who attended top-ten law schools, served on law reviews, or clerked on a federal appellate court. Supreme Court clerkships are not common credentials at OGC, as they are in the Solicitor General’s office. With about 100 lawyers, it may be difficult for OGC to develop or to maintain elite standards. Slow turnover contributes to stagnation. By comparison, the Office of Legal Counsel and the Solicitor General’s Office are each a fraction of OGC’s size. Accordingly, a fairer comparison might be between OGC lawyers who serve in the DO and lawyers in Justice’s most selective components. Even by that comparison, however, OGC does not measure up. In sum, OGC is a place for good lawyers, not great lawyers.

The Justice Department and the CIA are two different clubs. At Justice, lawyers are the center of attention, with the Attorney General at the top of the chart. It is a lawyers’ club. The CIA is a spy club. The lawyers are off to the side, and OGC occupies a small box on the organizational chart next to the DCIA. Some OGC lawyers try to compensate by aping the surrounding culture. Some even outdo the analysts and case officers in using spy lingo. Other OGC lawyers just make do.

B. Ongoing Scrutiny

Even after an OGC candidate is cleared, scrutiny continues. As with most clubs, payment of dues follows initiation fees. Once the OGC lawyer receives her coveted blue badge as a full-time employee, she is required to fill out regular notifications and reports. Thus, she spends some of her energy keeping the Office of Security happy. As a company woman, it is difficult, if not impossible, for her to be an iconoclast. While she watches over the case officers and analysts, the Office of Security watches over her – a guard over the legal guardian.

Still, the security watch at CIA is less intrusive than at intelligence services in other countries. Diplomats and intelligence officers from non-democratic countries are accustomed to “minders” who accompany them to make sure they do not go over to the other side. The Iranians, for example, do not leave their officials alone for long, abroad or at home. Their minders, like human blankets, join the officials in restaurants, hotel suites, even restrooms.

On the other hand, CIA officers do not believe that someone is always watching over them. At home, unless they have fallen under some serious suspicion, they assume that the Office of Security is not monitoring their phone calls, emails, and personal activity. They take their children to soccer games without another set of watchmen monitoring them.

1. Classified Information

CIA lawyers are not allowed to share classified information with people who lack authorized access. In forming legal opinions based on such information, CIA lawyers are not allowed to consult lawyers outside the government or to consult lawyers within the government who have not been “read into” a relevant classified compartment. For this reason, writing a legal document at OGC is different from writing scholarly articles that benefit from a wide range of comments and critiques.

Only a few people will review the quality of an OGC lawyer’s work. OGC does not publish its legal opinions, and the OGC work-product that is published is usually subsumed into a Justice Department filing. Many commentators, using the Justice Department’s August 2002 “torture” memorandum as evidence, have concluded that the best legal analysis does not take place in such secrecy.

Cipher locks, special phones, and classified fax machines add to the CIA lawyer’s chores. CIA lawyers work in vaults where they can leave classified documents out on their desks, relying on the last person out for the day to lock the vault to bar access from other parts of the CIA. Lawyers who work on more sensitive projects have separate safes in their offices, to prevent other lawyers from peeking at documents related to such projects. The safes are compartments within compartments, another impediment to comprehensive oversight.

CIA lawyers are not allowed to share secrets with their spouses, children, or other family members. As a result, a legal guardian at the CIA may be lonely. Even if family members have security clearances, even if they work at the CIA, the odds are that they do not have the requisite need to know. Sometimes the CIA’s very connection to a matter is classified. When a CIA lawyer makes a trip on such a matter, the most she may tell her spouse is the city she is visiting. Clever spouses, of course, can sometimes connect the city to high-profile litigation; even the Office of Security must resign itself to accept such leaks. CIA lawyers are not, after all, trained operatives. Theirs is not the business of dead-drops and chalk-marks.

2. Financial Disclosure

All CIA employees, including lawyers, fill out a financial disclosure form on an annual basis. This multi-page form calls for information about assets and liabilities, reaching such details as what kinds of cars the employee owns, whether the employee leases or owns her home, and what the employee’s

outside sources of income are. The financial reporting requirement is a direct reaction to the Aldrich Ames spy scandal. Ames's conspicuous consumption – fancy suits, new teeth, a Jaguar, and a house paid for in cash – did not draw sufficient attention from the CIA's Office of Security.⁸⁵ Today's CIA employees pay for Ames's sins with additional paperwork, another sign that all the watchmen are watched.

Of course, an employee who is willing to commit espionage will not hesitate to lie on the financial disclosure form. Even so, if an espionage prosecution of the employee encounters problems of proof or sensitivities about sources and methods used in the investigation, those false statements provide an alternative means of prosecution. A false statement prosecution⁸⁶ is more straightforward than a prosecution under statutes that turn on complex definitions of "national defense" information⁸⁷ and on the intent to help a foreign power. Thus, the CIA's paperwork is not completely unnecessary.

3. *Outside Contacts*

In my experience, all lawyers at OGC were overt. They were not required to hide the fact of their employment by the CIA. Nevertheless, some of us, in the tradition of CIA analysts, were discreet about our employment, not wanting our prior contacts and former employers to become subject to outlandish speculation that they were CIA fronts. Further, although the 9/11 tragedy has caused a renewed respect for public institutions, the CIA is still not popular in all quarters.

Whether CIA employees are overt or covert, some requirements are universal across the Agency. For example, OGC lawyers are not allowed to speak to the media without prior authorization. Indeed it would be very unusual for OGC lawyers to receive such authorization, since the CIA's official interaction with the media is most often funneled through its Office of Public Affairs.

Leaks, however, can occur in any part of the CIA or elsewhere in the intelligence community. Preventing and plugging leaks are perennial problems, and, as demonstrated by the firing of Mary McCarthy at the Office of Inspector General,⁸⁸ there may be harsh consequences for those who have unauthorized contacts with the media.

OGC lawyers must notify the Office of Security concerning their contacts with outside organizations and their personal plans to travel overseas. The purpose of these notifications is to steer lawyers away from situations where

85. See Tim Weiner, *Report on C.I.A. Spy Is Said To Show Agency's Blunders*, N.Y. TIMES, Sept. 25, 1994, §1, at 28.

86. See 18 U.S.C. §1001 (2000 & Supp. V 2005), as amended by Pub. L. No. 109-248, §141(c), 120 Stat. 587, 603 (2006).

87. See, e.g., 18 U.S.C. §793 (2000).

88. Mark Mazzetti & Scott Shane, *C.I.A. Defends Officer's Firing in Leak Case*, N.Y. TIMES, April 26, 2006, at A17.

they may be assessed, developed, or pitched by foreign intelligence services and to guide them away from awkward or inappropriate interactions. Another purpose of the notification about foreign travel is the lawyer's safety. CIA officers in the field will keep a non-operational employee away from active operations, and in emergencies CIA officers might even look out for her.⁸⁹ Some CIA employees, rather than bother with the paperwork and subject colleagues to unnecessary scrutiny, stay away from outside organizations and opt for domestic travel.⁹⁰ Such decisions contribute to the isolation of OGC lawyers from their communities.

Even overt employees from headquarters, such as OGC lawyers, travel overseas under light cover. That is as close as most of them get to tradecraft. To avoid hostility, they do not discuss their true employment. Cover also helps to keep them clear of surveillance from foreign services.

At home or abroad, everyday interactions of the OGC lawyer may contain the seeds of espionage. Imagine that she is about to become involved in a school board in Arlington County and, unbeknownst to her, but known to other parts of the CIA, a member of the Russian foreign intelligence service has joined the board. She may be setting herself up for a pitch.

If a lawyer believes that a neighbor or acquaintance has been too inquisitive about her career, she is expected to report that to OGC's security officer. Once the security officer checks the appropriate CIA databases for information about the individual with whom the OGC lawyer has had contact, he will advise the lawyer on her next steps. In most cases, the advice will be to avoid or to minimize contact. It is conceivable, however, that U.S. operatives might turn the contact around. The OGC lawyer might then function as a double-agent or might facilitate a pitch to somebody on the other side. She might be lucky enough to play out her spy dream. Anything is possible.

On balance, the personal life of an OGC lawyer is not much different from the lives of other Washington bureaucrats. She shops, practices yoga, and sees movies in the usual places. Yet as a result of the CIA's security requirements, she is more on guard about casual encounters. What may be uneventful for a lawyer in the Department of Labor may be more significant for someone in the intelligence community. So she develops a suspicion about her surroundings, learns that things are not always as they appear on the surface, and sometimes sees complications where there is utter simplicity. For better or worse, her OGC career changes her.

89. For example, they might include her in plans to evacuate U.S. personnel.

90. I resigned from my board position with the Iranian-American Bar Association, and I discontinued my affiliation with the American Iranian Council.

C. Justice Department Interaction

OGC lawyers deal with matters both inside and outside the Agency. Inside, they advise on government ethics (for example, whether an employee may accept the gift of a saber from a foreign intelligence service), and they handle administrative appeals (for example, discrimination claims by employees). This aspect of OGC practice has much in common with the ethics and administrative practices at other agencies. The details of the working environment are different, but, for the most part, the rules and regulations are the same.

Also in line with other general counsels' offices, OGC has outside interactions with the Justice Department regarding litigation. OGC's Litigation Division is the most active communicator with the Justice Department.⁹¹

If CIA information is involved in litigation or in potential litigation, OGC lawyers become involved as early as possible. Their mission, quite simply, is to protect the CIA's information from disclosure. They attempt to do so without unnecessarily compromising the work of the rest of the United States government. CIA information can be drawn into both civil and criminal cases. The more the CIA classifies, the more its information will be drawn into both kinds of cases.

One task of OGC in a civil case may be preserving the cover of a CIA employee without making false statements. The secrets must be protected while justice is done. Imagine an inflamed divorce proceeding in which a spouse knows the CIA employee's true occupation but those outside the classified realm do not, a traffic accident that involves a covert CIA employee in a government vehicle, or an airplane crash into a secret CIA facility. The possible variations are endless.

1. State Secrets Practice

Whether or not the United States government is party to a civil lawsuit, the CIA sometimes needs to assert the state secrets privilege. According to the case law, the state secrets privilege is not to be "lightly invoked."⁹² It can only be asserted by the head of the agency with control over the matter after personal consideration.⁹³ During my tenure at the CIA, the DCI asserted the privilege on behalf of the Agency. After creation of the National Directorate

91. I served as a senior attorney in the Litigation Division. OGC also has an Operations Division, an Administrative Law Division, a Contract Law Division, and an Intelligence Support Division, along with legal advisers to the CIA's chief financial officer and the chief information officer.

92. *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

93. *Id.* at 8.

of Intelligence, both the DCIA and the DNI should have this authority. In practice, it seems that the DCIA continues to assert the privilege for the CIA.⁹⁴

When questions arise about state secrets, OGC lawyers consult with their counterparts in the Justice Department's Civil Division. With policy and law stirred into the mix, they determine whether the privilege should be asserted. If the lawyers decide an assertion is necessary, they will draft a memorandum to the DCIA that explains the case and recommends the privilege. This memorandum, along with the necessary affidavits, will go through the General Counsel.

The DCIA, a political appointee, takes assertions of the state secrets privilege seriously. He consults with his staff to weigh the political implications of any assertion. An unclassified affidavit asserting the privilege is usually filed on the public record in the case, and a classified affidavit goes only to the court. If the CIA's connection to the case is itself classified, the privilege will need to be asserted in a way that does not mention the Agency. One solution is for the head of another agency, as a party to the suit or as an intervening party, to file the unclassified affidavit and for the DCIA to file the classified affidavit. After the privilege has been asserted and upheld by the court, the litigation either works around the secrets or is dismissed.

2. *Totten Practice*

OGC lawyers also handle cases that involve the *Totten* doctrine, but these arise less often than state secrets cases. *Totten* recognizes a prudential bar for courts asked to hear cases that involve secret agreements for secret services. The *Totten* doctrine was articulated in a case in which William Lloyd entered into an agreement with President Abraham Lincoln, for a monthly salary and expenses, to spy behind Confederate lines during the Civil War.⁹⁵ The Supreme Court ruled that Lloyd's claim, brought by the administrator of his estate, was nonjusticiable. More than a century later, the Supreme Court reaffirmed the *Totten* bar when it dismissed a lawsuit by two alleged spies from a Cold War adversary against the CIA for breaching a promise to take care of them for life.⁹⁶

Using an invigorated *Totten* doctrine, OGC lawyers may now try to convince courts to dismiss other kinds of cases without submitting affidavits and without asserting a privilege.⁹⁷ They may also use *Totten* to bolster

94. See *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007) ("In support of its formal claim of [state secrets] privilege the United States submitted both an unclassified and a classified *ex parte* declaration of the Director of the CIA (DCI).").

95. "Both the employer and the agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter." *Totten v. United States*, 92 U.S. 105, 106 (1875).

96. *Tenet v. Doe*, 544 U.S. 1 (2005).

97. See A. John Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 IOWA L. REV. 1259, 1291-1295 (2006).

requests to dismiss cases involving state secrets. In the new *Totten* era an internal guard (OGC) works against a weakened external guard (the courts), and more and more of the CIA's information is kept secret.

3. FOIA

Although the CIA is not immune from Freedom of Information Act requests, it benefits from many protections. For instance, the CIA generally is not required to search its operational files in response to a FOIA request.⁹⁸ All the same, the documents pile up in the directorates, and the Agency must separate the documents that stay inside the building from those that must be turned over to outside requesters. As for documents that are not operational, the CIA makes ample use of Exemption 1 (for information that has been properly classified)⁹⁹ and Exemption 3 (for information "specifically exempted from disclosure by statute").¹⁰⁰

CIA classifications are subject to more second-guessing under FOIA than they are under state secrets and the *Totten* doctrine. Perhaps the courts are more assertive in FOIA cases because they consider the stakes to be lower, and in any event the procedural context is more favorable for FOIA requesters.¹⁰¹ Despite the differences, the flow of FOIA records to outsiders is more of a trickle than a stream.

CIA lawyers review the assertions of FOIA exemptions for documents and categories of information. They coordinate with lawyers from other U.S. agencies whose documents may have come into the CIA's possession, prepare the *Vaughn* indices (a correlation of FOIA exemption claims with the information withheld), and draft the motions in FOIA litigation. In FOIA cases, the internal guardians at OGC justify CIA decisions to external guardians – Justice Department lawyers and the federal courts. At other times, OGC lawyers counsel CIA officials to back away from unreasonable classifications. This is one area in which they perform meaningful oversight.

4. CIPA Basics

The Classified Information Procedures Act (CIPA) creates another arena in which CIA classifications are second-guessed, another area for oversight.¹⁰²

98. 50 U.S.C. §431 (2000 & Supp. V 2005); see Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. RICH. L. REV. 231, 260 (1987).

99. See Winchester & Zirkle, *supra* note 98, at 236.

100. See *id.* at 250.

101. See 5 U.S.C. §552(4)(B) (in a FOIA case, the district court "shall determine the matter de novo, and may examine the contents of . . . agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions . . . and the burden is on the agency to sustain its action").

102. Classified Information Procedures Act, 18 U.S.C. app. 3 §§1-16 (2000 & Supp. V 2005).

When the Justice Department is sufficiently aligned on a case with the CIA, it considers its discovery obligations (under *Brady*, *Giglio*, *Jencks*, and Rule 16 of the Federal Rules of Criminal Procedure) to extend to CIA files.¹⁰³ Alignment often occurs in terrorism and espionage cases. Alignment has also occurred in narcotics cases and in prosecutions under the Foreign Corrupt Practices Act. When alignment exists, the Justice Department asks the CIA to search its files for information related to the case. Even if alignment does not exist, the Justice Department may ask for a “prudential search” to determine whether witnesses in the case have any connection to the CIA or whether any truth exists in a defendant’s claim (such as that made by Manuel Noriega) that the CIA put him up to committing his crime.

In theory, Main Justice is supposed to coordinate all CIPA requests from the Justice Department, but in practice a prosecutor’s office that is accustomed to dealing with OGC often makes its requests directly. This is most likely to be done by the offices of the United States Attorneys for the Eastern District of Virginia and for the Southern District of New York, which have had OGC contacts from prior terrorism and espionage cases. While I worked at the CIA, OGC did not object when Main Justice was bypassed in this way, perhaps to the chagrin of DOJ’s Counter-Terrorism Section and the Counter-Espionage Section, two sections that are now part of a new National Security Division.¹⁰⁴ In my experience, OGC enabled Justice Department superstars to work around Main Justice, a practice that may continue to this day.

Since 9/11, CIPA has become better known to the public.¹⁰⁵ In the *Moussaoui* case, for instance, CIPA was applied by analogy to a situation that

103. See Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL’Y REV. 331, 367-368 (1998).

[A]n investigative or prosecutive agency becomes aligned with the government prosecutor when it becomes actively involved in the investigation or the prosecution of a particular case. When that occurs, the agency’s files are subject to the same requirement of search and disclosure as the files of the prosecuting attorney or lead agency.

Id. at 347-348 (quoting United States Dep’t of Justice, *Department of Justice Manual*, vol. 9A Criminal Div., pt. 3A, ch. 90.210(D)(1) (1997)).

104. Department of Justice, *Fact Sheet: Department of Justice to Create a National Security Division*, Mar. 13, 2006, available at http://www.usdoj.gov/opa/pr/2006/March/06_opa_136.html.

105. See Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 81, 99-104 (2003); A. John Radsan, *The Moussaoui Case: The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417, 1433-1436 (2005); Cameron Stracher, *Eyes Tied Shut: Litigating for Access Under CIPA in the Government’s “War on Terror,”* 48 N.Y.L. SCH. L. REV. 173, 183-192 (2003/2004); Brian M. Tomney, *Contemplating the Use of Classified or State Secret Information Obtained Ex Parte on the Merits in Civil Litigation: Bl(a)ck Tea Society v. City of Boston*, 57 ME. L. REV. 641, 650-652 (2005); Comm. on Communications and Media Law of the Ass’n of the Bar of the City of New York, *The Press and the Public’s First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 22 CARDOZO ARTS & ENT. L.J. 767, 827-831 (2005); Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1964-1967 (2005).

did not directly involve classified documents, but rather the defendant's request for access to high-level al Qaeda detainees. Moussaoui claimed that those detainees would exculpate him or mitigate his role in the 9/11 plot. By the sentencing phase, Moussaoui was provided with detainee statements but not with personal access to the detainees themselves. In another case, OGC lawyers were surely busy interacting with special prosecutor Patrick Fitzgerald in the prosecution of Scooter Libby.

Contrary to popular myths, OGC lawyers do not simply push a button to respond to the Justice Department's CIPA requests. Instead, those lawyers pass the requests on to other people in the Agency, and CIA experts outside of OGC search various databases for the requested information. Some of the databases are so old that they must be searched manually. Because the searches are as much art as science, it is difficult (if not impossible) to guarantee that all responsive documents have been gathered. This difficulty applies to internal searches, too. The motivation of the CIA searchers may differ, depending on whether the request is internal to the CIA – part of an operation – or external. Enthusiasm may run higher for CIA-originated searches than for those being conducted at the behest of other government agencies, so one oversight role for OGC is to push the searchers to be consistently diligent.

The bulk of what the searchers gather is CIA cables. Once the cables have been gathered, a prosecutor with an appropriate security clearance (for example, Patrick Fitzgerald) is allowed to review them at CIA headquarters. An OGC lawyer coordinates this review. A thorough OGC lawyer reviews the documents before the prosecutor does. A less thorough OGC lawyer just makes sure the stack is in the right place. If the prosecutor determines that nothing needs to be turned over to the defense, the CIA's role usually ends there.

5. *CIPA Abuse*

If nothing is turned over to the defense, it is unlikely that a defendant will ever learn about the search of CIA files. Although the Justice Department's search request is not by itself classified, any response from the CIA, negative or positive, is almost surely classified. Revealing what the CIA does not know (for example, concerning a terrorist group) or does not have an interest in (for example, satellite imagery of a certain country) may create as much damage as disclosing the contents of CIA cables. OGC will not tell the defendant about the search on its own.

A skeptic might ask whether there is any check on a prosecutor who sees discoverable information at the CIA but does not acknowledge it. Will OGC second-guess the Justice Department's decision that something need not be turned over? Will one agency watch over another?

Since OGC lawyers have enough trouble finding an appropriate role – between watchdog and lapdog – in their interactions with CIA officers, they do not seek out additional battles with prosecutors. In dealing with the Justice

Department, OGC is the entity that errs toward non-disclosure. OGC lawyers consider their duties to be separate from the prosecutor's duties, viewing *Brady* and other discovery rules as the Justice Department's problem, not the Agency's. Whether this view is correct has, like much of OGC's work, not been closely analyzed or tested in the courts.

Ferretting out a prosecutor's misconduct, in ordinary cases and in national security cases, is difficult but not impossible. One case that warrants optimism about oversight – even in CIPA cases – is the *Koubriti* prosecution in Detroit.¹⁰⁶ There, four persons were indicted for allegedly being part of a post-9/11 sleeper cell. The convictions were overturned after trial because of prosecutorial misconduct.¹⁰⁷ Part of that misconduct, which the Justice Department brought to the court's attention, related to a drawing in a notebook that was found when the defendants were arrested. An expert witness for the prosecution – an FBI supervisor – testified that the drawing was a sophisticated casing of a terrorism target in Turkey. What the prosecutor did not reveal was that during a review before trial a CIA expert did not consider the drawing to be so sophisticated. This difference of opinion between government experts, which was not revealed to defense lawyers until after trial, might have served the defense well in cross-examination at trial.

During the Justice Department's own internal investigation into the misconduct in *Koubriti*, the prosecutor filed a civil suit against then-Attorney General John Ashcroft and others, alleging that he was being made a scapegoat for blowing the whistle on the government's incompetence.¹⁰⁸ Eventually, the prosecutor was prosecuted for his handling of the *Koubriti* case but was acquitted.¹⁰⁹ Defendant *Koubriti* later filed a damage suit against

106. See Dan Eggen, *Report Scolds Terrorism Prosecutors; U.S. To Drop Convictions Against Trio in Detroit*, WASH. POST, Sept. 2, 2004, at A3; Danny Hakim, *Defendant Is Released in Detroit Terror Case*, N.Y. TIMES, Oct. 13, 2004, at A16; Danny Hakim, *Judge Reverses Convictions in Detroit Terrorism Case*, N.Y. TIMES, Sept. 3, 2004, at A12; Danny Hakim & Eric Lichtblau, *Trial and Errors: The Detroit Terror Case*, N.Y. TIMES, Oct. 7, 2004, at A1.

107. *United States v. Koubriti*, 336 F. Supp. 2d 676, 679 (E.D. Mich. 2004) (“[T]he prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution's case. As the Government's filing also makes clear, these failures by the prosecution were not sporadic or isolated. Rather, they were of such a magnitude, and were so prevalent and pervasive as to constitute a pattern of conduct, that when all of the withheld evidence is viewed collectively, it is an inescapable conclusion that the Defendants' due process, confrontation and fair trial rights were violated . . .”).

108. Eric Lichtblau, *U.S. Had Doubts About Lesser Case Against Terror Suspects*, N.Y. TIMES, May 13, 2005, at A18.

109. Paul Egan, *Cleared of Misconduct, Former U.S. Prosecutor in Terror Case Seeks Redress from the Government*, DETROIT NEWS, Feb. 13, 2008, at 1A; Paul Egan, *Federal Jury Acquits Terror Prosecutor; Jubilant Convertino Calls Trial “Politically Motivated Prosecution,”* DETROIT NEWS, Nov. 1, 2007, at 1A; Eric Lichtblau, *Ex-Prosecutor in Terror Inquiry Is Indicted*, N.Y. TIMES, Mar. 30, 2006, at A18.

the prosecutor.¹¹⁰ Thus, internal oversight sometimes can itself generate complicated moves and counter-moves.

6. CIPA, CIA Style

The CIA, almost without exception, does not allow raw cables to be turned over to defendants. Often these cables contain “cryptonyms” (code names for human intelligence sources). They also reveal CIA locations, personnel, and interactions with foreign governments, all of which are very sensitive and generally have only tangential relevance to a case. Under CIPA §4, an OGC lawyer works with prosecutors to propose “summaries” or “substitutions” that are acceptable to the Agency and eventually to the judge. Although redacted cables have been turned over to the defense, the recent trend at OGC is to lift relevant information from the cables onto separate pieces of paper. In some cases, prosecutors have convinced OGC to be more forthcoming in discovery with the promise that the prosecutors will limit the defendants’ use of any classified information at trial.

At any stage of CIPA, OGC’s practice is simpler if unclassified summaries can be approved. If not, the CIA insists that defense lawyers obtain security clearances as a condition of being able to review the classified discovery. Prosecutors with CIPA experience know all this, and at OGC’s prodding they have convinced judges that the classified discovery should be shared only with cleared defense lawyers, not with the defendants themselves. The system does not take a chance by giving classified information to an alleged terrorist. *Moussaoui* is an example.

The disclosure of sensitive information in discovery does not by itself permit the defense to use that information at trial. Under CIPA §5, the defense must designate the classified information it intends to use at trial. Here, the usual pattern is for the defense to be too general in its designation, for the prosecution to insist on more specificity, and for the court to work out a compromise. Under §6, if the court determines that the designated information is needed at trial, the prosecution has another opportunity to propose summaries and substitutions.

Even when the §4 and §6 filters do not preclude the use of classified information at trial, the CIA may still allow the prosecution to proceed. Costs and benefits are weighed, and other techniques are considered for limiting disclosure. For example, the “silent witness” rule may be used to prevent an intelligence source from being publicly disclosed; all references in the courtroom and on the trial transcript may be to “Country A” or “Person A.”¹¹¹ Thus, only the judge, the parties, and the jury are told the actual names of the

110. Paul Egan, *Ex-Defendant in Terror Case Sues Convertino; Man Whose Conviction Was Overturned by the Justice Dept. Is Alleging Malicious Prosecution*, DETROIT NEWS, Feb. 13, 2008, at 7A.

111. *See, e.g., United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007).

country and the person. Or, as happened in the Jose Padilla trial in Miami, a CIA officer may be allowed to testify in disguise.¹¹²

CIPA is an expanding area of overlap between law enforcement and the intelligence community. All in all, the Justice Department's interaction with OGC is usually positive. Prosecutors remind CIA officials that they sometimes need to defend their classifications before other executive agencies, judges, and defense lawyers. External checks and internal checks thus come together under CIPA.

7. Referrals and Opinions

Separate from civil cases and from the CIPA process, OGC lawyers interact with the Justice Department on criminal referrals, providing another opportunity for OGC oversight. The CIA's Office of Inspector General, another internal guard at the CIA, also participates in referrals for criminal investigation, which are made pursuant to guidelines between the CIA and the Justice Department.

Referrals are sometimes made on mundane matters; others go to the core of the DO. A CIA employee may have submitted an inflated voucher for reimbursement of expenses for an official trip, leading to a prosecution for theft of government property or for false statements. Or an interrogation of an al Qaeda suspect may have gone beyond approved techniques, perhaps resulting in a suspect's death.¹¹³ The CIA makes several referrals to the Justice Department in a typical month.

OGC also seeks legal opinions from the Justice Department.¹¹⁴ In this exchange, the General Counsel acts as a company lawyer to the CIA, and the Justice Department serves OGC as outside counsel of sorts.¹¹⁵ The CIA, if questioned about an activity, whether in court, on Capitol Hill, or by the public, can point to its comprehensive advice of counsel. This advice, on the interrogation of al Qaeda suspects or on other topics, may provide CIA officers with some protection from civil and criminal sanctions. In that sense, the August 2002 "torture" memorandum may still be useful to them, whatever

112. Jay Weaver, "Secret Agent" Testifies About Padilla Document, *MIAMI HERALD*, May 16, 2007, at 3A.

113. See Jane Mayer, *A Deadly Interrogation*, *NEW YORKER*, Nov. 14, 2005, at 44 (discussing whether CIA operative Mark Swanner would face legal consequences for the death of Manadel al-Jamadi, an Iraqi insurgent who died of "unnatural causes" while under interrogation by Swanner).

114. The United States government has acknowledged that OLC's August 1, 2002, "torture" memorandum was prepared in response to a request from the CIA. See *supra* note 1.

115. A former OLC lawyer, Martin Lederman, has criticized the Bush administration for allowing parts of the Justice Department other than OLC to provide advice to the relevant agencies on U.S. counter-terrorism. See generally Walter Dellinger et al., *Principles to Guide the Office of Legal Counsel*, 81 *IND. L.J.* 1348, 1349 (2006) ("It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions.").

its analytical deficiencies. If these protections are deemed insufficient, the CIA may lobby for a Congressional fix. A case in point is the Military Commissions Act of 2006,¹¹⁶ which, following the Supreme Court's *Hamdan* decision,¹¹⁷ retroactively amended the War Crimes Act to restrict its coverage to a list of "grave breaches" of Common Article 3, rather than to all violations of Common Article 3.¹¹⁸

The General Counsel usually initiates requests for legal opinions from the Justice Department. She may want a second opinion on advice she has already given the Agency, or she may want somebody else's license on the line. Such CIA-DOJ interactions are tightly compartmented. At DOJ's Office of Legal Counsel, the group that handles the request may be limited to the lawyer who has the "CIA account," along with the chief and a deputy chief. The chief of OLC will, in turn, be inclined to brief the appropriate division chief, the Deputy Attorney General, and the Attorney General. If necessary, the Justice Department lawyers on the matter can be kept to a handful. The number of OGC lawyers will be similarly small: the General Counsel, the deputy General Counsel, the chief lawyer to the DO, and the one or two OGC lawyers assigned to the relevant division(s). Overall, not many guards are involved in legal opinions on sensitive topics.

D. Post-Employment Duties

Even after a CIA lawyer leaves OGC, she is not free from duties that relate to classified information. Potential watchdogs are taught to heel. Upon separation from the CIA, she signs another agreement, a reminder that she may not disclose anything classified. Her duty lasts for as long as she lives or for as long as the information stays classified. She is also reminded of the "pre-publication agreement" that she signed as a condition of her CIA employment. Before she publishes anything that relates to her CIA work, she must submit the manuscript to the Publications Review Board at CIA.¹¹⁹

The PRB does not require a former employee to notify the CIA if she is going to speak to the media or give a public speech without any written notes. It is at first surprising that the CIA trusts former employees to effectively protect classified information when speaking from memory, but does not trust

116. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 U.S.C.).

117. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

118. Military Commissions Act of 2006, §6(b), 120 Stat. 2633.

119. See, e.g., Seymour M. Hersh, *Ex-Intelligence Director Disputes Censorship of His Book on C.I.A.*, N.Y. TIMES, May 18, 1983, at A1; George Lardner Jr., *C.I.A. Delays Printing of Ex-Aide's Book*, WASH. POST, Apr. 3, 1980, at A13; Vernon Loeb, *Back Channels: The Intelligence Community*; *C.I.A. Wants a History Channel Preview*, WASH. POST, June 13, 2000, at A37; Robert Pear, *Wide Power Given on Classified Data*, N.Y. TIMES, Mar. 14, 1983, at D12; Scott Shane & Mark Mazzetti, *C.I.A. Crackdown Seeks To Tighten Agency's Secrecy*, N.Y. TIMES, Apr. 24, 2006, at A1 ("Authors say the agency's Publications Review Board has been removing material that would easily have been approved before.").

them when they put their thoughts on paper. There probably are at least two explanations for the disparity in procedures. First, it may be less practical, even impossible, for the CIA to police anticipated oral expression. Second, inadvertent oral disclosures may be less damaging than written ones. It is certainly easier for a foreign intelligence service to cull classified information from a written record, and no one from another intelligence service may even see a media appearance or hear a former employee's remarks on a panel or to a group of students. Nonetheless, oral disclosures may be recorded and eventually be found in written form in a newspaper or on the Internet, blurring the apparently clear lines between oral and written expression. And where does "blogging" fit under the PRB rules?

Uncertainties about the content and application of PRB policy affect the free speech of former CIA lawyers. Because of PRB, for example, one professor decided not to offer his students a written syllabus in a national security course. Perhaps he was being too cautious – or too cute – but when he left the CIA, the head of the PRB had told him that even the name of his casebook had to be submitted.¹²⁰

The PRB claims that it goes no further than demanding the removal of classified items, and denies that it censors the writings of former employees who criticize the Agency. No matter the Board's good intentions, the pre-publication review requirement may promote self-censorship or submissiveness. Former employees know their manuscripts will face some delay. The review of op-ed pieces takes days and weeks. Law review articles, including this one, take weeks and months.¹²¹ And books take even longer. Whatever the form of her writing, the former employee is in a position of weakness. If she disagrees with the PRB about whether something is classified, she has internal recourse and may appeal to the courts. Such review, of course, takes time and money. Therefore, to avoid conflicts with PRB, a former employee is likely to err on the side of caution, pulling back on criticisms, pulling away from what may be classified areas. She heels. Thus, I acceded to the PRB request that minor deletions be made in this article. Rather than challenge what I considered an inaccurate view of what is classified, I was relieved that the suggestions were not more substantial.

Valerie Plame, the former CIA officer at the center of the Scooter Libby case, is one person who did not accept the PRB's redactions. Backed by her publisher, Simon & Schuster, Plame took the CIA to court in the Southern District of New York in an effort to publish her memoirs without redactions,¹²²

120. Apparently NATIONAL SECURITY LAW (4th ed. 2007) by Stephen Dycus and his colleagues passes CIA muster.

121. I submitted a draft of this article to the PRB in mid-July of 2006. I did not receive a response, proposing minor deletions, until the end of October 2006.

122. See Steven Zeitchik, *Plame Stakes Claim, Sues CIA over Book*, DAILY VARIETY, June 1, 2007, at 2; VALERIE PLAME WILSON, FAIR GAME: MY LIFE AS A SPY, MY BETRAYAL BY THE WHITE HOUSE (2007).

yet this suit may have been meant to garner publicity as much as it was to overturn the PRB's decision.

For Plame and many others, the heavy cloak of CIA secrecy prevents those who know the most about the Agency from describing abuses. Very few veterans from OGC have been foolish enough or brave enough (or both) to speak out about the Agency. Two former general counsels, Anthony Lapham and Jeff Smith, have been quoted.¹²³ And a former assistant general counsel has spoken up.¹²⁴

In dealing with the Agency, the guardian is in a weak position. She may resign from OGC on principle. But even after she resigns there are severe limits on what she may say. She may allege that the CIA is way off course. The CIA is shameful, she may add. When pressed to back up her allegations, however, she may not refer to specifics. She may believe that secret prisons violate U.S. and international law, but her bosses, including the General Counsel, may disagree. They have the two-edged weapon of Commander-in-Chief powers and the executive prerogative to decide what remains classified. When she is inside the Agency, they can shut her out through tight compartments of information. When she is outside the Agency, they can shut her up through the PRB.

If a former employee defies the PRB by not submitting a manuscript for review or by not incorporating the PRB's suggested changes, she is exposed. She may argue that the manuscript does not fall within the scope of her prior

123. Anthony Lewis, *Abroad at Home; The Greater Threat*, N.Y. TIMES, Feb. 21, 1985, at A23, (“[A] former C.I.A. general counsel, Anthony Lapham, said in 1979 . . . ‘We have had in this country for the last 60 years an absolutely unprecedented crime wave, because surely there have been thousands upon thousands of unauthorized disclosures of classified information’”); Tim Weiner, *The Mideast Talks: Cloaks and Daggers; The U.S. Intelligence Chief Steps Up to the Plate*, N.Y. TIMES, Oct. 23, 1998, at A12 (“‘C.I.A.’s relationships with the intelligence services in both countries allow it to bridge gaps otherwise unbridgeable,’ said Jeffrey Smith, who as the general counsel of the agency worked with Mr. Tenet on his mediation efforts in 1996.”); see also Jeffrey H. Smith, Op-Ed., *Secret Lives, Honest Spies*, N.Y. TIMES, Nov. 27, 1996, at A25.

124. Peter Baker & Michael Abramowitz, *A Governing Philosophy Rebuffed*, WASH. POST, June 30, 2006, at A1 (“‘Rather than push so many extreme arguments about the president’s commander-in-chief powers, the Bush administration would have been better served to work something out with Congress sooner than later – I mean 2002, rather than 2006,’ said A. John Radsan, a former C.I.A. lawyer who now teaches at William Mitchell College of Law.”); Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1 (“‘The ambiguity in the law must cause nightmares for intelligence officers who are engaged in aggressive interrogations of Al Qaeda suspects and other terrorism suspects,’ said John Radsan, a former assistant general counsel at the agency who left in 2004.”); Dana Priest, *Covert C.I.A. Program Withstands New Furor; Anti-Terror Effort Continues To Grow*, WASH. POST, Dec. 30, 2005, at A1 (“‘In the past, presidents set up buffers to distance themselves from covert action,’ said A. John Radsan, assistant general counsel at the CIA from 2002 to 2004.”); Scott Shane, *Seeking an Exit Strategy for Guantanamo*, N.Y. TIMES, June 18, 2006, §4 (Week in Review), at 1 (“Mr. Radsan, the former C.I.A. lawyer, offers a more measured critique. He says the secret detainees held abroad are a more serious constitutional concern than the Guantanamo inmates, because they have no access to any legal process.”).

work at the Agency, but that argument only goes so far. If the former employee does not go through PRB and if she earns profits from the manuscript, the CIA can take those profits through a constructive trust, as noted in the *Snepp* case.¹²⁵ In such situations, even the lawyer who seeks to be a watchdog is tamed.

I am told that Bob Baer, a former CIA case officer, did not make changes the PRB requested in his book *See No Evil*.¹²⁶ If he published the book with passages the PRB had designated for redaction, he took a risk. And the risk may have paid off. The Hollywood movie *Syriana* was based, in part, on Baer's book.¹²⁷ The movie sold many tickets, and with Hollywood on board it is safe to conclude that Baer made some money.¹²⁸ Under the *Snepp* doctrine, the CIA may still covet those profits.

Apart from the possible loss of profits, a former employee who defies PRB may face serious difficulties in obtaining a security clearance if she decides to return to government service. Baer might well accept that as the price of his defiance. Perhaps an even greater concern for a defiant former employee is the threat of criminal prosecution. Baer, who served the CIA in Lebanon, Iraq, and other tough places, can probably handle the anxiety. But former CIA lawyers may not be so tough. While the Justice Department has not been keen on bringing prosecutions against CIA employees for leaks, that reluctance can change in an instant. The former employee can, like Frank Snepp, be made an example by the Agency. Accordingly, the CIA uses the possibility of criminal or civil proceedings to control its former employees, transforming them from potential watchdogs into lapdogs.

Out of self-interest, former employees closely follow the back and forth of the PRB pendulum with each new Director. The Porter Goss regime turned

125. *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (imposing a constructive trust on profits from a book that a former CIA case officer wrote about what he considered the CIA's shameful performance at the end of the Vietnam War, not because the book contained any classified information or secrets, but because it was not submitted to the CIA for pre-publication review as the author had agreed by signing an agreement and by entering into a relationship of trust with the Agency).

126. Baer, who had over 20 years of experience at the CIA, is an outspoken critic of the Agency.

127. George Clooney won an Academy Award for best supporting actor for playing the Bob Baer character. See David M. Halbfinger & David Carr, "Crash" Walks Away with the Top Prize at the Oscars, N.Y. TIMES, Mar. 6, 2006, at E1. In a touch of irony, Bob Baer himself has a cameo role as an unctuous employee of the CIA's Office of Security. The Baer character greets the Clooney character in a hospital after a Hezbollah crazy has pulled out Clooney's fingernails. In the movie, the Office of Security, true to its real-life role, is more concerned about any secrets that may have been divulged than about Clooney's well-being.

128. When I invited Baer to speak at the National Security Forum at William Mitchell College of Law, his agent at Creative Artists Agency informed me that his usual speaking fee is \$15,000. Baer has not yet appeared at the Forum.

out to be tougher than the George Tenet regime.¹²⁹ For the moment, it is too soon to read Michael Hayden, the new DCIA.

V. ROTATION AND ADVANCEMENT

The prize for an OGC lawyer is being assigned to the Directorate of Operations,¹³⁰ the place where she becomes the ultimate company lawyer. With an eye on the DO prize, she toils as a junior lawyer on FOIA requests and on other less than glamorous assignments.

A. *The DO Versus the Rest*

Differences exist at the CIA among the analytical wing (the Directorate of Intelligence), the technical wing (the Directorate of Science and Technology), and the support wing (the Directorate of Support). There are also integrated centers that transcend separate directorates: the Counterterrorism Center and the Counter-Intelligence Center. But the biggest split in the CIA is between the DO and everybody else. The DO is a special place, a dominant culture at the Agency. To highlight these differences, I focus on the DO against the backdrop of the DI. The DI, in my comparison, represents all those parts of the CIA that are outside the big, bad DO.

1. *Different Goals*

Although the line between collection and analysis is not always clear, the separation between the DO and the DI reflects a common split at intelligence services. The DO collects foreign intelligence, takes covert action, and conducts counter-intelligence. The DI reviews what the intelligence community has collected (human source reports, intercepts, satellite photographs, open-source reports, and many other items) and converts the raw data into written and oral reports for policy makers.

The highest prize for the DO is recruiting a foreign country's head of state as a source. Next best is the head of that country's intelligence service. From the early days of the CIA, the highest product for the DI was the President's

129. See Douglas Jehl, *New C.I.A. Chief Tells Workers To Back Administration Policies*, N.Y. TIMES, Nov. 17, 2004, at A1 (reporting the discovery of a memorandum written by Goss that outlined Goss's expectations of CIA employees, which "appeared to be a swipe against an agency decision by George J. Tenet . . . to permit a senior analyst at the agency, Michael Scheuer, to write a book and grant interviews that were critical of the Bush administration's policies on terrorism"); Porter Goss, Op-Ed., *Loose Lips Sink Spies*, N.Y. TIMES, Feb. 10, 2006, at A25 (asserting that "those who choose to bypass the law and go straight to the press are not noble, honorable or patriotic. Nor are they whistleblowers. Instead they are committing a criminal act that potentially places American lives at risk. It is unconscionable to compromise national security information and then seek protection as a whistleblower to forestall punishment.").

130. See *supra* note 15.

Daily Brief, a classified digest of trends and developments. Now the Office of the Director of National Intelligence has taken over that production, and the DNI, not the DCIA, now meets with the President on a daily basis.¹³¹ Next best for the DI is its leading role in preparing National Intelligence Estimates, the inter-agency conclusions on major national security issues. The public learned about NIEs, their virtues and flaws, in the run-up to the 2003 invasion of Iraq.¹³²

2. Different Styles

On the CIA campus, the DO personnel are the jocks and the DI personnel are the nerds. The people in these two directorates keep their distance, their views of one another shifting between respect and disdain. The DO officers I met, whether in a restaurant or in the office, were always on, always assessing, always working the situation. The world was a big operation for them. They made passes at waiters and waitresses for the fun and practice. The DI officers, by contrast, were more likely to separate their work from their socializing. With them, it seemed possible to have a conversation that did not have an ulterior motive. They behaved.

The work in the two directorates also differs. The DO officer convinces people from other countries to commit espionage. The recruitment cycle from assessment to development to pitching to handling is complex, but the goal is simple: convince a foreigner to turn over his country's secrets or to betray his group. In the past, the DO officer ran arms to rebel groups, planted stories in the foreign media, and passed money to foreign political parties. He has been on guard against our enemies in the dark alleys, on the look-out for sources and agents in caves and back streets. The Special Activities Division within the DO handles paramilitary activities and other aspects of covert action. To the extent that the CIA is involved in Predator strikes on suspected terrorists,¹³³ SAD probably has a role.

The DO officer, whether in SAD or in other divisions, must be an extrovert or at least be able to draw upon the active side of his personality. More than anyone else at CIA, the DO officer is the guard in need of a guardian. He works the farthest from headquarters. His potential excesses,

131. See *supra* note 21.

132. See, e.g., Douglas Jehl, *Senators Assail C.I.A. Judgments on Iraq's Arms as Deeply Flawed*, N.Y. TIMES, July 10, 2004, at A1; Douglas Jehl, *White House and C.I.A. Withhold Document on Prewar Intelligence Given to Bush*, N.Y. TIMES, July 14, 2004, at A15; James Risen, *After the War: Intelligence; Iraq Arms Report Now the Subject of a C.I.A. Review*, N.Y. TIMES, June 4, 2003, at A1; Eric Schmitt & Alison Mitchell, *Threats and Responses: Baghdad Arsenal*, N.Y. TIMES, Sept. 11, 2002, at A23.

133. See Barton Gellman, *CIA Weighs "Targeted Killing" Missions*, WASH. POST, Oct. 28, 2001, at A1; Douglas Jehl, *CIA Kills in Pakistan Shadows*, INTL. HERALD TRIB., May 17, 2005, at 3; Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike*, WASH. POST, Nov. 8, 2002, at A1; James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda*, N.Y. TIMES, Dec. 15, 2002, §1, at 1.

such as stealing from an asset's cash payment, sleeping with an agent, or killing a source, are perhaps the most costly.

The DI officer, cut from a different cloth, is like a university professor. He solves puzzles by extrapolating from less than a full box of pieces. He takes the bits of what the intelligence community has collected and fits them into the so-called intelligence mosaic. His mistakes, such as sloppy analysis and mirroring American assumptions onto our adversaries, are costly, too; they may lead to unjustified wars and to surprise attacks against us. But other people, other analysts at the CIA and elsewhere, review his work. Because his excesses are not immediately fraught with death and bodily injury, he is perhaps less in need of a guardian.

3. Different Education

In the early days of the CIA, Ivy League universities provided a high percentage of the recruits who became case officers and analysts. Spying, no matter the particular function, was for gentlemen. Things have changed. Today, the typical CIA recruit is more likely to have a degree from the University of Michigan than from Princeton.

Not everything has changed, however. Today, as in the past, the DI has a higher percentage of officers with advanced degrees than the DO. Many analysts are recruited from masters and doctorate programs in international affairs and area studies. While it is next to impossible to become a case officer without a college degree, the DO does not emphasize academic merit as much as the DI does.

In the early days of the CIA, many DO types had paramilitary experience from their World War II days in the Office of Strategic Services. DO people are jumpers, DI people are not. The DO people, as much as they look down on FBI agents as cops, come across as G-men. George Smiley from John Le Carré's fiction is the British version of a calculating DO man. DI people, by their dress and by their hairstyles, would be comfortable at the Brookings Institution. Tacked onto the walls of their cubicles are charts, cards, and photographs. Jack Ryan from the Tom Clancy novels is a DI man.

4. Different Training

All CIA employees receive briefings. Assigned all over the Agency are officers from the Office of Security who remind the various sections and directorates about the proper handling of secrets. They all have PowerPoints and videos, but additional training in the DO is quite different from that in the DI.

DO people, destined to serve in the field, receive months of basic training at a facility called the Farm. Among many things, they learn about secret communications, detecting surveillance, and parachuting to the ground from an airplane. Later in their careers, or for special assignments, they receive additional training. They learn to do.

Unlike DO officers, DI officers are unlikely to receive training that requires wading through swamps. Instead, DI officers are more likely to study Immanuel Kant on how categories influence the phenomenology of data. They learn to synthesize.

5. *Different Digs*

The locations of work for DO and DI differ. Although the DI assigns some officers to locations away from headquarters, most analysts spend comfortable careers in the Washington area. DO officers, on the other hand, fill the bulk of CIA stations overseas. Accordingly, the field person is most often somebody from the DO. As soon as he finishes training at the Farm, the DO officer is anxious to join the action overseas. Through experiences in the field, the heads of DO components gain their posts and the respect of their peers. That is where the legends are made.

Back at headquarters, the daily meeting of the DDO with the heads of components is called the meeting of intelligence barons. This meeting, filled with spymasters, may be even more prestigious than the Director's morning meeting. The Director's meeting includes political appointees, such as the General Counsel and the Executive Director. The barons' meeting includes professionals, mostly men and women who have made things happen in the field; the General Counsel, an outsider, usually does not attend.

The barons do not fully respect people different from them, and barons look down on other barons who are relatively lighter on field experience. For example, when James Pavitt was DDO under George Tenet, the barons could barely hide their disdain for him. When Michael Hayden was named DCIA, Steve Kappes, field man extraordinaire, was brought back to CIA as DDCIA to reassure the DO troops that the White House still respected their mastery in human source operations.¹³⁴ Another nod to the DO was John Rizzo's nomination to be General Counsel.

6. *Different Covers*

Officers from both the DI and the DO use cover, not revealing their CIA affiliation in public. Some use official cover, a claim that they work for another United States agency. Some use non-official cover, a claim that they work for a non-governmental employer. Those in this second group, "illegals," do not benefit from diplomatic immunity. If a foreign intelligence service catches them engaged in espionage, they can be prosecuted in that country.

Because DO officers operate in the field, often in hostile environments, a higher percentage of DO officers than DI officers use cover. It is difficult, if

134. Walter Pincus, *Kappes Is Expected To Boost CIA Morale*, WASH. POST, June 19, 2006, at A4.

not impossible, for CIA personnel to be admitted to foreign jurisdictions if they tell immigration authorities that they work for the CIA. “Hello, I am here to recruit spies,” is not a good opening line. Even in those countries where the foreign intelligence services know what our DO officers truly do, the cover stories make it easier for host governments to deny (or to justify) the CIA presence there. Imagine the costs otherwise to leaders in the Middle East for cooperating with the CIA.

Some analysts may benefit from cover even though they do not recruit and run human sources. Valerie Plame may be an example. As a part of her duties, an analyst may attend conferences and seminars and may surf the Internet. An open CIA affiliation could make it difficult for her to be invited to conferences in some countries or to be allowed access to some websites. Cover is part of the solution for her.

An improper rolling back of cover can have grave consequences for both DO and DI people. The improper roll-back puts the officer and everyone with whom the officer has interacted in danger. Now that al Qaeda has replaced the Soviet Union as the main enemy, the threats to CIA officers are even greater.

If the counter-intelligence branch at another country’s service determines that an officer is actually CIA or suspects a CIA connection, it will walk back that officer’s interactions. To do so, the other service will review surveillance logs and other records. In the review, what might once have seemed innocuous may be seen in a different light. A person from that foreign service may find it more difficult to justify a past meeting with an American who is confirmed as a CIA officer. Spies may be exposed, networks rolled up.

The general split between the DI and the DO at the CIA replicates itself on a smaller scale in the Office of General Counsel. OGC does assign lawyers to the DI, but those people do not strut their stuff. The lines are clear at CIA. There are those who work for the DO – and there is the rest of the office. The DO lawyers adopt the DO’s disdain for the rest of the Agency. They are the insiders on the move. With the importance that comes from busyness, they check their watches more often than the plodders do.

B. Selection into the Club

The chief DO lawyer, someone with many years of Agency service, has great influence in deciding who is deployed from the OGC ranks as a lawyer for the DO. The chief DO lawyer makes recommendations to the OGC front office (the General Counsel’s suite on the seventh floor) about assignments into various divisions of the DO. Thus, the chief DO lawyer, who is not located in the OGC front office, stands in the reporting line between the General Counsel and the “component” lawyers, whether in Africa Division or Latin America Division or elsewhere.

It is almost unheard of for a lawyer in OGC, no matter how many years of experience the attorney has elsewhere, and whether hired through the honors program or the lateral program, to be assigned straight into the DO upon joining the CIA. She must pay her dues and be assessed by her peers in

other parts of OGC, where she is tamed. Further, she must learn the office's line on what separates properly advising on the law from improperly intruding into policy discussions.

Except during times of scandal or during the reign of an aggressive General Counsel, a lawyer who views her role as "providing adult supervision" will not be sent into the DO. Beyond technical competence, the DO prefers that its lawyers have bought into its culture. DO lawyers, whether by OGC's plan or by inertia, learn to accept the Directorate's special mores.

In selecting lawyers for DO service, OGC consults the front office in the relevant division. Such consultation gives the DO an opportunity to scout its lawyers. The scouting is done by case officers who, after all, are reasonably adept at gathering intelligence. Only rarely will OGC impose a lawyer against the will of a division. The DO, aware of this, will not easily accept a lawyer who, based on a division's assessment, is going to be a problem. Of course, one person's "problem" may be another person's "oversight."

Even when a CIA lawyer makes it into the DO, she will most likely be the junior person in a component that has more than one lawyer (for example, the Near East Division). She benefits from a senior lawyer's mentoring and training, but at least one other person, either the chief DO lawyer or the senior lawyer in the division, watches for signals that she is likely to create problems for DO officers rather than resolve them. It is uncommon, however, for CIA lawyers to be transferred out of DO service – once in the club, always in the club.

A DO lawyer needs to have a close relationship with the division in which she serves. She will not be very useful, whether providing oversight or facilitating deals, if the division's front office and other officers do not trust her. She will be decoration, the tamest of lapdogs.¹³⁵ There are just too many special channels of communication for her to make complete sense of the job on her own. The DO lawyer, to be most effective, needs to tap into what is known as "RUMINT," the hallway talk, the phone calls, and the discussions in the cafeteria. Without the intelligence of rumors – not to be confused with signals intelligence (SIGINT) – the DO lawyer would drown in the ordinary channels of information, the cables and emails, that fill her office. For special access, she cozies up to DO officers. This is another way watchdogs are tamed.

C. Inevitable Conflicts

Throughout the Agency, supervisors review the performance of their officers. The most important reviews are done annually in writing. In my day, these reviews were called fitness reports. As at many academic

135. One lawyer assigned to the European Division worked for weeks before anyone other than a secretary would talk to him.

institutions, the CIA inflates its grades. Faint praise is feared, and officers look for hidden messages anytime a superlative is not used.

Many years ago, when OGC first decided to deploy lawyers to the DO, an important issue was who would write the lawyers' fitness reports, OGC supervisors or DO managers. A reasonable argument can be made for either reporting channel. Because DO managers regularly work with their lawyers, they have the most data. Because the lawyers need independence in providing what may be unpopular advice, however, and because lawyers appreciate the quality of legal practice better than lay persons, OGC supervisors should be involved. A hybrid solution has OGC supervisors write the reports with some input from DO managers. The chief DO lawyer then meets with each component lawyer to go over her report and to have her sign it, a resolution that reflects a rough compromise between the OGC lawyer's role of outside oversight and that of company lawyer. Thus, the relative roles for OGC and the DO in preparing fitness reports may mark the boundary between oversight and facilitation. In any case, the more DO managers participate, presumably, the less potential there is for oversight.

Some DO officers resent the privileges enjoyed by OGC personnel. Because lawyers hold advanced degrees, they start much higher on the government pay scale, and a rank of GS-15 can be reached quickly. For case officers, the GS-15 rank is the prize at the end of a long career. Further, OGC has a disproportionately high representation in the ranks beyond the GS scale, the senior intelligence service (SIS). The rank of SIS thus merits more respect in the DO than in OGC, where it is less unusual.

Lawyers in the DO have separate offices. Those quiet offices go with the deep thinking they are supposed to do. It is their right. In the rest of OGC, only the most junior lawyers suffer the indignity of having to double up in offices, and that indignity lasts at most a few months. At headquarters in the DO and the DI, except for the front offices in the two directorates, most CIA officers work in cubicles and shared spaces. They are out on the floor. For a case officer or an analyst, an office is a privilege, a sign that the employee has moved into managerial duties.

Other substantial lines divide lawyers from other CIA personnel. If a DO officer falls under the Inspector General's suspicion or, worse, the Justice Department's, the most the DO lawyer can do is advise the officer that she does not represent his personal interests. She may, as a matter of first principles, give him unsolicited advice to retain personal counsel.

Having worked in close quarters with the DO officer, the DO lawyer will be tempted to give free advice. When she acts on temptation, the DO lawyer best not leave a paper trail. Moreover, she must consider whether she is willing to cover up the communication if the Inspector General or the Justice Department asks her about it at a later date. Even if she trusts the DO officer, even if she scripts with him, she cannot be sure that her story will correspond with his when they are questioned separately under oath. Acting on such temptations thus takes the DO lawyer into uncomfortable territory that

includes possible false statements and possible obstruction of justice. The safest course for her is to wipe her hands clean of the DO officer.

If the Inspector General or the Justice Department is investigating a DO officer for wrongdoing on an operation, the investigators may seek to minimize OGC's role.¹³⁶ But even if OGC refuses individual advice to the DO officer under investigation, OGC still may be involved. For example, if the DO officer retains counsel on his own, his lawyer will need to have a security clearance. OGC's Litigation Division usually has a role in checking such clearances and in processing the applications for them. Therefore, in order to limit OGC's involvement the Inspector General's Office or DOJ will need either to take over those duties for the investigation or to coordinate with OGC on clearances. Otherwise, the checking of security clearances and the application for clearances will give private counsel a chance to ask OGC about the course of the IG/DOJ investigation and will give OGC a chance to volunteer such details. It is contrary to common sense to suggest that such interactions will never result in some inadvertent seepage of information. Some OGC lawyers, especially those loyal to friends in the DO, may even talk out of school.¹³⁷ Thus, watchdogs may be converted into lapdogs for their DO masters.

The relationship between the General Counsel and the Inspector General at CIA is crucial to effective oversight. Faced with a criminal investigation of CIA officers, the General Counsel may argue to the Inspector General that an OGC lawyer needs to attend interviews between the IG/DOJ and the DO officers. The General Counsel may say this is necessary not to represent the person under investigation but to protect the institution. The General Counsel may argue that OGC needs to stay current on the case to advise the DO's management about whether DO officers need to be reassigned or put on administrative leave. The IG/DOJ may counter that staying current on the investigation does not require attendance at the interviews; IG/DOJ can let OGC know.

Sometimes the General Counsel and the Inspector General reach accommodations on such issues. If they are unable to find a compromise, legal authorities in the form of statutes, regulations, and internal guidance are thin. To resolve their disputes, they may appeal to their mutual boss: the DCIA. The DCIA will be able to direct OGC where to stand between oversight and facilitation.

136. An ethical issue beyond the scope of this article is the propriety of joint Inspector General-Justice Department investigations. A CIA employee cannot refuse an Inspector General interview without administrative consequences. On the other hand, unless she is given immunity a CIA employee preserves her Fifth Amendment privilege against self-incrimination in criminal investigations. Accordingly, a CIA employee who is told by a Justice Department prosecutor that an interview is "completely" voluntary may focus less on those words than on the presence in the room of an investigator from the Inspector General's office.

137. I know OGC lawyers who helped DO officers select private counsel. I know one senior OGC lawyer who convinced private counsel to put off charging clients until the Agency could determine whether official funds could be used to pay for the representation.

Even if the Inspector General keeps OGC lawyers out of the interviews, the IG/DOJ may need OGC's assistance. Current officers are as available to the Inspector General as they are to the General Counsel, but retired and former officers are a different matter. CIA personnel are accustomed to making OGC their first stop for inquiries about what they are allowed to say in legal proceedings. Before an officer retires or leaves the CIA, he receives a briefing on how much, if anything, of his Agency activities he is allowed to discuss. As a part of the officer's ongoing obligations, he is told that he must contact OGC any time he is about to be drawn into litigation.¹³⁸ The scope of this obligation is broad enough to cover testifying in a child custody dispute, contesting a traffic ticket, or being questioned by the IG/DOJ. A well-briefed officer will not say anything until he obtains guidance and authorization from OGC. Even if the Inspector General assures the former officer that he can speak to the IG without contacting OGC, that officer may insist on confirming that the Inspector General has the authority to step in for OGC. Such insistence may, of course, be sincere or it may be a stalling tactic. In either case, OGC may play a role in arranging for the interview with the Inspector General.

These kinds of ethical issues exist in Agency practice but are rarely discussed in scholarship. In practice, at least one General Counsel has pulled aside at least one OGC lawyer in an effort to shape his loyalties. Remember, Scott Muller told me, when Justice comes after "our" officers, they are coming after all of "us." The General Counsel wanted to make sure that the Agency took care of its people. As a new boss, he was proving himself. Be that as it may, the public should expect such lines from the Godfather, not from the CIA's General Counsel. Alas, the General Counsel's performance sometimes does not live up to our expectations of a balanced and better breed.

VI. SYNTHESIS

A. *Various Mixes*

It is not feasible for the CIA's General Counsel to be a total watchdog. If she yelps, barks, or whines too much, her political masters at the CIA will put her out in the yard. But she should not be a total lapdog, either. She should

138. "Whenever a demand for production is made upon an employee, the employee shall immediately notify the Litigation Division, Office of General Counsel, Central Intelligence Agency . . . which shall follow the procedures set forth in this section." 32 C.F.R. §1905.4(a) (2006). "If oral or written testimony is sought by a demand in a case or matter in which the CIA is not a party, a reasonably detailed description of the testimony sought, in the form of an affidavit or, if that is not feasible, a written statement, by the party seeking the testimony or by the party's attorney must be furnished to the CIA Office of General Counsel." *Id.* §1905.4(d). "Demand means any subpoena, order, or other legal summons (except garnishment orders) that is issued by a federal, state, or local governmental entity of competent jurisdiction with the authority to require a response on a particular matter, or a request for appearance of an individual where a demand could issue." *Id.* §1905.2(b).

serve as more than an ornament, totally responsive to the whims of her masters. The General Counsel should be a mixed breed – somewhere between a watchdog and a lapdog, somewhere between strict overseer and adamant facilitator.

Just what mix of watchdog and lapdog the General Counsel is depends to a large extent on the will of the political leadership at the CIA and the White House and, to a lesser extent, on the will of Congress, the media, and the people. On this continuum, the Carter White House preferred watchdogs. It was disgusted by CIA excesses revealed by the Church Committee, including assassination plots, human rights abuses, and the surveillance of U.S. citizens. President Carter, emphasizing the importance of human rights in American foreign policy, appointed Stansfield Turner as DCI. Turner was a vigilant director whose first order of business was to trim the ranks of the DO. An expanded Office of General Counsel was part of this new vigilance, and some flexibility in operations was traded for more enforcement of the law. It was a time for watchdogs.

After the hostage crisis in Iran and the Soviet invasion of Afghanistan, U.S. foreign policy swung to the other end of the continuum. The Reagan White House, inspired by conservative think tanks, sought to correct what it perceived as President Carter's fecklessness. The intelligence community was used by President Reagan to reassert U.S. power. Upon election, President Reagan appointed his campaign manager, William Casey, a trusted insider, as DCI. Casey, until his death in office, led an aggressive CIA campaign against the "Evil Empire" on many continents, supplying the Mujahadin against the Soviets in Afghanistan and helping the Contras challenge the Sandinistas in Nicaragua.

In the new environment after 1980, the Office of General Counsel at the CIA was called on to enable the company, and some enforcement of the law was traded for operational flexibility. It was a time for lapdogs. If policymakers forgot a written finding for a covert action, an enabling General Counsel facilitated them with a retroactive one.¹³⁹ OGC, hand in hand with the National Security Council, was eager to accommodate the President. Some CIA officers were indicted for their role in the Iran-Contra affair, and only presidential pardons¹⁴⁰ and CIPA technicalities¹⁴¹ saved them from convictions.

Depending on our political leaders and on the perceived external threat, the pendulum will continue to swing between the Carter and the Reagan

139. Stanley Sporkin, Casey's friend, was CIA General Counsel at the time.

140. The first President Bush pardoned former DDO Clair George and former Division Chief Duane Clarridge. David Johnston, *The Pardons; Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial*, N.Y. TIMES, Dec. 25, 1992, at A1. George was convicted on false statement and perjury charges. *Id.* Clarridge was awaiting trial on similar charges. *Id.*

141. Joseph Fernandez, chief of station in Costa Rica during Iran-Contra, was successful in practicing graymail. *See Iran-Contra Defendant Wins Ruling*, CHI. TRIB., Sept. 7, 1990, at C6; *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990).

approaches to intelligence activities. The activities of spymasters, operating on the dark side, will oscillate between retrenchment and reassertion. Even within a particular administration, a General Counsel's behavior may shift across the continuum.

In the range between oversight and facilitation, General Counsels will have different default modes. McNamara's was not the same as Muller's. Muller's was not the same as Rizzo's. General Counsels will not, of course, decide all matters from their default positions. From decision to decision, each one shifts toward either watchdog or lapdog. So much depends on the situation. In one situation the General Counsel's advice to the DCIA about congressional testimony may be strict. In light of possible perjury and false statement charges, she may insist that the truth be told in response to specific questions. In another case, the same General Counsel may be less strict. For purposes of congressional notification, she may be less categorical about what activities fall within the statutory definitions of covert action and significant anticipated intelligence activities.¹⁴² In making such fine distinctions, she might even distinguish between committed acts and omitted acts.

B. A Delicate Scenario

Even the most vigilant guards cannot prevent all misconduct, a fact that stands true in our day as much as it did in Juvenal's. Oversight of an intelligence agency, whether internal or external, is limited. Lawyers cannot prevent or ferret out all wrongdoing. Some spymasters who break the law will not be caught. Some policy makers who push activities beyond established lines will not be punished. Juvenal's question about who will guard the guard may, after all, simply be a rhetorical statement about human imperfection. Many scenarios can be constructed involving spymasters who escape criticism, policy makers who cross established lines, or lawyers who are cut out of the action.

Imagine that a foreign country captures a high-level al Qaeda operative. Only a few people in that country's security and intelligence services know about the capture. During a state visit to Washington, the country's prime minister asks for a one-on-one meeting with the President of the United States. The President agrees, and the two men meet in the Oval Office without notetakers and without any recording. When the prime minister tells the President about the capture, the President nods his interest. The prime minister, trusting the President not to publicize the capture, offers to make the captive available to American interrogators. The two heads of state agree that direct involvement in an interrogation is sometimes better than passing questions through intermediaries.

142. The definitions are found in the Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, §602, 105 Stat. 429, 441-444 (1991) (codified at 50 U.S.C. §§413(a)(1), 413b(e) (2000 & Supp. V 2005)).

The President accepts the prime minister's offer. The prime minister suggests that the day-to-day interaction should be between the DCIA and the head of the foreign country's intelligence service. The prime minister and the President shake hands. Then, the President opens a door to let their advisors into the Oval Office. All they say is that they had a good chat.

The next day the President contacts the DCIA. They also have a one-on-one meeting in the Oval Office – no notes, no recording. The President explains that he accepted the prime minister's offer to have CIA officers question the captive directly in that foreign country. The DCIA smiles. "That is great news, Mr. President." The President instructs the DCIA that only those with an absolute need to know should be included in the project.

The DCIA asks whether they need a finding for covert action. The President writes something down for the DCIA. Then he looks the DCIA in the eye. "I have the constitutional authority as Commander in Chief to keep this to ourselves," the President declares. "Later, we'll decide what we tell the Hill."

The DCIA asks the President whether the CIA's General Counsel should be included. The President responds, indirectly, that he has already received sufficient legal advice from the Justice Department and the White House Counsel. The DCIA, pleased to be back in direct contact with the President, accepts the response. The DCIA has one additional question, though. "How tough can we be on him?" Wincing, the President shows his displeasure. "Stay within the law," he says. "But do what needs to be done."

Back at CIA headquarters, the DCIA calls the Deputy Director of Operations on a secure phone. The DCIA and the DDO meet in the Director's suite. They do not take notes, do not record their conversation. Neither the Deputy Director of the CIA nor the Executive Director nor the General Counsel is informed. The DCIA tells the DDO to select two senior officers to handle the interrogation. The officers are to report only to the DDO. The DCIA is to be the only point of contact with the head of the foreign intelligence service. The DDO agrees to the strict compartments. He identifies two other issues and, in the course of their conversation, comes up with two solutions.

First, to prepare for the interrogation, the interrogators will need to search the Agency's databases for information about the suspect. To leave the smallest trail, the DDO will run those searches himself. Second, if the captive provides information to the aggressive interrogators, they will need a means of informing the President and the rest of the intelligence community about the take. The DCIA and the DDO do not want to reveal that U.S. interrogators played a part in extracting this information. To accommodate their wishes, the extracted information will be shared with the foreign intelligence service. The foreign intelligence service can then provide the information back to the CIA through a restricted channel. The liaison service will appear to be the original source.

The DCIA and DDO, both accustomed to various means of protecting their sources, do not consider this end-around to be at all significant. Rather,

they are focused on the rare opportunity to interrogate a high-level al Qaeda operative.

After the meeting, the DDO selects two officers for the interrogation. They are fluent in Arabic, the captive's native language. They are senior managers in the DO with extensive field experience. Because they have traveled to the foreign country several times in the past, their travel this time will not raise too many eyebrows. They ask the DDO whether they should inform the CIA chief of station in the country about their operation. The DDO and his two officers agree that even if they did not tell the chief of station, he would find out from the liaison service or from his own sources in the country. So they agree to inform him with vehement instructions that he not tell anyone else. "Strict need to know," the DDO reminds them.

The two officers have the CIA's travel office arrange their flights to the foreign country. There, during an aggressive interrogation, including sleep deprivation and bombarding the suspect with lights and music, they extract very useful information from him. The information comes to the CIA and then circulates within the U.S. intelligence community. A few OGC lawyers read the cables, but they have no idea what went on behind the interrogation.

As a result, the operation has been run with the knowledge of six Americans: the President, the DCIA, the DDO, two case officers, and a chief of station. Congressional notification is put off into the indeterminate future. To the extent that this operation raises issues of law, such as reporting to the oversight committees and the President's power to order torture, those issues may not be addressed by lawyers in the intelligence community. They remain the fantasies (or the nightmares) of imaginative law school professors. Lawyers, wherever they are located, and however much they strive to attain a balance, can only do so much.

C. Final Notes

Throughout American history, Presidents have been tempted by Commander-in-Chief powers and by executive authority to keep information classified. Secretly, they have supported coups and killings away from the traditional battlefield. Whether in Chile or in Laos, spymasters have usually done their Presidents' bidding on the dark side.¹⁴³ If Presidents have insisted on the utmost secrecy, spymasters have accommodated them, cutting out Vice Presidents, cabinet secretaries, and ambassadors. The spymasters have also cut out other intelligence officers, friends, whom they or the President determined did not have a need to know. The harsh reality in intelligence activities is that cutting out a few lawyers is just as easy, even easier.

143. Exceptions exist. For example, when DCI Richard Helms did not take the White House's suggestion to invoke "national security" reasons in order to steer the FBI off the Watergate investigation, he was demoted to American ambassador to Iran.

In basic terms, the Presidents' varying approaches to the rule of law parallel those of the General Counsels at the CIA. Some Presidents, like President Carter, may have strictly adhered to the letter of the law on intelligence activities. Some Presidents, like President Reagan, may have strayed. Some CIA General Counsels have followed their President's course; some have strayed. Even when Presidents and General Counsels share similar courses, they are not always in lock-step, because too many layers of executive authority – White House Counsel, the National Security Adviser, the DCIA, and other staffers – often stand between them. Yet the President and the General Counsel have an effect on each other, even if that effect is indirect and not easily measured.

To understand how lawyers affect intelligence agencies, one can identify a General Counsel's usual position between watchdog and lapdog, then observe shifts from that position on particular decisions, such as aggressive interrogation, the destruction of interrogation tapes, and referrals to the Justice Department for criminal investigation. The journalist with inside sources or the lawyer working on the inside can be more effective in making these observations than the typical scholar. Even so, no matter how much information is gathered or by whom, an analysis of CIA lawyers cannot penetrate too far beneath the surface. That is not to say that this analysis is worthless. It is merely to admit, in the humblest of terms, the difficulty in penetrating any reality, especially a classified reality.

The CIA's Office of General Counsel, when it lives up to its promise, serves as one guard over the activities of the CIA. The lawyers there are not perfect, but as watchdogs, lapdogs, and mutts they answer Juvenal's famous call for some sort of guard over the guardians.