When the Smoke Clears at CIA

By

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CIA officers love conspiracy theories by which each layer of truth reveals another. But sometimes they miss things that are obvious outside the shadows.

Some officers may distrust their new director, Leon Panetta. Anything is possible to a paranoid mind accustomed to dangles, false flags, and counter-surveillance. James Angleton, the legendary head of CIA counter-intelligence, believed to his grave in 1987 that the KGB defector, Yuri Nosenko, was a double agent. In his own wilderness of mirrors, Angleton argued to the disbelief of another CIA Director that the proof Nosenko was a double was his giving us so much valuable information. Angleton said the

KGB was doing its best to establish Nosenko’s bona fides, tricking us into believing that the Soviets had nothing to do with President Kennedy’s assassination. Nosenko’s vital piece of disinformation was his claim to the CIA that Lee Harvey Oswald was not a Soviet agent.

A generation later, the most suspicious officers at the CIA may actually believe that Panetta is part of a White House conspiracy to cripple their Agency. Others who are less suspicious may react to the public outcry since 9/11 about irregular renditions, secret prisons, and harsh interrogations by concluding that they should have stayed within the traditional CIA mission of gathering intelligence and refused to do anything else the President proposed or considered. No first teams into Afghanistan. No negotiations with Qaddafi to convince him to abandon his nuclear program. No disruptions in AQ Khan’s network of selling nuclear know-how. Nothing close to Guantanamo or Abu Ghraib. No Predator strikes. No assistance in the war against Iraq. No training of foreign security services. Nothing. Please find somebody else to do those things, Mr. President.

Have things gotten so bad that CIA officers today are more frightened of rogue prosecutors than they are of rogue nukes? More afraid of Amnesty International than Hezbollah? Are we in the sad situation where the safest course for a CIA officer is to do nothing more than read the newspapers at Langley? How many hours a week do CIA officers now spend with private lawyers to discuss the course of a grand-jury investigation led by the Justice Department’s John Durham?

Some CIA officers may even need to return to headquarters from stations overseas. The lucky ones have their legal bills paid by their private insurer, Wright & Company. The unlucky ones pay for lawyers out of their own pockets. CIA officers, after all, cannot rely on the Office of General Counsel (“OGC”) to represent them on individual matters. These officers are being reminded that the attorney-client privilege does not protect their prior conversations with government lawyers. Even some lawyers from OGC have retained private counsel.

The IG Piles On

The August 24 release of the CIA Inspector General’s (“IG”) report, *Special Review of Counterterrorism Detention and*
Interrogation Activities (Sept. 2001-Oct. 2003), compounds the fears at the CIA that some officers or contractors will be prosecuted for their actions after 9/11. Moreover, this release comes after the Justice Department’s decision to investigate the 2005 destruction of CIA interrogation tapes, after House Speaker Nancy Pelosi’s accusation that the CIA lied to her about what interrogation tactics were actually used on suspected terrorists, and after Senator Diane Feinstein’s statement that the CIA broke the law by giving Congress incomplete briefings about a kill-and-capture program. The Inspector General’s report makes clear that CIA interrogators used a handgun and a power drill on a suspected terrorist, threatened sexual assault and death to family members, blew cigar smoke into a detainee’s face, put detainees in stress positions, scrubbed a detainee with a stiff brush, stepped on detainees’ shackles, used a waterboard hundreds of times, applied pressure to the carotid artery to make a detainee pass out, staged a mock execution, and doused detainees with cold water. A careful reading of the IG report reveals deeper points.

Some outside observers questioned how the CIA dared to use any enhanced interrogation techniques on Abu Zubaydah, the “first high value detainee” from al Qaeda, between the time of his capture in Pakistan in March 2002 and August 1, 2002, when the Justice Department issued its opinions about interrogations. The answer is right there on page four of the IG report: “The Office of General Counsel (OGC) took the lead in determining and documenting the legal parameters and constraints for interrogations.” In other words, CIA officers first relied on advice from CIA lawyers. After that, whether they admit it or not, Justice Department lawyers in the Office of Legal Counsel may have been boxed into agreeing with prior advice.

John Rizzo, Acting CIA General Counsel at the time, said during his unsuccessful bid for Senate confirmation in June 2007 that he still agreed with the substance of the August 1, 2002 advice from the Justice Department’s Office of Legal Counsel. But he did not offer much of an explanation in the open session to the hearings. In the closed session, perhaps he explained to the Senators that he and other top CIA lawyers had provided similar written advice about enhanced interrogations before the Justice Department did. The questions about interrogations, after all, came less from the White House than from CIA officers in the field.
CIA lawyers were present in so many other parts of the program; even the smallest decisions, such as an extra abdominal slap on a detainee, seemed to involve a lawyer. Before a CIA interrogator was allowed in the booth, he signed an acknowledgement (surely drafted by CIA lawyers) that he had read the 2003 interrogation guidelines and would comply with them. As the flow of cables confirms, field officers were not on the loose from headquarters. Perhaps most embarrassingly, the field officer is revealed as a kindergarten student who needs permission to go to the potty instead of the Jason Bourne of Hollywood lore. Despite the pervasive role of the CIA lawyers, abuses still occurred. But the abuses would have been more egregious if nobody was looking over Jason Bourne’s shoulder.

OGC, which has grown to over 100 lawyers, does not need to be larger. But OGC needs better lawyers who conduct more effective oversight. To prevent the lawyers from being co-opted, more of them should be rotated to positions outside the CIA in the intelligence community. Wherever the lawyers are assigned, they should see themselves more as regulators than facilitators, more as parents than pals. Calm and balanced, they serve the CIA’s long-term interest by not submitting to political expediency. Sometimes the lawyers must say no.

NOT THE FIRST TIME FOR TROUBLE

The CIA has gone through bad times before. In 1994, Aldrich Ames, a long-serving officer, was arrested for espionage. Lax practices within the CIA’s clandestine service and its office of security had allowed him, for many years, to sell secrets to the Russians. American networks were rolled up, human sources killed. In the 1980s CIA officers were indicted for their role in the Iran-Contra fiasco. They stayed out of jail through pardons and technicalities. But the worst may have been during the 1970s when the combination of Vietnam, Watergate, and the abuses revealed by the Church Committee—including the CIA’s domestic spying, its preposterous assassination plots against Fidel Castro, and its testing of psychedelic drugs on unwitting subjects—caused serious people to question whether we really needed a CIA. President Ford’s Director of Central Intelligence, William Colby, threw parts of the CIA overboard, feeding the media and the political sharks, so that there might be something left of the CIA’s body when the
blood-letting was over. Somehow, despite Ames, Iran-Contra, and Church, the CIA survived.

In truth, the siege at the CIA started before President Obama took office. It seems that Republicans and Democrats, in a rare display of bipartisanship, have both gone after the CIA. George Tenet, the Clinton holdover at the CIA, took the blame for allowing faulty intelligence into President Bush’s speech about Iraq’s pursuit of nuclear weapons, but he did not accept responsibility for all the errors in Secretary Powell’s 2003 Security Council plea for war against Iraq. Tenet dared to point the finger back at Bush and Cheney. So, following a standard script between politicians and spymasters, Tenet was given a medal and pushed off stage. Next, in September 2004, the White House sent Porter Goss as a new Director out to Langley to plug the leaks that were making the administration look bad and to remind officers that they served President Bush more than the country. Steve Kappes, the current Deputy Director of the CIA, resigned after refusing to fire a senior officer as instructed by Goss’s top aide. Tensions between the Director and his officers increased.

Changes were made in law and practice to cut the CIA down to size. The creation of the Office of the Director of National Intelligence in April 2005 added a layer of bureaucracy between the Director of the CIA and the President. As a result, Admiral Dennis Blair, not Panetta, is the President’s daily briefer these days. No longer is the CIA the great coordinator of the intelligence community. Already diminished, the CIA may also be losing its historical prerogative of appointing the chief intelligence representatives in foreign countries. In that case, the CIA’s loss would be a gain for the Director of National Intelligence and the National Security Agency. And other parts of the Defense Department, particularly Special Forces, continue to tread on CIA turf. These are disturbing trends. If the country truly believes in the importance of gathering foreign intelligence by human sources, it has nowhere else to turn but the CIA. Special Forces cannot take us into the minds of North Korean leaders, and satellites cannot reveal Iranian nuclear facilities buried under ground.

Since its creation, the CIA has held an awkward place in the American system. The American character, no matter the political party, is not comfortable with the duplicity inherent in the intelligence business. We go through cycles of piousness followed by corrections. We ride with Don Quixote until he hits real
obstacles. In 1929, Secretary of State Henry Stimson, who opposed gathering intelligence by snooping, said that gentlemen do not read each other’s mail. He changed his mind when he learned that our enemies—and even our friends—continued to spy on us. President Truman, desperate to return to normalcy, disbanded our foreign intelligence service as soon as we won the Second World War. Two years of Soviet aggression and provocation around the globe convinced him that we actually needed spies. So the Central Intelligence Agency, William Donovan’s dream since running the Office of Strategic Services during the war, was created in 1947. Years later, President Carter believed we could pursue a foreign policy based exclusively on human rights. The Soviet invasion of Afghanistan in 1979 and the Iranian taking of hostages from the United States embassy earlier in the year showed him that we needed a third option between marines and diplomats. To correct Carter, President Reagan unleashed the CIA to attack communists around the world. But his Director of Central Intelligence, William Casey, embroiled the CIA in a deal to free hostages in Lebanon that involved selling missiles to Iran and diverting proceeds to Contra forces in Nicaragua. Then President Clinton, returning to piousness, largely ignored his Director of Central Intelligence.

Over the years, the CIA responds as much to politics as to changes in the law. After 9/11, the CIA applied the lessons from Church and Iran-Contra: make sure you have presidential authorization for a controversial program; brief the program to the oversight committees; and obtain legal advice. According to media accounts, President Bush approved the CIA’s detention and interrogation program in a comprehensive written finding days after 9/11; the program was briefed either to the full intelligence committees or selected members of Congress; and legal advice was obtained from what was considered the gold standard—the Office of Legal Counsel. Some critics fault the CIA for not anticipating an eventual change in the country’s mood about aggressive counterterrorism. Others, perhaps asking too much of policymakers who lack legal training, say the CIA’s senior management should have been more skeptical about the legal advice from OGC and the Justice Department.

No matter the criticisms, the CIA, in large part, did what it was supposed to do. Yes, mock executions, power drills, and threats of sexual assault are all wrong—but those actions went beyond what was authorized. In response, something must be done to improve
the internal checks on the CIA. That is easy. The tougher issue is
whether criminal prosecution is appropriate.

THE CASE AGAINST PROSECUTION

Criminal prosecution is the ultimate external check. Federal
prosecutors, from an Assistant United States Attorney to the
Attorney General, are supposed to use their discretion to factor the
greater good into their decision making. Our law does not require
that all violations be punished. Behind the scenes, Panetta or his
surrogates have already made an elaborate case against any
criminal charges related to the CIA’s counterterrorism activities.

Panetta could argue that Obama’s election and his executive
order to use the Army Field Manual as a uniform interrogation
standard throughout the government are enough to signal a break
with past practices. It would be very bad politics for the Obama
administration to seem quicker to prosecute CIA officers than
suspected terrorists, including the alleged planner of the 9/11 plot,
Khalid Sheikh Mohammed. Cheney would come after them, and
the cases would highlight the lack of an endgame for Guantanamo.
CIA officers who crossed the line can be penalized in other ways:
reprimands, firings, removals of security clearances, or civil suits
against the officers and the government in which the state secrets
privilege is not asserted to shut down the case. As career
prosecutors noted during the Bush administration, criminal cases
will be difficult to prove since witnesses and evidence may be
gone and the alleged victims are not sympathetic to American
juries. Finally, the cases will inevitably result in disclosures of
more classified information because the Classified Information
Procedures Act, as a procedural statute, can only go so far in
resolving the tension between the transparency needed for Article
Three justice and the secrecy needed to protect legitimate
intelligence sources and methods.

To help the case against prosecution, Panetta should go further
and convince his bosses and the American public that he is
changing the culture at the CIA. Some may not be satisfied until
George W. Bush is indicted for war crimes, but many others are
looking for tangible signs that the CIA will function effectively
within the rule of law. So the embarrassing news from the IG
report could serve as a prod for changes in the CIA’s culture and
practices. Internal checks could thus substitute for external checks.
For an agency that operates behind a veil of secrecy, lawyers are especially important as an internal check. At the Agency’s creation, its first General Counsel, Lawrence Houston, showed courage in advising officers that the CIA’s cryptic “fifth function” in the National Security Act of 1947 did not include paramilitary activities. That was principled advice during the Cold War. And, during the war on terror, I knew someone in the Office of General Counsel who said—to no avail—that the Agency should turn over its interrogation videotapes to the 9/11 Commission. According to the IG report, a CIA lawyer reviewed the tapes in 2002 and concluded that the interrogations complied with the guidelines. The Inspector General’s review of the same tapes in 2003, however, reached a much different conclusion. For the internal checks on the CIA to be more effective, the General Counsel should work with the Inspector General rather than against him. One check reinforces another. And to counter political temptations, the CIA might even start a tradition of selecting a General Counsel out of a political party different from the President’s.

The CIA’s lawyers must make better calls since the IG is not always there to correct them. Stephen Preston’s appointment in July 2009 as the CIA’s top lawyer is a step in the right direction. He has the pedigree and the experience for the job. He graduated from the same law school as the President and the First Lady. More importantly, as an outsider to the CIA, Preston has not been co-opted by the clandestine service. The jobs he held during the Clinton administration—as a senior official at the Justice Department, as Acting General Counsel of the Defense Department, and as General Counsel to the Navy—provide him ample experience in advising government officials on sensitive projects. During his years in private practice with Clinton’s former Deputy Attorney General, Jamie Gorelick, he represented many clients under government investigation. Today the CIA needs his best advice in running operations and in dealing with congressional hearings and criminal investigations.

For advice and cover, the Directorate of Operations (now called the National Clandestine Service) should bring the Inspector General into operations much sooner. The IG is not the enemy. On the detention and interrogation program, the Directorate of Operations only addressed problems in a systematic way after individual officers, relying on promises of confidentiality from John Helgerson’s Office of Inspector General, took their concerns
to the IG. The IG has kept those promises. Since Helgerson’s retirement in March of 2009, the new Inspector General’s relationship with the clandestine service should function as a sort of biopsy, an unpleasant procedure that detects problems while there is still a chance to remedy them.

The code of silence—in which an officer in the field looks the other way on his partner’s incompetence, indiscretion, or worse—must be broken. The clandestine service can break the code in the same way police departments do. By appealing to selfish interest, internal review boards can convince officers that they are better off patrolling themselves: when self-regulation fails, outside regulators, who are less nuanced and less understanding, are invited in.

Secrecy, to be sure, is necessary for intelligence activities. But there are very few programs that stay secret forever. From fixing elections in Italy in 1948 to beaming propaganda behind the Iron Curtain to supplying the mujahedin with weapons against the Soviets in Afghanistan, the CIA has learned that covert action is most likely to succeed when it fits with the rest of our policies and does not deviate too far from American values. CIA officers might have foreseen that the public, here and abroad, would turn against the use of secret prisons and the waterboard after 9/11. Their role in keeping the country safe from another attack, of course, circled back into the situation to make those tactics seem extreme eight years later. Under Obama, they were the first things swept out of the CIA closet. Obama, for now, continues with Predator strikes in Afghanistan and Pakistan and with irregular renditions of suspected terrorists around the world. If we go several more years without an attack at home, those programs may seem extreme from the safety of hindsight. But if we are attacked again this month, a fickle public might question why Obama abandoned secret prisons, the waterboard, and other harsh tactics.

In the new century, the CIA’s continued existence is not guaranteed. That is alarming because our country depends on its intelligence services for survival. CIA officers, while protecting us against real dangers, should help clear the smoke for all to see that the Justice Department’s investigation, whether or not it leads to criminal charges, is not part of a vast conspiracy against them. Understanding that the eagle in the CIA’s seal stands for both security and liberty, they should trust Panetta to improve the Agency with more assertive roles from a new General Counsel, a
new Inspector General, and better internal review boards. These internal checks are especially important for an agency that operates so much in the shadows. These checks have to be realistic, however, or else the case officers will no longer take their tough questions to the safe havens. Balance is vital.

Panetta and other reasonable people know that if we adopt the terrorists’ tactics, we tarnish the principles that make our country worth defending. But if we are not tough enough against the terrorists, there may be no country left to defend. Director Panetta can help the CIA weave Obama’s light strands into Cheney’s dark strands for a national DNA that brings prosperity to Democrats and Republicans alike.