

Guest Post: Intelligence Legalism and the Torture Report

By *Margo Schlanger*

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As I was reading the SSCI's torture report last week, my mind went back to two *Just Security* posts last month ([here](#) and [here](#)), in which I argued that the U.S. Intelligence Community (IC) has, since the scandals of the 1970s, embraced "intelligence legalism"—an "ethical attitude that holds moral conduct to be a matter of rule following" nearly regardless of the content of those rules. In this post, I describe some non-legalistic strategies for civil liberties support, and then look at the SSCI torture report, whose devastating depiction of the CIA's manipulation and evasion of legal rules against torture suggests that the IC's embrace of legalism has been partial at best.

Even when agencies are committed to legal compliance, I have argued, the results for civil liberties are less than ideal:

[N]either the Constitution nor FISA aims to optimally balance security and liberty—and well-understood difficulties in congressional intelligence oversight mean that new statutes are unlikely to fill that gap. Likewise the existing foundational Executive Order, 12333, is at the very least out-of-date. Accordingly, intelligence legalism and its compliance mindset, cannot achieve optimal policy. Its concomitant empowerment of lawyers is real and important, but does not deputize a pro-civil-liberties force. Indeed, legalism actually both crowds out the consideration of policy and interests (as opposed to law and rights), and legitimates the surveillance state, making it less susceptible to policy reform.

In a [new article](#), out yesterday in *Democracy Journal* (which, like my prior posts, anticipates a forthcoming [law review article](#)), I looked at recent proposals to appoint and empower insiders attuned to civil liberties—the NSA's civil liberties and privacy officer, White House privacy and civil liberties officials, and a public advocate for the FISA Court. As I explain:

What ties these initiatives together is that they all propose to police the intelligence community by amplifying civil liberties advocacy *inside* institutions hidden from the public eye. In most activities of government, outside scrutiny and accountability can promote good policy. In the secret world of the intelligence community, however, these methods are largely unavailable—there's simply too much the public doesn't, and can't, know. Therefore, the proposals listed rely on the designation of in-house officials to prioritize privacy and civil liberties—values that otherwise lack advocates within the intelligence community's governance structure.

It will take significant effort to ensure that these proposals work — specific steps must be taken to buttress insider civil libertarian influence and commitment, and fend off the dangers of impotence and capture that inevitably threaten offices whose role is to promote a value that constrains their agency, rather than furthers its main mission. Civil liberties offices need institutional rules allowing them robust and uncontested access to agency policy development and implementation. And they must themselves maintain ties to a professional privacy and civil liberties community, inside and outside the government, that can serve as a salient reference group, using a combination of hiring, networking, and

fostering of career paths that value privacy and civil liberties expertise and commitment. I conclude:

In this post-Snowden moment, Congress can and should protect Americans' privacy and civil liberties by clamping down on bulk surveillance, creating legal rules that can then be enforced by the courts and the intelligence community's large compliance bureaucracy. But Congress and the President should not be limited by intelligence legalism. They should also follow the quite different strategy of amplifying voices *inside* the surveillance state who will give attention in internal deliberations and agency operations to civil liberties and privacy interests. . . . We need to add civil libertarians inside the surveillance state to nurture its civil liberties ecology. If that ecology doesn't improve, the next big leak, in five or ten or 20 years, may reveal invasions of Americans' privacy that dwarf anything we've heard about so far.

Part of my argument, developed more fully in my law review article, is that we cannot rely on lawyers, or even on law, to safeguard our liberty. Rather, we need *policy* analysis: weighing the security gains against the liberty costs. We need to make sure that the question "Is it lawful?" does not substitute for "Is the cost or threat to individual liberty we are proposing worth the gain to security?"

In light of the SSCI's torture report, I hasten to add that "Is it lawful?" is a *necessary* question, even if it's not a sufficient one. It is clear that legalism does not sufficiently prioritize civil liberties. But we know now, even more clearly than before, that subversion of the rule of law can do terrible damage to democracy and liberty. The SSCI report offers a stomach-churning view of such subversion in the IC. As the CIA built a bureaucracy of torture, with policies and procedures and brutal techniques dressed up in euphemisms ("anal rehydration" being only the worst), lawyers functioned not as rule-followers or rule-enforcers but as rule-manipulators, working to build safe harbors for themselves and their clients.

Lawyers are far from civil libertarians by professional predilection (though of course many civil libertarians are lawyers). To paraphrase Tocqueville, lawyers tend to value legality over freedom. The ideology of the legal profession does, however, dictate that lawyers be simultaneously committed to the rule of law and their clients' interests and projects. Balancing the two means that some rule-shading is only to be expected. Indeed, it's probably ethically required; if a lawyer's client wants to do something, it's the lawyer's job to try to find room. But shading can go only so far. The law imposes real constraints, and an agency's lawyer's job is also to institutionalize those constraints in that agency. The SSCI torture report depicts a legal culture that jettisoned constraint and commitment to the rule of law. The government lawyers it describes, at CIA and OLC and the White House, used the law as cover, writing documents in the *form* of legal memos to provide the barest of legalistic fig leaves to try to shelter what was clearly illegal behavior.

It's worth noticing that this shameful approach had dissenters. As John Sifton summarized [here](#) last week, the CIA's lawyers were deeply complicit in the agency's decision to shift from ordinary to "enhanced" interrogation—that is, from talking to hurting detainees. But the CIA lawyers were evidently forced to forum shop: they found OLC's John Yoo and Jay Bybee, and the White House's David Addington, far friendlier to torturous techniques than Michael Chertoff, the head of the Justice Department's Criminal Division. And, advised by its lawyers, the FBI—hardly known as a civil liberties protector—declined to

participate in waterboarding, long-term sleep deprivation, and the rest of the brutal techniques adopted. (For more details, some admittedly speculative, see Marcy Wheeler's [response](#) to John's post.)

Because the IC's secrecy obstructs normal accountability mechanisms, we lean heavily on lawyers to infuse it with rule-of-law values. Sometimes that works, other times, we relearned last week, it does not. It's not enough—as in, it doesn't work—to simply demand that lawyers offer only good faith, reasonable legal interpretations, and that everyone obey the law. Merely increasing the volume or vehemence of that demand is unlikely to make it more effective. So I think one of the questions we should now be asking with real urgency is: Why do some IC elements have legal cultures that seek to use the law to shield bad behavior—or, if you prefer, to apply lipstick to pigs—where in others, law actually constrains? (Jennifer Granick and I seem to have [a disagreement](#) about which side of this line the NSA is on.) It's a hard question, and I'm just getting started thinking about the takeaways from the torture report. No doubt some of the differences between the lawyers who facilitated torture and those who did not were political or personal, even characterological. But I suspect that there are other, institutional differences, too. For example, perhaps routine accountability socializes lawyers to accept legal constraints even in non-accountable settings. The FBI routinely has to explain and defend its activities before judges. Likewise the DOJ Criminal Division's lawyers appear before judges who can agree or disagree with its arguments. CIA and OLC, by contrast, rarely if ever have to justify their positions to judges. Lots of other institutional factors must similarly influence agency lawyers' rule-of-law commitments. We need to understand those much more comprehensively, and then structure IC lawyering accordingly.