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WHO'S THE BOSS?—THE "PUBLIC INTEREST VS. AGENCY INTEREST" BALANCING ACT OF INTELLIGENCE AGENCY GENERAL COUNSELS

Ryan M. Check[†]

In the last seven years, national security issues of increasingly high stakes have brought an end to America's "holiday from history." These issues have thrust into a more prominent light not only our intelligence agencies, but also the General Counsels (GC) and Office of General Counsel (OGC) attorneys who advise them. In many cases, we have demanded more and more from our intelligence agencies without providing clear guidance as to how they may produce these results. When, for example, agencies must seek information from captured terrorists with guidelines such as: "You may not use interrogation methods that are 'cruel, inhuman, or degrading,'" their attorneys must interpret these nebulous terms to determine exactly where policymakers intended to set the legal boundaries.

In advising their agencies, these attorneys tread a sort of tightrope. On the one hand, the attorneys represent the agency, and thus owe a duty of loyalty to the agency and its views on how to best execute its national security obligations. On the other hand, the attorneys are government employees and public servants, and are therefore tasked with defending the nation's citizens and its laws. Critics argue that by leaning too far toward agency interests, the attorneys become facilitators or enablers in skirting or ignoring the law. But by leaning too far toward the public interest, the agency may self-limit its authority to the point where it cannot provide the protection that the public desires. Assuming that it is likely to be either rare or impracticable to give equal consideration to both interests, which way should the agency attorney lean?¹

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1. For simplicity, the majority of this essay will simply refer to the GC, but

While some academics have already dissected this question from a theoretical viewpoint,² this article examines the subject from a more empirical perspective. To that end, I posed three questions about this balancing act to attorneys who currently serve, or have served, our intelligence agencies, and to outside observers whose occupations bring them into close contact with the agencies. Responding to these questions were:

- **Steven Aftergood** – Director, Project on Government Secrecy, Federation of American Scientists
- **Marion “Spike” Bowman** – Former Senior Counsel (National Security Law), Federal Bureau of Investigation
- **Jeffrey Breinholt** – Deputy Chief, Counterterrorism Section, National Security Division, U.S. Department of Justice
- **Richard Cinquegrana** – National Academy of Public Administration; Former Legal Counsel to the CIA Inspector General; Deputy Counsel for Intelligence Policy, U.S. Department of Justice; Assistant General Counsel, CIA
- **Robert Delahunty** – Associate Professor of Law, University of St. Thomas School of Law; Former Special Counsel, Office of Legal Counsel, U.S. Department of Justice; Former Deputy General Counsel, White House Office of Homeland Security
- **Dr. Dieter Fleck** – Former Director, International Agreements & Policy, Federal Ministry of Defense, Germany
- **Laura Hill** – Former attorney, CIA Office of General

should be read as being applicable to all attorneys within the OGC whose job it is to provide legal counsel to the agency.

2. See, e.g., A. John Radsan, *Sed Quis Custodiet Ipsos Custodes: The CIA’s Office of General Counsel*, 2 J. OF NAT’L SECURITY L. & POL’Y (forthcoming May 2008).

Counsel

- **Paul Kelbaugh** – Former Chief Legal Counsel, CIA Latin America; Former Deputy Chief, Legal Group, DCI Counterterrorism Center, CIA
- **David Koplow** – Professor of Law, Georgetown University Law Center; Former Deputy General Counsel (International Affairs), U.S. Department of Defense
- **Jonathan S. Landay** – Senior National Security and Intelligence Correspondent, McClatchy Newspapers
- **Dana Priest** – National Security Correspondent, *Washington Post*
- **John A. Rizzo** – Acting General Counsel, Central Intelligence Agency
- **Robert F. Turner** – Professor of Law & Associate Director, Center for National Security Law, University of Virginia School of Law; Former Counsel to President's Intelligence Oversight Board

The following is a series of composite answers to those questions that incorporate many common themes and specific insights of the respondents.³ Their responses provide us with a valuable perspective on this debate, and help us to better understand the challenges that intelligence-agency attorneys face in providing legal guidance on matters of national security.

3. The respondents' full email answers are available on the website of the *National Security Forum* at <http://www.wmitchell.edu/national+security+forum/documents/appendix.html>.

I. In balancing his responsibilities, should the General Counsel of an intelligence agency lean toward protecting the agency's interest or protecting the public's interest?

A. The Public Interest

Most respondents who favored the public interest as the agency's top priority rejected the assumption that public and agency interests could not be reconciled. Mr. Cinquegrana contended that "the agency's interest should never be out of line with the public interest," a notion Mr. Rizzo seconded, saying that there could be "nothing either-or about it." Mr. Bowman emphasized that while the agency lawyer owes a duty to his client, a higher duty is owed to the nation. The GC is, by definition, a public servant; he should be neither a shill for the agency nor a sycophant. After all, said Mr. Landay, the public pays the salary of the GC—and all public servants—to protect the rights and well-being of the public, not agency management.

As Dr. Fleck pointed out, there is no "intelligence exception" to the good governance principle of serving the public interest. Mr. Landay stressed that if the agency violates the law, the GC must report up the chain of command to disclose the harm. And if the agency will not deal with the issue internally, the GC would owe a duty to the public to seek alternative means to disclose the harm done. Even in cases involving classification or sensitive information, the Justice Department and congressional intelligence-oversight committees provide opportunities for the GC to "report out" if problems arise.

Regardless of whether one agrees that agency and public interests are entirely parallel, Mr. Rizzo maintained that it is essential for the GC to simultaneously protect agency and public interests. "[Intelligence agencies'] paramount interests are to do everything in [their] power to protect the national security, as well as operate [consistently] with the values of our society." And, Professor Delahunty noted, if the agency operates within the law, public and agency interests should not collide. But as the agencies strive to protect our national security, potential conflicts can arise. Here, the GC has a duty to reconcile any conflicts between agency interest and public interest that arise, which Mr. Bowman and Professor Koplow believe can be done in most cases.

Ms. Priest took a slightly different tack, and suggested that

"[t]he agencies' interest, in the long run, is the public's interest. If General Counsels are too short-sighted . . . they will not, ultimately, serve the agency's interest well, which is to survive in a healthy, legal manner." And since political appointees may only serve an agency for a short time, they may view the agency's long-term interest too narrowly, which can cause them to run afoul of both agency and public interests. As such, Ms. Priest asserted that the GC must think strategically and, "above anyone else within the intelligence agency, [the GC must] be anchored in the rule of law and its historical application *vis-a-vis* intelligence matters as it intersects with the public's interest."

B. The Agency Interest

Those who stressed the GC's allegiance to the agency also argued that the GC advances the public interest where he vigorously represents the agency's interests. Most often, the GC does so by either advising legal means to accomplish the agency's goals, or raising concerns when the agency veers toward illegality. Mr. Aftergood and Ms. Hill insisted that, if the agency operates within the law, the GC will have fulfilled his duty. Of course, while the attorney's task is to show the full spectrum of legal action, the boundaries of legality must be legitimate and established in good faith. Dr. Fleck underscored that if the GC condoned "a little torture," he would clearly violate his duty.

Mr. Breinholt suggested that the need to defend the agency's interest may become even more pronounced when interagency disputes arise. During interagency turf battles, it is not uncommon for an agency attorney to be accused of protecting the agency rather than the public; but these claims usually amount to mere gamesmanship, and should not force one side to capitulate. When the attorney asserts the agency interest in these cases, it most often leads to the issue being more thoroughly considered before a decision is reached, which again benefits the public.

Others supported the supremacy of agency interest because issues that affect the public interest tend to encompass policy decisions that belong to agency management. Thus, Mr. Kelbaugh maintained that the GC should focus on being an informed advisor to his client, using his position to keep his client on the proper path, and not substituting his judgment for that of the policymakers. Professor Turner proposed that, while every government attorney's highest duty is to the Constitution, unless

the attorney views an action as illegal or contrary to an executive order or presidential directive, the attorney must respect the agency's judgment call, especially regarding "the business of intelligence If lawyers start second-guessing policy decisions, the end result very quickly will be that policymakers will stop consulting lawyers and will act on their own instincts."

Professor Turner believed that the GC should feel free to raise concerns or policy arguments to management, but has no right to ignore orders or decisions, to falsely tell a client an activity is illegal in order to block policy decisions, or to carry his objections outside the agency because of a purely policy-based disagreement. The attorney's role is to help the client—within the structure of the law—notwithstanding the attorney's own potential difference of opinion. If the GC concludes that laws are being broken, there are remedies within the system. But if the GC complains too loudly or too often about policy decisions, the agency is less likely to seek his counsel.

II. To what extent should the General Counsel of an intelligence agency—as opposed to, for instance, a corporate General Counsel—alter his counsel and advice to the organization based purely on concerns for the interests of those outside the agency?

A. GC Should Consider External Interests

Many who favored a GC protective of the public interest also felt that the GC should consider external interests when formulating recommendations. Mr. Cinquegrana reiterated that the agency and public interests should be congruent, and that the GC cannot advise action that is against the public interest. And Messrs. Rizzo, Bowman, and Landay all insisted on the GC's role as a servant of the people, whose obligation is to consider at all times whether agency actions harm Americans' rights or well-being.

External factors are thus especially important to the GC in providing the agency with the clearest and most accurate advice on the law. Mr. Rizzo asserted that, to provide counsel—as distinct from mere legal advice—the GC must advise his client about the legality of proposed actions, but also about the prudence of the proposed action and its potential reception by those outside the agency. Mr. Bowman stated that, in this respect, the GC has a duty to align his agency with the public's social values, which may

change within a short time, and which may, as Ms. Hill noted, require the GC to be more conservative in his advice.

But even those who advocated considering extra-agency interests agreed that the GC cannot rely solely on external factors. Professor Delahunty contended that such reliance would likely destroy agency morale, and could compromise the GC's relationship with other agency employees. But to the extent that external factors affect the agency's interest—for instance, the preferences of the White House and Congress—the GC would be well-served to consider these factors in formulating advice and counsel.

B. GC Should Not Consider External Interests

Ms. Priest provided the most succinct answer to the question of when the GC should consider extra-agency interests in formulating advice: "Never." The primary resistance to the GC considering non-agency interests was again grounded in the concern that the GC's role does not involve policymaking. Mr. Kelbaugh maintained that by defining activities that would be illegal, the GC protects his clients and operates within the structure of the law. Concerns for extra-agency interests then become policy matters, which he and Professor Turner agreed were best reserved for management. Since the GC bears a duty of loyalty to his client, he should be an advocate for the agency. Within that duty, there is no policy function for the GC, so he should not infringe on the policy discretion committed to the agency.

From Mr. Cinquegrana's perspective, there should generally be no need for the GC to alter advice to the agency based solely on external interests. Where the GC may have concerns about the welfare of a person in the agency's hands, as opposed to what the law would permit or require, the GC still must give an "unvarnished legal opinion." That opinion may be supplemented with the GC's own moral or personal views, but he must be very careful to distinguish between those views and the interests of the agency and the public, which should be paramount.

III. In order for the General Counsel to effectively influence senior management of an agency, the persons to be influenced must have confidence that the General Counsel has similar goals for the agency. As such, is the General Counsel of an intelligence agency capable of performing an oversight function while still seeking to retain that confidence?

A. Ex Ante Oversight

Mr. Kelbaugh voiced a common view of the GC's counseling role—giving “timely, tailored, and accurate legal advice on proposed and actual activities of the agency.” Thus, the GC is particularly well-suited to fill an *ex ante* oversight role, which management should desire from the GC. By diligently reviewing the agency's proposed actions and warning management about potential legal issues, the GC fulfills his duties to the agency. Professor Delahunty suggested that this preventative oversight should promote confidence among agency management, who are likely to fear the blowback from legal troubles and operational excesses.

Mr. Breinholt noted that, when actual fraud or wrongdoing is or has been present, it is often easiest for the GC to provide advice that will be well received by agency management. But he also cautioned: “The biggest dilemma for a [GC] would be in situations where his advice is not considered sufficiently expedient by the tastes of the client.” In these cases, Professor Delahunty proposed that the GC may be able to obtain additional support for his advice from outside groups such as the Department of Justice and the Office of Legal Counsel, or, internally, from the agency's Inspector General. Supervision by congressional intelligence committees can also check rogue operations and fortify the GC's power.

In providing this *ex ante* oversight, Mr. Cinquegrana stressed that the GC must present his objective counsel to the agency, regardless of its popularity. The GC cannot compromise his own judgment in order to stay in senior management's good graces or he will be abdicating his responsibilities as chief legal counsel and his standing as an independent source of advice. While the challenge of standing that ground should not be underestimated, Mr. Bowman stated that he had never witnessed a GC removed for being unwilling to bend the rules.

B. Ex Post Oversight

Others viewed the GC more as an internal overseer and monitor than as one who merely provides preventative counsel. In this role, the GC would serve a function similar to a corporate GC, and would be part of the larger internal oversight scheme. Thus, the GC should be able to serve as an independent check and still maintain the confidence of agency management. In fact, Mr. Rizzo maintained:

CIA senior management has always looked to—and relied on—the GC to be a robust and aggressive overseer of CIA's day-to-day activities, especially in the area for covert operations Indeed, on those isolated occasions over the years when CIA management has found fault with the performance of the GC, it was because of a perception that the GC was not being sufficiently rigorous in this oversight role.

Where senior management does not have confidence in the GC, and ignores or consistently disagrees with the counsel he offers, there was a large consensus that a GC in such a position should resign. Since the goals of both management and the GC should be to safeguard the security and rights of the people they serve, a GC who cannot ensure that senior management complies with this goal will be ineffective in carrying out his professional obligations. Professor Delahunty commented that, fortunately, "most agency [GCs] have sufficient standing in the bar and outside world that they can be fairly independent of management pressure." But even where management is unwilling to respond to the GC's counsel, Mr. Bowman offered an alternative to those who would advise the GC to resign and stated that "it would take a lot to get me to resign because I would consider it a duty to try and 'right' the process."

C. No Oversight Role

While most of the oversight debate centered on the type of oversight a GC should provide, Mr. Aftergood and Dr. Fleck believed that the GC's role simply does not include oversight. Dr. Fleck believed that the GC should not provide oversight unless his agency's director specifically requested that he do so. Similarly, Mr. Aftergood felt that the oversight function "must be exercised

elsewhere—by the congressional oversight committees, the inspectors general, [the President’s Foreign Intelligence Advisory Board], and, not least, the press.”

How agency attorneys should balance agency interests against public interests remains a hotly contested issue, and respondents on both sides of the debate believe that their approach best serves the country. But while one side believes that the GC should be closely attuned to the public’s concerns, the other side argues that the GC should maximize the ability of the agency to use the power granted it by the public. Similarly, some feel that the GC ought to serve as both advisor and watchdog, while others contend that the GC’s greatest value in preventing abuse is in the advice that he can provide before the fact.

And while there is clearly a divide over the extent to which the GC should leave policy matters to agency management, the GC may have little choice but to move beyond the role of legal advisor and wade into the policymaking waters. Without clearer legal boundaries for intelligence agencies’ most sensitive duties, the GC and other agency attorneys are left with a great deal of discretion to decide how aggressively or conservatively to interpret existing laws, and are put in the position of not only advising their client, but of setting intelligence policy by filling in the white spaces left by lawmakers. With this kind of responsibility thrust upon them, determining how these attorneys ought to balance agency interests against public interests will remain an especially important inquiry.