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Calling a Truce in the Culture Wars: From
Enron to the CIA

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Abstract

This Article compares and evaluates recent Congressional efforts to improve institutional “cultures” in the private and public sectors. The Sarbanes-Oxley Act of 2002 was designed to upgrade corporate culture by patching up the “walls” that separate corporate management from boards of directors, accountants, lawyers, and financial analysts. The Intelligence Reform Act of 2005 took a different tack, hammering away at walls that supposedly segmented the intelligence community. The logic was that the market failed because people did not observe sufficient formalities in their dealings with one another, while the intelligence community failed precisely because people kept their distance from one another and declined to share information. The way to improve their respective cultures, Congress determined, was to build up walls in the one case and to tear them down in the other. This Article expresses some skepticism, however, about these solutions. Building walls in the private sector increases transaction costs, which may outweigh any benefits in detecting fraud. With respect to the intelligence community, compartmentalization of information diminishes risks associated with double agents; redundancy of tasks may provide a safety margin; and segmentation of government agencies may guard against civil liberties violations as well as provide additional spurs to action. Furthermore, thriving firms in the private sector forge successful, though likely idiosyncratic, cultures designed to exploit business opportunities. Because the market is largely self-correcting, regulatory efforts to dictate a particular reorganization or cultural shift are probably unnecessary and possibly harmful. By contrast, the CIA, FBI, NSA, and all other government agencies operate without fear of bankruptcy, which is to say in the absence of penalties for deficient cultures (or rewards for successful ones). Nonetheless, efforts to re-structure government bureaucracies, nominally to re-make their cultures, should be regarded with caution. First, such efforts will almost inevitably be undertaken by political

actors, whose motivations are at a minimum suspect. Second, even assuming the best of intentions and the utmost of human wisdom, central planners cannot forecast the untold costs and benefits to a major governmental reorganization. The Intelligence Reform Act's overhaul of the intelligence community will have certain and substantial costs in the short-term, and very uncertain, if any, benefits in the long term.

Calling a Truce in the Culture Wars:
From Enron to the CIA

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I. Introduction

Less than three months after the September 11, 2001 terrorist attacks, the Enron Corporation fizzled into bankruptcy. Members of Congress, who can find provocations to legislate wherever they gaze, predictably responded to these events by enlarging the United State Code by hundreds of pages. To put the matter in common vernacular, 9/11 was an “intelligence failure” and Enron was a “market failure”; and here in America, whatever may be the case in lethargic Old Europe, if there’s a failure, there’s a solution.

With respect to 9/11, the diagnosis ran something like this: American law enforcement and intelligence officials possessed all the information need to stop the attacks before they occurred. The problem was not one of data collection, but analysis; in the well-worn metaphor of the day, we failed to “connect the dots.”¹ Switching metaphors, the solution was to tear down “the walls” that had compartmentalized information.² The USA Patriot Act,³

¹ In K.A. Taipale, *Data Mining and Domestic Security: Connecting the Dots To Make Sense of Data*, 5 COLUM. SCI. & TECH. L. REV. 2 (2005), the author notes that Joint Inquiry Into the Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001 House Permanent Select Comm. on Intelligence & Senate Select Comm. on Intelligence, H. Rep. No. 107-792, S. Rep. No. 107- 351 (2002) [Joint Inquiry Report] refers at least ten times to the intelligence communities’ failure to “connect the dots.”

² See, e.g., Richard Henry Seamon and William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J. L & PUB. POL. 319 (2005); Eleanor Hill, Staff Director, Joint Inquiry Staff Statement for Hearing on the Intelligence Community’s Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001 14 (Oct. 8, 2002) [hereinafter Joint Inquiry Staff Statement], available at <http://intelligence.senate.gov/0210hr/021008/hill.pdf>. (“The walls that had developed to separate intelligence and law enforcement often hindered efforts to investigate terrorist operations aggressively.”). I must plead guilty to using *both* the connecting the dots and wall metaphor. See

enacted just weeks after the 9/11 attacks, chiseled away at the walls in various places. Grand jury information, once hoarded by federal prosecutors, could now be shared with intelligence officers.⁴ Information obtained by intelligence officers could now be provided to law enforcement officers.⁵ Hortatory provisions in the Patriot Act huffed and puffed at the persisting wall fragments,⁶ and a few years later, with the Intelligence Reform and Terrorism Prevention Act of 2004 (Intelligence Reform Act),⁷ Congress sledgehammered those remnants into rubble. The centerpiece of the Intelligence Reform Act was a new post, a Director of National Intelligence (DNI), whose "principal authority to ensure maximum availability of and access to intelligence information within the intelligence community consistent with national security."⁸ In creating a DNI, Congress deferred to the National Commission to Study the Terrorist Attacks Upon the United States (the 9/11 Commission), which envisaged the DNI as a "powerful CEO" of a "very large private firm." His goal was to "unify[] the intelligence community," which included branches within the FBI, the CIA, the NSA, the State Department, the Defense Department, the FAA, and the Department of Homeland Security. Yes, now the walls really were tumbling down.

Fortunately, Congress had other uses for all the metaphorical bricks and mortar.

When Congress turned its attention to the collapse of Enron, a common diagnosis went like

Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493 (2003).

³ Pub. L. 107-56, 115 Stat. 272 (2001).

⁴ *Id.* § 218.

⁵ *Id.* § 203.

⁶ *Id.* § 504 (urging enhanced coordination between intelligence and law enforcement personnel).

⁷ Intelligence Reform & Terrorism Prevention Act (IRTPA) of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of 5 U.S.C., 8 U.S.C., 22 U.S.C., 28 U.S.C., 46 U.S.C., 49 U.S.C., and 50 U.S.C.).

⁸ *Id.* § 1011. "[T]he Director of National Intelligence shall develop the Intelligence Community component of the strategy, [which] should encompass specific efforts to: ... to develop [the] capability to facilitate the timely and complete sharing of relevant intelligence information both within the Intelligence Community and with other appropriate federal, state, and local authorities." "Joint Inquiry Report at 4

this: Federal and state authorities had “deregulated” various aspects of the energy market, allowing companies like Enron to flourish. Throughout the 1990s, Congress, the courts, and regulators “deregulated” still more, the implicit premise being that the market could more efficiently discipline bad actors than either lazy bureaucrats or rapacious plaintiffs’ lawyers.⁹ Alas, left to its own devices, the market failed to monitor Enron (and several other companies);¹⁰ to state the matter more precisely, personnel within the company and closely connected to it inadequately fulfilled their roles as checks on corporate management.¹¹ Directors of the board, accountants, lawyers and financial analysts, all of whom should have preserved an independence from top executives, were increasingly aligned with those executives. Walls (yes, the wall metaphor again!) that were designed to channel tasks and duties had crumbled; and Congress, in the Sarbanes-Oxley Act of 2002¹² sought to restore the walls the market had pummeled—walls between accountants and clients, between independent directors and corporate executives, and between investment banks’ retail banking divisions and their underwriting arms.

Members of Congress justified all this wall construction and destruction by the need to re-make “cultures” of incompetence and even deceit. With respect to Enron, its culture was studied and pronounced diseased. According to Senator Cantwell, “Enron’s corporate culture

⁹ See, e.g., *Cent. Bank of Denver, N.A. v. First Interstate of Denver, N.A.* 511 U.S. 164, 191 (1994) (eliminating private “aiding and abetting” liability in securities fraud cases); Private Securities Reform Act of 1995 (raising pleading standards for securities fraud); John C. Coffee, *Understanding Enron: “It’s About the Gatekeepers, Stupid,”* 57 BUS. L. REV. 1403, 1410 (2002) (“There is reason to believe that, from some point in the 1980s until the late 1990s, the SEC shifted its enforcement focus away from actions against Big Five accounting firms.”).

¹⁰ See, e.g., Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1235 (2002) (suggesting that Enron stock's behavior in the markets provided “another set of reasons to question the strength of the efficient market hypothesis” and arguing for skepticism about the market as a policy option); FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 30 (2004).

¹¹ See generally Coffee, *supra* note 9.

¹² Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002).

fostered a disregard for the American energy customer.”¹³ Senator Leahy agreed: “The collapse of Enron has become a symbol of a corporate culture where greed has been inflated and accountability devalued.”¹⁴ Senator Baucus, musing on Arthur Andersen’s complicity in Enron’s crimes, noted that “professional firms need to cultivate professional cultures.”¹⁵ How true! Members of Congress also cast a critical eye on the culture of intelligence community, which was also judged deficient. As Senator Olympia Stowe, a sponsor of the Intelligence Reform Act, announced in a press release, “We need to continue to move forward with broader reform in Congress so we can change an intelligence community culture that is drastic need of reform.”¹⁶ Pounding the same drum, Senator Specter criticized the “cultures of concealment” present in the intelligence community,¹⁷ Senator Chambliss spoke of the need for building a “risk-taking culture” in the intelligence community,¹⁸ and Senator Kyl announced that Congress, through the Intelligence Reform Act “will cultivate a culture within the intelligence community that makes it less likely that people will be willing to do the jobs we are asking them to do, and more likely that they will want to ‘play it safe.’”¹⁹

“Culture” might once have referred to a nation’s or a people’s music, philosophy, art, etc.—that is, the high stuff that lifts us out of our dismal bourgeois existence. That plainly was not the Senators’ meaning when they heaped scorn on Enron and the intelligence

¹³ 150 Cong. Rec. 109-101. Senator Cantwell was quoting from a FERC document. The line was also quoted by Senator Feinstein, 149 Cong. Rec. S13957-02,

¹⁴ Or as Senator Byron Dorgan commented on CNN, Enron “is almost a culture of corporate corruption. <http://archives.cnn.com/2002/LAW/02/03/enron.lay/>.

¹⁵ 149 Cong. Rec. S15813-01>

¹⁶ <http://snowe.senate.gov/pressap/record.cfm?id=225729>. The other Senator from Maine also saw fit to invoke “culture” in discussions of intelligence reform. In a Congressional hearing, Senator Collins asked a witness, “Could you please give us your thoughts as to how the DNI should use the legislation’s personnel authority in order to create a culture of jointness [sic?] across the intelligence community.” 2005 WLNR 6238454.

¹⁷ 150 Cong. Rec. S11939-01,

¹⁸ 150 Cong. Rec. S11939-01

¹⁹ 150 Cong. Rec. S9997-02

community. But trying to figure out what they did mean is extraordinarily difficult. For that matter, the word “culture” does not seem to have any precise meaning when wielded by know-it-alls in the academy.²⁰ As far as I can tell, “culture” means any set of inner norms or beliefs that motivates a people to act in a certain way. To be more marginally more precise, culture seems to refer to a particular community’s background moral rules. If one were inclined to be pompous, one might liken “culture” to what Nietzsche called the “language of good and evil” in which a particular people converse.²¹ Of course, no one would say that the CIA or FBI were deceitful prior to 9/11, merely that they were incompetent for failing to pool information with one another. But perhaps we should fault them just as we badger our children to share their favorite trucks and shovels in the playground, justifying this badgering to ourselves and them by the imperative of making them “better” people.

Suffice it to say that “culture” talk is all the rage these days; and Congress has embarked upon massive reorganizations, both in the private sector through the Sarbanes-Oxley Act and in the public sector through the Patriot Act and Intelligence Reform Act, with the nominal goal of changing “cultures” that had somehow failed. Yet at a tactical level, these culture wars are apparently being waged in quite different fashions. In the case of the private sector, Congress diagnosed a culture of too much coziness, and hence the need for walls; in the case of the intelligence community, Congress perceived a culture of too little trust, and hence the need to hack away.

In this Article, I compare and evaluate the Congressional diagnoses and solutions with respect to improving cultures in the private and public sectors. Given the fact that the 9/11 Commission itself has modeled its piece de resistance—the Director of National

²⁰ A Westlaw search in the TP-ALL database on July 8, 2005 of ‘culture /10 norm!’ generated 2589 hits.

²¹ The suggestion occurs in FRANCIS FUKUYAMA, TRUST 35 (1995).

Intelligence—on a CEO, it would seem to have invited the comparison between public and private sectors. I begin in Part II with an analysis of how Sarbanes-Oxley was designed to improve American corporate culture—by building walls among various groups and sub-groups, thereby diminishing trust and coordination. This section is useful in drawing attention to the potential utility of walls in shaping culture in the private sector. In Part III, I argue that, at least at first glance, the approaches taken in Sarbanes-Oxley and the Intelligence Reform Act make sense: The market failed because people did not observe sufficient formalities in their dealings with one another; by contrast, the intelligence community failed precisely because people kept their distance from one another. The way to improve their respective cultures is to build up walls in the one case and to tear them down in the other.

At second glance, however, the story become more complicated, and the Congressional solutions more problematic. As I explore in Part IV, building walls in the private sector increases transaction costs, which may outweigh any benefits in detecting fraud. And with respect to the intelligence community, are walls necessarily a bad thing? Compartmentalization of information diminishes risks associated with double agents; redundancy of tasks may increase safety; and segmentation of government agencies may guard against civil liberties violations as well as provide additional spurs to action.

Ultimately, in Part V, I conclude that the attempt to analogize between private and public sector reorganizations is faulty *ab initio*. Enron, broadly cast to include its accountants at Arthur Andersen, its lawyers at Vinson & Elkins and its various analysts on Wall Street, *was* badly organized (and did have a corrupt culture, whatever that might mean), and to state the obvious: Enron does not exist any more. Thriving firms in the private sector forge successful, though likely idiosyncratic, cultures designed to exploit business opportunities.

Because the market is self-correcting, regulatory efforts to dictate a particular reorganization or cultural shift are probably unnecessary and possibly harmful.

By contrast, the CIA, FBI, NSA, and all other government agencies operate without fear of bankruptcy, which is to say in the absence of penalties for deficient cultures (or rewards for successful ones). Nonetheless, efforts to re-structure government bureaucracies, nominally to re-make their cultures, should be regarded with caution. First, such efforts will almost inevitably be undertaken by political actors, whose motivations are at a minimum suspect. Second, even assuming the best of intentions and the utmost of human wisdom, central planners cannot forecast the untold costs and benefits to a major governmental reorganization. As I argue below, the Patriot Act's discrete changes to the laws governing information sharing among intelligence officers and law enforcement agents were defensible, for they were narrowly tailored to address grave flaws in the pre-9/11 law. By contrast, the Intelligence Reform Act's overhaul of the intelligence community will have certain and substantial costs in the short-term, and very uncertain, if any, benefits in the long term. Contrary to the story told by the 9/11 Commission, the intelligence community performed quite well before 9/11, and to the extent that individuals within it did not perform even better it was because of legal barriers (real or imagined) already removed by the Patriot Act.

II. The Enron "Culture" and Two Cheers for Walls

After Enron's collapse, many people took to studying its "culture" and, needless to say, it was pronounced mortally sick. Within the company, an extreme competitiveness was fostered by a "rank and yank" policy that annually meant the dismissal of the bottom 10% of employees in every division. This policy led to a high level of amorality and cronyism.

Another diagnosis of Enron, from a different angle, emphasized that there was all too much

coziness at and around Enron. People whose interests should not have been perfectly aligned acted in perfect harmony. It is useful to pause and reflect on a harmonious culture *as a problem* and not as the stuff of a Kumbaya pow-wow. A culture of trust may be useful in accomplishing an organization's objectives, but whether that is good or bad depends on the value of those objectives. One would prefer, for example, that an organized crime family not be so harmonious; and indeed what prevents Tony Soprano from more enthusiastically plundering northern New Jersey is his need to respond to miscellaneous rebellions and traitors within his midst. With respect to Enron, individuals who should *not* have been entirely devoted to upper level executives—accountants, lawyers, directors of the board, mid-level executives, and financial analysts—failed to exercise sufficient objectivity and independence. The Congressional solution, the Sarbanes-Oxley Act of 2002, was to erect interpersonal walls that did not exist, or to cement those walls that had allegedly crumbled in many public corporations.

A review of a few provisions of Sarbanes-Oxley will here suffice. First and perhaps most importantly, in response to the perception that Arthur Andersen, Enron's accountants, had become too cozy with top management,²² Sarbanes-Oxley included several measures to instill a sense of detachment in accountants.²³ Second, there was a perception that Enron's lawyers at Vinson and Elkins had collaborated in dubious and possibly illegal accounting structures. Sarbanes-Oxley called lawyers to remember their independent duties as officers of the court, strengthening already existing legal ethics rules that mandate disclosure of client

²² See Thaddeus Herrick & Alexei Barrionuevo, *Were Auditor and Client Too Close-Knit?*, WALL ST. J., Jan. 21, 2002, at C1. Seven former Andersen accountants became Enron employees in 2000 alone. John Schwartz & Reed Abelson, *Enron's Collapse: The Partner; Auditor Struck Many as Smart and Upright*, N.Y. TIMES, Jan. 17, 2002, at C11.

²³ Sarbanes-Oxley, § 201 (prohibiting auditors from doing non-audit work for clients); § 202 (requiring rotation of audit partners every five years).

wrongdoing.²⁴ Third, dissatisfaction with Enron's directors, who had cavalierly approved Andrew Fastow myriad self-dealing arrangements, prompted measures to preserve director independence.²⁵ Fourth, mid-level executives, who had been disappointingly silent as higher-ups looted the company, were given incentives to rat out bosses who broke the law.²⁶ And finally, the financial analysts, whose independent analytical skills had been compromised by their firm's investment banking activities,²⁷ were subjected to rules insulating them from pressure from their own firm's investment arms.²⁸

Walls, it turns out, have their uses. As someone whose house and property is demarcated by solid fences, I can testify that my neighbors are delightful people, and part of what makes them so likeable is that they don't trespass. Walls remind people to keep their distance and mind their own business; and let's face it, there's much to be said for that. In the private sector, accountants are in the business of certifying the accuracy of a company's financial statement, and those certifications are meaningful to third parties only if the accountants themselves have a reputation for independence and integrity. In theory, then, accountants should value their own reputations more than the fees they garner from any individual client; and therefore they should have sufficient incentives to "fire" any client engaged in deceptive or fraudulent practices.²⁹ The theory failed to mirror practice in recent

²⁴ Sarbanes-Oxley, § 602 (providing for censure and bar from practice before SEC on the basis of improper professional conduct); *see also id.* § 307.

²⁵ Sarbanes-Oxley § 301 (directing securities and exchange associations to prohibit listing of security if the issuer does not have independent audit committee).

²⁶ Sarbanes-Oxley § 806.

²⁷ *See Are Chinese Walls the Best Solution to the Problem of Insider Trading*, 9 FORDHAM J. CORP. AND FIN. L. 475, 489 (2004) ("The reason for the Sarbanes-Oxley Act of 2002 was a concern that investment banks weren't maintaining Chinese Walls between retail brokerage and underwriting.").

²⁸ Sarbanes-Oxley, § 501.

²⁹ *See, e.g., DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) (Easterbrook, J.) ("An accountant's greatest asset is its reputation for honesty, followed closely by its reputation for careful work. Fees for two years' audits could not approach the losses [the auditor] would suffer from a perception that it would muffle a client's fraud....").

years, as accountants began to treat fees from accounting services as loss leaders for more lucrative fees for non-accounting services. In addition, accounting firms became less vigilant in ensuring that their own lead accountant (in the case of Arthur Andersen's Enron account, David Duncan) did not become "captured" by the client. The result, in the case of Enron and Arthur Andersen, was a wholesale mingling of auditor and client.³⁰ The regulatory solution was to re-erect those walls, as well as walls between lawyers and clients. Even within firms, Congress became concerned that the Enron experience demonstrated the dangers of "group think." The ability of top executives to stifle internal concerns, most famously evidenced by the reaction to the Sherron Watkins memo in mid-2001, led Congress to strengthen whistleblower provisions, in effect mitigate the trust and harmony within firms, which in effect mitigates the trust and harmony within firms.

The question arises, if walls are so useful for organizations in the private sector, why not also within government bureaucracies?

III. The Private Sector Needs Walls, The Public Sector Needs to Share

As a first take, it might seem that Congress got it right. In the private sector, the principal danger is that individuals became so focused on private gain that they pursue it at the expense of society. The modern market depends on the independence of auditors, lawyers, boards of directors, and financial analysts. We assume that all these individuals are

³⁰ See Marianne M. Jennings, Restoring Ethical Gumption in the Corporation: A Federalist Paper on Corporate Governance - Restoration of Active Virtue in the Corporate Structure to Curb the "YeeHaw Culture" in Organizations, 3 WYO. L. REV. 387, 406-407 (2003) ("The staffs of Enron and Andersen were inextricably intertwined. As noted earlier, David Duncan was a close friend with Mr. Causey, the company's Chief Accounting Officer and the man responsible for approving the SPE transactions that Mr. Fastow handled as both CFO and principal in the off-the-books entities. Further, the employees at Enron were not sure who the Andersen employees were and who worked for Enron; because many Andersen staff had permanent offices at Enron, were often then hired by Enron, and also were beneficiaries of office parties, just as Enron employees were.").

selfish, but in erecting walls between them we ensure that their clashing self interests work to the benefit of society—in effect, Federalist No. 51 applied to the private sector.

The dangers in government are different. There, our paramount concern is that individuals will forget their objective, which is to serve the common good, and instead become dedicated to the service of the government division in which they service. As many have noted, government bureaucracies are inevitably dedicated to their own aggrandizement (both jurisdictional and financial).³¹ The long-standing conflict between the CIA and FBI would seem to illustrate this problem. President Truman created the CIA in 1947 over J. Edgar Hoover's objections,³² and Hoover's "attitude influenced a generation of FBI agents."³³ Conflicting jurisdiction over counterintelligence operations exacerbated tensions between the two agencies, especially after the CIA's original director, a relative nonentity, gave way to more vigorous directors. Over the years, presidents issued a series of executive orders directing the CIA and FBI to coordinate operations,³⁴ but persisting strains, evidenced during the investigation of Aldrich Ames,³⁵ prompted Congress to pass the Intelligence Authorization Act of 1995,³⁶ which issued yet more injunctions to the CIA and FBI to share and be nice. Mixed messages, however, emanated from the executive branch, which seemed to suggest the desirability of walls between law enforcement and intelligence operations to

³¹ See, e.g., GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* 34-36 (1965); WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 42 (1971).

³² See generally MARK RIEBLING, *WEDGE: FROM PEARL HARBOR TO 9/11: HOW THE SECRET WAR BETWEEN THE FBI AND CIA HAS ENDANGERED NATIONAL SECURITY* (Simon & Schuster 2002). See generally Wedge

³³ David M. Crane, *Divided We Stand: Counterintelligence Coordination within the Intelligence Community of the United States*, 1995-DEC ARMY LAW 26, 33.

³⁴ Exec. Order No. 12,333, 46 C.F.R. 59941 (1981); Presidential Decision Directive 24, U.S. Counterintelligence Effectiveness, Weekly Comp. Pres. Doc. (May 3, 1994).

³⁵ Senate Select Comm. on Intelligence, *An Assessment of the Aldrich H. Ames Espionage Case and its Implications for United States Intelligence*, 104th Cong., 3d Sess. 1 (1994).

³⁶ [P.L. 103-359](#)

guard against civil liberties violations.³⁷ The investigation of Wen Ho was severely hampered by these 1995 rules,³⁸ and a GAO report issued in July 2001 that FBI and CIA operatives were under the impression that their various investigations needed to be insulated in airtight walls.³⁹

The Patriot Act, belatedly but meaningfully, addressed the problem, by allowing law enforcement officers and intelligence agents to share information. There is a tendency of late, to criticize the FBI's and CIA's pre-9/11 information compartmentalization as not legally required. Richard Posner, for example, writes, "[B]efore 9/11 the CIA and the FBI exaggerated the degree to which they were forbidden to share information, and the FBI exaggerated the degree to which its intelligence officers and its criminal investigators were forbidden to share information with one another."⁴⁰ I believe this conclusion is incorrect. First of all, the claim that the CIA and FBI "exaggerated" the walls between them may be true in some respects, but there *were* often quite irrational legal prohibitions on the pooling of information. For example, if federal prosecutors and FBI agents uncovered evidence about foreign intelligence operations in the course of a grand jury investigation, there was, consistent with Federal Rule of Evidence 6(e), no mechanism by which this information could

³⁷ See, e.g., Memorandum from Janet Reno, Attorney General, to the Assistant Attorney General, Criminal Division, the Director of the FBI, the Counsel for Intelligence Policy, and the United States Attorneys (July 19, 1995) (regarding "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations"), available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html>.

³⁸ FINAL REPORT OF THE ATTORNEY GENERAL'S REVIEW TEAM ON THE HANDLING OF THE LOS ALAMOS NATIONAL LABORATORY INVESTIGATION at 721-34 (2000).

³⁹ U.S. GEN. ACCOUNTING OFFICE, GAO-01-780, FBI INTELLIGENCE INVESTIGATIONS: COORDINATION WITHIN JUSTICE ON COUNTERINTELLIGENCE CRIMINAL MATTERS IS LIMITED (2001).

⁴⁰ See RICHARD POSNER, PREVENTING SURPRISE ATTACKS (2005). Posner adopts the conclusions of the 9/11 Commission. See 9/11 Commission Report at 78-80. I return to this issue at text accompanying notes xyz-xyz.

be shared with the CIA. Only with the Patriot Act's amendment to Rule 6(e) can such information be shared.

Posner's second complaint—that the FBI “exaggerated” the legal separation between law enforcement and intelligence operation—is even more unjust. A string of memoranda by the Department of Justice emphasized that the FBI should not mingle foreign intelligence operations, conducted under the rubric of the Foreign Intelligence Surveillance Act (FISA), and ordinary law enforcement operations. The Foreign Intelligence Surveillance Court (FISC), overseen by Judge Royce Lamberth *ordered* the FBI to segment foreign intelligence/law enforcement investigations into two camps, and to document that information, to the extent that it flowed at all, was precisely calibrated.⁴¹ When Lamberth discovered that in some cases more information had been pooled than what he had prescribed, he reprimanded an FBI agent by name and disqualified him from serving again before the FISC, thus ending that agent's career. As Heather MacDonald has written, the reaction to Lamberth's decision for FBI culture was sudden and devastating:

[T]he FBI and Justice Department hunkered down completely. FBI headquarters and the [Office of Intelligence Policy and Review at the Department of Justice], already a crippling drag on terrorist investigations, became paralyzing weights. Recalls [former U.S. Attorney in Manhattan] Mary Jo White: 'The walls went higher. Nothing could have been worse.' It was as if the Wall had become covered with concertina wire and broken glass, says [former FBI agent James] Kallstrom. Morale plummeted. Agents in the New York bureau put signs on their desks saying: 'You may not talk to me.'⁴²

It is true that *years later* the Foreign Intelligence Surveillance Court of Review got around to correcting Lamberth's interpretation of the FISA,⁴³ but it is obviously unfair to blame FBI

⁴¹ See *In re all Matters Submitted to Foreign Intelligence Surveillance Court*, 216 F.Supp.2d 611, 620-21 (2002) (discussing walls used in investigations in recent years).

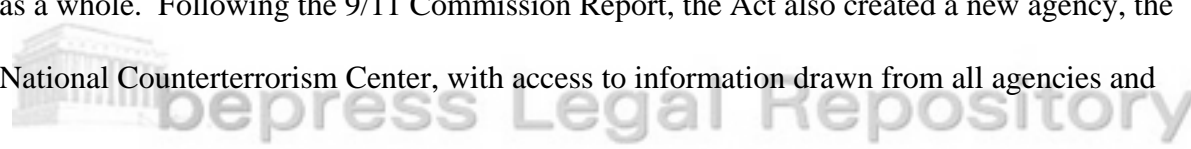
⁴² Heather MacDonald, *Why the FBI Didn't Stop 9/11*, CITY JOURNAL, 2002.

⁴³ See *In re Sealed Case*, 310 F.3d 717 (2002).

agents for trying to comply with the law, at least as the Department of Justice and federal judges were relentlessly interpreting it.

In its recommendations for governmental reorganizations, the 9/11 Commission emphasized the need for unity—again and again. Its four overarching recommendations were to promote: “unity of effort across the foreign-domestic divide” (p. 400), “unity of effort in the intelligence community,” (407), “unity of effort in sharing information” (416), and “unity of effort in the Congress” (419). In its subsidiary recommendations, the Commission extolled “the virtue of joint planning and the advantage of having someone in charge to ensure a unified effort” (401) and “a civilian-led unified joint command for counterterrorism” (403); and it recommended the creation of “a center for joint operational *and* joint intelligence” (403, emphasis in original), the creation of a new agency, the National Counterterrorism Center (NCTC), that would “lead strategic analysis, pooling all-source intelligence, foreign and domestic” (404) and the creation of a new post, the Director of National Intelligence (DNI) and who will “oversee national intelligence” and “manage the national intelligence program” (411).

The political elites, including President Bush and his then-campaign opponent, John F. Kerry, as well as the vast majority of the members of Congress, responded almost immediately to the 9/11 Commission Report with fulsome praise; and most, although not quite all, of its recommendations found their way into law a few months after its release. The centerpiece of the Intelligence Reform Act, as already indicated, is the creation of a DNI who will streamline personnel, budgetary and policy decisions among the intelligence community as a whole. Following the 9/11 Commission Report, the Act also created a new agency, the National Counterterrorism Center, with access to information drawn from all agencies and



which will conduct “strategic operational planning.” In an executive order on June 30, 2005, President Bush further strengthened the DNI by giving him authority over a newly created department within the FBI, the National Security Service, which will coordinate intelligence and counterintelligence operations within the FBI.⁴⁴ This recent executive order has been perceived as a demotion of the FBI, just as the Intelligence Reform Act was a downgrading of the CIA. The message could not be clearer to the various agencies: Cultures of bureaucratic parochialism will no longer be permitted.

IV. Second Thoughts

But does any of this make sense? With respect to Sarbanes-Oxley, Congress seems to have neglected the potential difficulties that result from creating barriers both within and among private firms. For example, Sarbanes-Oxley presumes that by severing business ties, such as consulting arrangements, with clients, auditors will face fewer incentives to commit fraud. The problem, as Larry Ribstein has pointed out, is that “prohibiting some links between monitors and firms, such as the performance of nonaudit services, may block ‘knowledge spillovers’ that give monitors access to valuable information.”⁴⁵ Likewise, it is unclear that outside directors, whom Sarbanes-Oxley foists willy-nilly on all public corporations, will be able to detect fraud as easily as inside directors closely aligned with corporate management.⁴⁶ Furthermore, erecting walls between accountants and lawyers and outside directors on the one hand and corporate insiders on the other may undermine the useful harmony that existed and still exist in many firms that, unlike Enron, have long thrived. As

⁴⁴Douglas Jehl, *Bush To Create New Unit In FBI for Intelligence*, NEW YORK TIMES, June 30, 2005, at A1.

⁴⁵Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 40, 41 (2002).

⁴⁶*Id.* at 41 (“[D]irectors with inside knowledge of the company may be better able than outside directors to see through ambiguous, opaque, or misleading financial statements because they have enough background to understand the kinds of tricks insiders might be playing.”).

Ribstein writes, “forcing insiders to deal with adversarial outsiders might induce them to see their jobs as a kind of game, or Dilbert comic strip, in which they must outwit clueless outsider directors, courts, and overly scrupulous auditors.”⁴⁷ There is an abundance of behavioral science evidence that people behave in a less trustworthy fashion when they are assumed to be untrustworthy.⁴⁸ It surely would have been useful for Enron to have more effective barriers between outsiders and insiders, but imposing such walls on other organizations might have substantial costs.

By contrast, removing such walls in the intelligence community poses many potential difficulties. First, walls play a vital role in intelligence work in minimizing the dangers associated with double agents. Two of the most illustrious individuals in the American intelligence community—former DCI James Woolsey and legendary counterintelligence chief Paul A. Redmond—have tried to cool the ardor among Beltway elites for “information sharing” within the intelligence community. At a conference in March 2005, Woolsey remarked, “I really have been disturbed at the broad use of the term ‘information sharing.’ . . . It’s good not to be too enthusiastic about how well it could go if everybody in large bureaucracies knew everything. One of them’s going to be a Wahhabi or a Chinese.”⁴⁹ Given the fact that American intelligence agencies undertook to quickly hire large numbers of Arabic and other foreign-language speakers after 9/11, Redmond argued that “It’s an absolute certainty that there are spies now in the national intelligence establishment.”⁵⁰ (When the CIA tried to estimate the damage caused by Robert Hansen, it discovered that lax compartmentalization rules allowed this obscure analyst to review a staggering array of

⁴⁷ *Id.* at 42.

⁴⁸ See generally, Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553 (2001).

⁴⁹ <http://www.dawn.com/2005/03/07/int5.htm>.

⁵⁰ *Id.*

documents.) To be clear, this is not an argument against information sharing in all instances; it simply means that such sharing may impose certain costs.

Another potential problem arising from the removal of departmental walls within the intelligence community is the greater danger to civil liberties. In the 1970s, Congress held numerous hearings into the FBI's and CIA's allegedly abusive domestic surveillance activities. The legislative remedy, the FISA, was intended to curtail the powers of foreign intelligence officers to operate on American soil and to create walls between intelligence operations on the one hand and law enforcement operations on the other.⁵¹ Those walls may have proven too high and air-tight in recent years; it often would have made sense to allow spies and cops to pool their resources rather than force them to segregate overlapping investigations.⁵² My point, again, is simply that removing walls within the intelligence community at least introduces a potential cost (to civil liberties), and therefore raises some question as to whether the wholesale removal of walls is an unmitigated good.

The more one reflects on the question of walls in the intelligence community, the more one is struck by the complexity of the problem. Although removing walls might improve efficiency, even that point is not entirely clear. One unified intelligence agency may have certain logistical advantages, but so too does the alternative organizational model, with specialized, competing and even duplicative agencies. Yes, such agencies may end up doing the same thing, but this is precisely the way other fail-safe institutions, like nuclear power plants and air traffic control systems, operate. As John von Neumann observed, redundancy makes "reliable systems out of unreliable parts."⁵³ Even when different organizations

⁵¹ I discuss this in Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 ILL. L. REV. 599, 614-15.

⁵² See *supra* note 39.

⁵³ Quoted in http://www.findarticles.com/p/articles/mi_m4035/is_n2_v42/ai_20034968

perform similar tasks, they may bring complementary skills to bear. The 9/11 Commission Report observed that although the CIA and the Defense Department both engage in paramilitary operations, each has “comparative advantages”: The CIA is noted for its “agility in operations,” while the Defense Department is renowned for being “methodical and cumbersome.”⁵⁴ There would seem to be obvious arguments for leaving well enough alone, but the Report proceeds, bafflingly, that “[t]he CIA’s experts should be integrated into the military’s training, exercises, and planning.”⁵⁵ Why? So that CIA operations could be as “cumbersome” as military operations?⁵⁶

And how will all this “information sharing” play out in practice? One need not subscribe to the egotistical philosophy of Ayn Rand to believe that most hard work is done either alone or in small groups. I can attest from experience that the most dreaded words one can hear as a young associate tasked with writing a legal brief is that yet another partner wanted to be “kept in the loop.” What that means is: longer meetings, more conference calls, more “suggestions,” another ego to stroke, and essentially zero added value. Although I have no experience in intelligence work, reading through the Intelligence Reform Act left me almost sorrowful as I imagined the well-meaning and beleaguered CIA analyst in Langley who is now spending half his week scurrying to meetings at Quantico and Foggy Bottom and Fort Meade. Maybe he’ll pick up some useful information during all those meetings, but will it compensate for all the lost time, all the additional rigmarole? Moreover, in the private

⁵⁴ 9/11 Commission Report at 416.

⁵⁵ *Id.*

⁵⁶ What makes this proposal, which fortunately was not adopted in the Intelligence Reform Act, all the more mysterious is the fact that, by all accounts, the CIA paramilitary teams performed extraordinarily well in Afghanistan. In general, the decision to demote the CIA in the newly fangled intelligence community given that, of all the agencies, the CIA comes off relatively well in the 9/11 Commission Report. See *id.* at 349 (“Before 9/11, no agency had more responsibility—or *did more*—to attack Al Qaeda, working day and night, than the CIA.”).

sector we realize that individuals perform better at specialized tasks, and every expansion of a job's scope comes at a potential cost in terms of worker efficiency. A Defense Department analyst studying Russian submarines may, in the course of his work, come across an item of broader interest. But to the extent that we remorselessly badger the poor fellow with the shrill commands "Share! Cooperate!" we will presumably be distracting him from locating Russian subs.

All this wall destruction is justified by the need to remake the intelligence community's "culture"; there is, however, some doubt as to whether that culture will improve when we replace competing agencies, each with their own esprit de corps, with one big blob of an agency. It is not easy to say what motivates particularly talented individuals to join and remain in the CIA or NSA or FBI, but it cannot be money, for these individuals could earn more in the private sector. It is likely that many persons find the study of foreign affairs and national security more interesting than modeling yen-deutschemark spreads or advising chemical companies to minimize exposure to asbestos litigation. But think tanks and "private CIA" companies, such as Stratfor and Open Source, LLC, provide private sector opportunities in these fields. Public-spiritedness—a desire to serve the country—doubtless captures part of what inspires individuals to join and remain in governmental organizations, but closely connected is a sense is that one is part of an elite, and not some run-of-of-the mill, governmental organization.⁵⁷ This factor would seem to have especial relevance when we consider the CIA, an organization despised in our democratic society and many of whose top

⁵⁷ Someone told me a story about trying to secure a job at the Department of Justice for a friend, who had done work on a political campaign. The supervisor looked at the resume of the applicant and said, haughtily, "Send him over to [the Department of] Commerce. We don't hire people like this at Justice." Anyone who has lived in Washington, D.C. for some time is aware of the occasional smugness of those working at "Mother Justice." And even within the Justice Department, certain departments, such as the Office of Legal Counsel and the Solicitor General's Office, pride themselves as the elite within the elite.

employees must wonder why they are undertaking sacrifices for a country, typified by a every-
wary and often insulting Congress, that so thoroughly distrusts them. The wholesale
resignations at the CIA whenever a DCI departs suggests that the CIA employee's ego is
relatively "fragile" and that he or she needs to feel "appreciated."⁵⁸ As the CIA's prominence
in the newly fashioned "no walls" intelligence community declines, one wonders if the CIA
will continue to attract and retain its top employees, or whether they will flee for the private
sectors, leaving the bureaucratic deadbeats behind.⁵⁹ So much for fostering a culture of
creativity and imagination.

Indeed, perhaps the most striking "intelligence failure" of the 9/11 Commission, and
the Congress that adopted most of its recommendations—and here I use intelligence in the
everyday sense of dumb vs. smart—is the assumption that the twin goals of organizational
coordination and organizational creativity are compatible. As I earlier suggested, from the
point of view of the young legal associate, a partner's request to remain in the loop induces
terror for it necessarily multiplies one's work. Nor am I convinced that, from the point of
view of the client, it is advantageous to have yet another draftsman at the table. Leaving aside
the added cost, the more partners on a brief, the more difficult it is to stake out a truly creative
position. What one partner considers inventive, the other four will likely regard as outlandish,
and thus does it end up on the cutting room floor. The best legal briefs that I have ever read
are the work of one or two people, who disappeared into an office for a few weeks and

⁵⁸ POSNER, *supra* note 40, at 45-46.

⁵⁹ Of course, other organizations, such as the NCTC, may emerge as the new "elites," but that will take
some time (5 years, 10 years?) over the course of which we must assume that the talent pool in the
intelligence community will be lower than what it is now. In addition, once a new elite develops, it
will fashion, formally or informally, walls that segregate itself from other organizations that it deems
inferior. Many in the CIA reportedly think that the acronym DIA, which most of us assume stands for
Defense Intelligence Agency, in fact represents Da Idiot Agency. The DIA returns the favor by
referring to the CIA as "Clowns in Action."

emerged with a final product, to be massaged but not dramatically altered by others. And not surprisingly, when we consider truly creative endeavors, it is almost impossible to name a great novel or poem or play or sculpture or painting that was “co-produced.” Turning to the intelligence community, the greater the emphasis on sharing and coordination and team-work, the harder it will likely be for one or two courageous analysts to stake out a controversial position and argue it forcefully.⁶⁰

V. Can the Private Sector Teach Government Anything?

In 2000, *Fortune* magazine ranked all American corporations on a number of matrices, and one stood out for praise. It showed extraordinarily high profits year after year, and the magazine crowned it No. 1 for innovativeness and No. 2 in attracting and retaining talent. That company ceased to exist a year and half later—its name was Enron.

It is comical, albeit darkly so, to read articles about the “Enron culture” pre- and post-crash. In its heady days, Enron was celebrated for its free-wheeling and innovative culture.⁶¹ A few years later, the same “rank and yank” culture was said to be central to Enron’s failure.⁶² It is fairly easy to understand why a “rank and yank” culture might excite disdain in the academic community, whose denizens either hunger for, or wallow in, the ultimate in job security—tenure. That being said, it is hard to argue with success, and the world’s most successful company, at least rated by market capitalization, is General Electric, and its long-time CEO Jack Welch famously employed a “fire the bottom 10%” approach similar to that used at Enron. Still, one cannot say that any particular business culture is good or bad, at least if the criterion is making money. Some organizations thrive with brutal competition, others

⁶⁰ See Joshua Rovner and Austin Long, *Intelligence Failure and Reform: Evaluating the 9/11 Commission Report*, BREAKTHROUGHS, Vol. 14, No. 1, at 12.

⁶¹ John Greenwald, *Rank and Fire*, TIME, June 11, 2001.

⁶² *What Really Went Wrong at Enron? A Culture of Evil*, Match 5, 2002, symposium discussion available at <http://www.scu.edu/ethics/publications/ethicalperspectives/enronpanel.html>

by emphasizing job security. Consider the two law firms of Kirkland & Ellis and Cleary, Gottlieb, Steen & Hamilton. Kirkland is legendary as an “eat what you kill” firm, with partner’s draws annually re-calculated on the basis of “what have you done for me lately,” that is, how much work have you brought in; Cleary assures partners of lockstep annual increases, regardless of work generated. Both policies seem to have worked quite respectably, with annual partner draws of about \$1.5 million per year.⁶³ The success of these two firms suggests that “one culture” need not fit all—that different people might thrive in different environments: A Kirkland lawyer might find the Cleary culture too collegial; a Cleary lawyer might find the Kirkland culture too competitive.

Enron’s culture was—after the fact—diagnosed as a weird brew of competitiveness and coziness. Enron’s executives were too chummy, it was said, with its directors, accountants, lawyers, and financial analysts. Yet as mentioned earlier, this sort of chumminess might prove useful in a well-run company. Businessmen and lawyers, for example, can prove quite symbiotic. The former are trained to generate multiple ideas, and the sort of person who excels in a business setting is prone to optimism;⁶⁴ the latter are trained to watch their words carefully (consider the effect of the “Socratic method”), and they are always thinking of worst case scenarios. A thriving company might prefer not to have walls between these two groups, but to promote a high level of trust and interaction. To the extent that Sarbanes-Oxley imposes nebulous duties on lawyers to rat out their clients, that level of trust will diminish. Regulatory solutions of this nature reflect a fixation on what went wrong at companies like Enron, and impose those “solutions” on companies that may have had no problems to begin with, or were even thriving as they were currently constituted. Indeed, it is

⁶³ Top 200 Law Firms, American Law, at http://www.law.com/special/professionals/amlaw/amlaw200/amlaw200_ppp.html.

⁶⁴ See generally MARTIN SELIGMAN, LEARNED OPTIMISM (1991).

odd to make Enron the poster child for pervasive corporate corruption and the model for regulatory solutions when, as Professor John Coffee has noted, its “governance structure was sui generis.”⁶⁵

None of this is to say that the private sector is often not flawed. In any large company, executives have incentives to pursue personal aggrandizement over the company’s gain. Part of what makes one company successful, and another not, is cost-effectively monitoring agents, but even in the best company one must assume some residual loss. Although agency costs have long been the subject of academic study,⁶⁶ there has lately been a growing interest in the way “bounded rationality” plays out in the corporate setting. It turns out that cognitive biases are rife in boardrooms and offices just as they are in every other setting that human being inhabit. Indeed, in certain respects biases are most likely to flourish in business settings:

High levels of self-esteem and self-efficacy are associated with aggressiveness, perseverance, and optimal risk-taking. These biases may be particularly adaptive in business settings, where decisiveness and aggressiveness are considered indicators of a successful manager. Certainly, overconfidence at times leads to disaster and severe career failure. Those who fail too visibly are often weeded out. However, there is little evidence that successful managers learn humility very well. Instead, they recharacterize their minor failures in self-serving terms. They take the apparent absence of major failures, maybe from luck as much as anything else, as proof of superior skill. High levels of optimism and confidence are not only good internal motivators, but they also influence others; exhibitions of confidence and optimism make people more persuasive and influential.⁶⁷

⁶⁵ John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1403-04 (2002) (“Enron's governance structure was sui generis. Other public corporations simply have not authorized their chief financial officer to run an independent entity that enters into billions of dollars of risky and volatile trading transactions with them; nor have they allowed their senior officers to profit from such self-dealing transactions without broad supervision or even comprehension of the profits involved. Nor have other corporations incorporated thousands of subsidiaries and employed them in a complex web of off-balance sheet partnerships.”).

⁶⁶ See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

⁶⁷ Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 153-54 (1997).

There is a staggeringly large literature, ignored in its entirety by the 9/11 Commission, devoted to understanding how corporations can minimize the effect of optimism and commitment biases in its managers. Likewise, there is a staggeringly large literature, ignored by the 9/11 Commission, as to how corporations improve “upward information flow” to ensure that subordinates generate the best possible data and do not simply mimic their managers’ views.

Companies in the private sector operate in a highly competitive environment, and market forces reward those companies that best counter the effect of cognitive biases. But there does not appear to be any single “solution.” In banks, for example, it has been found useful to separate lending groups (perhaps prone to optimism bias) from workout groups (perhaps overly prone to discount the possibility of creative thinking).⁶⁸ At Intel, by contrast, long-time CEO Andy Grove encouraged a free-wheeling flow of ideas, his motto being, “Let chaos reign, then reign in the chaos.” Grove argued this culture allowed him to recognize and predict “strategic inflection points,” that is, business upheavals triggered by changes in technology or regulation or competition. For Intel, the critical moment was in the 1980s, when it abandoned the dynamic random access memory market, in which it had thrived, to pursue the microprocessor market, which meant the firing of thousands of employees and a calamitous half billion dollar write-off when a technical glitch was encountered.⁶⁹ Grove’s decision was quickly validated, and is now consistently lauded in business school classes as a model of strategic leadership. Interestingly, even at Intel there was not quite as much honest “upward information flow” as Grove had assumed, which may explain why Intel persisted in

⁶⁸ The definitive work on this cultural divide within banks is TOM WOLFE, *MAN IN FULL* (2000).

⁶⁹ See generally Robert Burgelman, *Fading Memories: A Process Theory of Strategic Business Exit in Dynamic Environments*, 39 ADMIN. SCI. Q. 24 (1994).

the memory market after it became clear (at least retrospectively) that a move to microprocessors was unavoidable.⁷⁰

What does all this suggest about reforming “the intelligence community?” One conclusion might be that the goal of forging a singular culture is misguided. The various segments of the community are engaged in quite different tasks and might attract different kinds of people. The sort of person who could thrive as an NSA analyst might be less well suited to work in the CIA. The 9/11 Commission, and the Congress that adopted most of its recommendations, ignored the substantial benefits in allowing different organizations to develop idiosyncratic cultures through specialization on discrete tasks. For example, the Commission apparently criticizes the NSA for not following up on information gleaned in late 1999 about communications between men named Khalid, Nawaf, and Salem. “Working-level officials in the intelligence community knew little more than this. . . . The NSA did not think that its job was to research these identities. It saw itself as an agency to support intelligence consumers such as the CIA. The NSA tried to respond energetically to any request made. But it waited to be asked.”⁷¹ The reason that the NSA had this view of its own responsibilities, apparently unbeknownst to the 9/11 Commission, is that Executive Order 12333 specifically defines the NSA’s roles as the collection, processing and dissemination of information in accordance with the DCI. And this makes a lot of sense: “Otherwise, the

⁷⁰ Chris Argyris, *Double Loop Learning and Implementable Validity*, at <http://www.palgrave.com/pdfs/1403911401.pdf> (“When middle manager wanted to move from memory products to . . . microprocessors. . . they strove to communicate their views to top executives, but failed to get their message across. . . . Later, when [a researcher] told Andy Grove this story, he did not believe it. To his credit, he interviewed the relevant managers and learned that it was true.”).

⁷¹ 9/11 Commission Report at 353.

potentially infinite realm of signals to intercept or images to acquire would rapidly overwhelm the NSA or any of the other technical agencies.”⁷²

The 9/11 Commission urged Congress to institutionalize a culture of creativity in the intelligence community, and Congress codified the recommendation, incoherently and one must assume ineffectually, by authorizing the DNI to create myriad “red teams” to play devil’s advocate.⁷³ But it is not at all clear that, for much of the intelligence community, creativity is a job requirement: NSA analysts should be meticulous, not creative.

Furthermore, creativity is often problematic, especially in the public sector. Someone who comes up with an innovative idea or prepares to chart a revolutionary path in the private sector, as Grove did when he entered the microprocessor market, is quickly held in check by profits and losses. A creative idea that loses a company millions of dollars year after year (and most of them do) will soon be abandoned, or the company bankrupted; but this is not the case in the public sector. Indeed, in the 1990s, after the collapse of the Soviet Union, the Department of Defense was freed from the “tyranny of scenario plausibility” and promptly embarked on a spending spree that has saddled the country to this day with countless wasteful projects.⁷⁴ It’s swell to “let chaos rein” in the private sector, but it does not seem like a good idea in the public sector.

To the extent that one really wanted to generate a culture of creativity, a multi-billion dollar reshuffling and enlargement of existing and newly created bureaucracies is not the most cost-effective solution that comes to mind. When Ronald Reagan was elected president in 1980, the CIA was a wasteland of bureaucratic inertia and incompetence, strangled by its own

⁷² Rovner and Long, *supra* note 60, at 11.

⁷³ Intelligence Reform Act, § 1017(a).

⁷⁴ See Carl Connetta and Charles Knight, *Dealing with Uncertainty: The New Logic of American Military Planning*, PROJECT ON DEFENSE ALTERNATIVES, February 1998.

legalistic DCI, Stansfield Turner, and by a Congress that had held endless hearings on CIA abuses. Reagan's solution was simple: He brought back former OSS agent William J. Casey to be DCI, and told him to go to work. Casey immediately plucked a few analysts from within the CIA, as well as scouring the private sector for talent, and let them loose. "Virtually overnight the CIA was back in business, and hardly a week went by without Casey being hauled before one Congressional committee or another because its members were 'outraged' or 'horrified' by some leaked CIA analysis that challenged the conventional wisdom, or by some overseas operation that had gone wrong and had kicked up a diplomatic storm."⁷⁵ Likewise, to foster a culture of creativity in the CIA, President George W. Bush might have named a swashbuckling DCI, given him the authority to hire as he saw fit (which would include people now disqualified because of familial connections in the Arab world or because of drug use in college) and then, as Bette Davis would say, "Buckle up, everybody, it's going to be a bumpy ride."⁷⁶

But this was not the approach taken by the 9/11 Commission or the Congress that enacted the Intelligence Reform Act. It bears pointing out in this context that the 9/11 Commission was lawyer-heavy—in addition to a General Counsel, there were 24 other lawyers listed on the staff⁷⁷--with very few, if any, heavyweights from the intelligence community. Even more debilitating, it was a politicized Commission, with all of its members big-shots in either the Democratic or Republican parties. This fact, plus the Commission's determination to issue a unanimous report, resulted in a slew of self-serving and meaningless lines like "We believe that both President Clinton and President Bush were genuinely

⁷⁵ Herbert E. Meyer, *A Talent for Intelligence*, REAL CLEAR POLITICS.COM, at http://www.americanthinker.com/articles.php?article_id=4523

⁷⁶ All About Eve (1950).

⁷⁷ 9/11 Commission Report at xiii-xiv.

concerned about the danger posed by Al Qaeda.”⁷⁸ Ever careful never to say anything too critical about either President, *or any politically prominent individual by name*, the Commission instead scolded faceless organizations such as “the FBI.”

As mentioned earlier, the Commission peddled the now-popular theory that the FBI “exaggerated” legal barriers. In making this assertion, the Commission never even acknowledged that Judge Royce Lamberth minted an erroneous interpretation of the FISA that had handcuffed the FBI for years, until the Foreign Intelligence Surveillance Court of Review reversed him. Nor did the Commission explore the role that Lamberth’s erroneous interpretation played in shaping an FBI culture that was wary of information sharing.⁷⁹ Likewise, the Commission circumspectly side-stepped the role of Attorney General Janet Reno and Deputy Attorney General Jamie Gorelick, in issuing memoranda that ordered the FBI to observe internal barriers even “beyond what was legally required.”⁸⁰ But this latter omission is not particularly surprising given Gorelick’s astonishing presence on the Commission itself.⁸¹

⁷⁸ 9/11 Commission Report at 349.

⁷⁹ See *supra* at text accompanying note xyz.

⁸⁰ Gorelick’s memo, after the 1993 World Trade Center bombing, stated, “We believe that it is prudent to establish a set of instructions that will more clearly separate the counterintelligence investigation from the more limited, but continued, criminal investigations. These procedures, *which go beyond what is legally required*, will prevent any risk of creating an unwarranted appearance that [the Foreign Intelligence Surveillance Act] is being used to avoid procedural safeguards which would apply in a criminal investigation.” The declassified memo is now available at http://www.fas.org/irp/agency/doj/1995_wall.pdf.

⁸¹ In a telling passage, the 9/11 Commission Report quotes one FBI agent criticizing an informational “wall” and even noting that “someday someone will die” as a result of the legal barriers. 9/11 Commission Report at 271. The Commission Report then goes out of its way to exonerate Member Gorelick of any wrongdoing, noting that technically her 1995 memorandum would not have foreclosed the communication in question. *Id.* at 539 n. 83. The Report nonetheless does not endorse the memorandum, in fact remaining dubitative on this point: “[w]hatever the merits of the March 1995 Gorelick memorandum. . . .” *Id.* Truly, this is bizarre. Either the memorandum was right, both as a matter of law and policy, or it was wrong. Surely, the Commission should have taken a position on this vital point, but then again how could it, given that Gorelick was herself on the Commission. Instead of focusing on this point, the Report complains broadly about the FBI’s “bureaucratic culture”

Turning to the recommendations, the Commission (and later Congress's) fixation on bureaucratic reshufflings apparently reflects the idea that a decision-maker acting upon incomplete information will make mistakes, and what is needed is to disturb existing informational relationships. Unfortunately, it is not at all clear how internal bureaucratic changes will do much to remedy the problem. Schematically, the intelligence community used to look like this:

Diagram 1

Now it looks like that:

Diagram 2

There are more boxes and more dotted lines in Diagram 2, but precisely how this will facilitate the upward flow of accurate information remains anyone's guess. And if interesting morsels of information do rise, there is no certainty that the people at the top of the food chain will bother to listen.

Let us now contrast how the private and public sectors reorganize in response to "strategic inflection points." When Andy Grove realized that Intel needed to shift to the microprocessors market, he embarked on a painful transition, firing thousands of workers and losing, in the short term, hundreds of millions of dollars. Had Grove not made this shift, of course, Intel would have long since ceased to exist, or at a minimum would not be the

that led it to resist sharing of information. Given that the Deputy Attorney General has emphasized that the walls between counterintelligence and criminal investigation should "go beyond what is legally required" precisely what sort of culture was it reasonable to expect?

spectacularly successful corporation we recognize today. By contrast, the 9/11 Commission informs us that we face a new and mortal threat, “Islamic terrorism.”⁸² Yet the public sector solution is to add thousands of employees and create new agencies, but otherwise leave everyone in place. If one truly had wanted to change the culture of the intelligence community, it would have made more sense simply to bring back someone in the mold of Bill Casey and then slashed the intelligence community’s budget in half. Such a reduction would have forced some useful hard thoughts about priorities. When it comes to public sector reorganizations, however, it turns out that there is no pain, only gain.

In sum, organizations in the private sector forge idiosyncratic cultures in response to market conditions. Government attempts to remake firm cultures are almost by definition misguided; for most firms that exist, and certainly the ones that thrive, already have successful cultures: If they hadn’t, they wouldn’t be here and surely wouldn’t consistently be turning a profit. Government organizations, by contrast, face no economic pressures. They may adapt cultures that are successful in terms of motivating employees to seek and promote the public good; but just as likely, government organizations adapt perverse cultures in which the overriding objective is ingratiating itself with the dispenser of funds (usually Congress). Indeed, the latter organizations likely will succeed in competition with the former, at least in the warped Darwinian world of government.

VI. Conclusion

This article is a plea for a truce in the culture wars.⁸³ Congress is not qualified to remake corporate cultures. Inevitably, any reforms Congress decrees will be rationalized with reference to failed companies that had—by definition—failed cultures. The “solutions”

⁸² 9/11 Commission Report at 364.

⁸³ For the inspiration for the title of the Article, see F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 ILL. L. REV. 561.

Congress orders, however, will saddle all firms, including thriving firms with successful cultures. Turning to the public sector, although it is true that many government bureaucratic cultures may be diseased, the hard question is whether Congress is likely to improve matters, at least when its solution simply consists of reshuffling, expanding and adding entire departments. If Congress identifies a government bureaucracy with a deficient culture, the best solution is either to slash the budget or eliminate the bureaucracy altogether, especially when it seems to serve no purpose whatsoever. NASA immediately comes to mind in this context, but the astonishing persistence of this often fatal boondoggle suggests the political infeasibility of the elimination option in virtually in all instances.⁸⁴

How might one have designed a 9/11 Commission more likely to generate useful ideas for reform? Principally, one should have reduced the number of politicians and lawyers, and in their place invited people who are apolitical (e.g., scientists) and able to generate truly creative ideas (read: fewer lawyers, more businesspeople). For example, when in 1986 NASA commissioned a panel to study why the Space Shuttle Challenger exploded soon after take-off, it included the Nobel laureate Richard Feynman. Unlike many others on the panel, who were long-time NASA bureaucrats, Feynman had no axe to grind, just a brilliant mind to deploy, and his ten-page appendix explains what precisely went wrong and begins and ends with the central questions: How risky is the Space Shuttle and how much risk is tolerable?⁸⁵

My criticisms of the 9/11 Commission or in the Congress that enacted the Intelligence Reform Act does not discount the possibility that each body included truly public-spirited individuals. What this article has tried to bring out is the near-impossible task that confronted

⁸⁴ After both the 1986 and 2003 Space Shuttle Crash, members of Congress excoriated the NASA “culture.” NASA also formed commissions panels to investigate, and inevitably their reports were festooned with disparaging references to NASA’s “culture.”

⁸⁵ Report on the Space Shuttle Challenger Accident, Appendix F, at <http://science.ksc.nasa.gov/shuttle/missions/51-l/docs/rogers-commission/Appendix-F.txt>.

them. Even if we imagine someone with the intelligence of a Richard Feynman and the patriotism of a Patrick Henry, what would such a person have done when faced with the cultural divide reflected in the following account of life pre-9/11 in the intelligence community:

Very different cultures deepened the wall between intelligence and law enforcement. For instance, FBI agents have Top Secret clearances, but few are cleared into the Specialized Compartmentalized Information that is the woof and warp of intelligence. So when faced by unfamiliar FBI counterparts in meetings, CIA agents officer might be sincerely uncertain about how much they could say. FBI agents, in turn, feared that inadvertent disclosures might jeopardize prosecutions. The safest course was to say nothing. If the conversation turned to matters domestic, then the CIA officials would also be uncertain how much *they* should hear.⁸⁶

Obviously, this state of affairs is insane. But what is the correct reform? Here we rub up against the Hayekian point that a central planner, regardless of how bright and well-meaning, is *never* able to forecast how many widgets a factory in Topeka or Kiev should manufacture (which is why this should be left to the market). Nor can one individual (or even an 8-person commission of philosopher-kings) design a perfect intelligence community, calibrating the walls and barriers perfectly to account for the various logistical and civil liberties requirements. This fact does not relieve us of the need to construct an intelligence community, but it would suggest a certain humility in approaching this undertaking.

So had I been asked to participate in the 9/11 Commission, my approach would have been as follows: All things considered, the intelligence community did not do all that badly. The Commission harped on supposed shortcomings of the intelligence community, but my reaction when reading the Report was often quite the opposite. The picture of the intelligence community that comes across on most of the pages of the Report is of truly well-meaning and energetic public servants, who may have misunderstood some of the legal barriers to

⁸⁶ Gregory F. Treverton, *Intelligence Gathering, Analysis, and Sharing*, Rand Publication.

information sharing, which was hardly surprising given the complexity of the law and the sparse and contradictory guidance supplied by their superiors.⁸⁷ Because the intelligence community as currently constituted performed relatively well, structural tinkering is preferable to radical overhaul. The Patriot Act's amendments to FISA and grand jury secrecy rules make sense, for they eliminate some of the more plainly nonsensical features of pre-9/11 law. Beyond that, however, the radical changes dictated by the Intelligence Reform Act may or may not have some salutary consequences five or ten years out, but we know with certainty that they will cause upheaval, and a consequent reduction of efficiency, in the short term. Given the uncertain long-term benefits and the certain short-term costs, such massive reorganizations should be regarded with some caution.

I fear that there after some future terrorist attack, another Commission may inaugurate further structural upheaval. The expected overhaul at that point will consist of stripping domestic intelligence work out of the purview of the FBI and creating an entirely new bureaucracy altogether—a counterpart to Britain's MI-5. There is some abstract logic to support such a change; and indeed, such a change makes more logical sense than most of the reorganizations recently undertaken. The basic idea is that intelligence work should be done by spies, not cops, and therefore should be outside the FBI's bailiwick. That said, I am still

⁸⁷ I have earlier written about the energetic attempts of FBI agent Colleen Rowley, whose efforts to search Zacarias Moussaoui's laptop computer were derailed by FBI headquarters. See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 957-71 (2003). Also impressive were the labors of the FBI's New York office, which tried to pursue an investigation with respect to two 9/11 hijackers, only to face interference due to perceived legal barriers. See 9/11 Commission Report at 270-72. Nor was the CIA nearly as ineffectual as some have claimed. For example, "CIA assets in Afghanistan" correctly reported that Bin Laden was in Kandahar, Afghanistan in 1999 and pitched the idea of killing him then and there. High level officials who—surprise, surprise, go unnamed in the 9/11 Commission Report—vetoed the idea. See *id.* at 140 ("It was a fat pitch, a home run.' . . . When came back that they should stand down, 'we all just slumped.'"). If bureaucrats in the Department of Education were half as energetic and public-spirited as the members of the intelligence community depicted in the 9/11 Commission Report, American schoolchildren might be mastering classical Greek at age 12.

not convinced that, in actual practice, such a reorganization will prove beneficial. True, the United States is unique among Western nations in having its domestic intelligence conducted by an arm of law enforcement. But it is hard to know which structure is necessarily better. In America, domestic intelligence is conducted by the FBI, *which can threaten people with criminal prosecution*, and this is a powerful motivator to talk. By contrast, Britain's MI-5 does not have prosecutorial powers; criminal investigations of domestic enemy infiltrators must be passed over to Scotland Yard.⁸⁸ There are costs and benefits to keeping domestic intelligence within the FBI, and perhaps we should just leave well enough alone.

The 9/11 Commission and the Congress that enacted the Intelligence Reform Act obsessed about forging a new culture in the intelligence community, but the reality is that the intelligence community cannot forge a culture antithetical to the spirit of the general culture of society. At least in a democracy, if society at large thinks that spies are wicked and to be distrusted, it is unlikely that responsive political elites will tolerate a truly invigorated intelligence community. Although not at all congenial to the modern democratic spirit, it might be useful for some future commission to lay out some facts with clarity, such as: The reason the CIA and the rest of intelligence community exist in the first place is that there are evil people in this world who want to kill us. Yes, he who fights monsters must be wary of becoming one, but an even greater danger facing many Western liberal democracies is the delusion that there are no monsters at all.

⁸⁸ In the wake of the July 7, 2005 London bombings, some commentators have pointed to the shortcomings of the U.K. model.