Institutionalizing Rights in the National Security Executive

*Shirin Sinnar**

The national security executive has grown explosively in size and power since September 11, 2001. This Article highlights a parallel development that has largely escaped notice: the rise in institutions within the executive branch charged with monitoring and protecting individual rights and liberties. Emerging out of dual political impulses to expand executive power and protect rights, these institutions have proliferated, and their paths have diverged. A civil rights office struggled for influence across multiple political administrations; an Inspector General exposed rights violations and triggered reform; a civil liberties board capitalized on the Snowden controversy to surmount presidential neglect but not partisan division. Together, these case studies suggest that internal rights oversight is constantly challenged; only with a rare confluence of leadership, design, and external political circumstances can these institutions succeed. From these accounts, the Article makes three claims on the challenges and constraints facing these institutions. First, rights-oversight institutions designed as "external reviewers," rather than as "internal advisors," may be better poised to reform policy. Second, both kinds of institutions face serious limitations in shaping executive legal interpretation on national security authority or the scope of legal rights. Third, these institutions are at perennial risk of mission drift — of shifting their attention from promoting rights to protecting national security. Ultimately, internal rights oversight plays a necessary but limited role in protecting rights at risk from the national security state.

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INTRODUCTION

The national security state has grown explosively since September 11, 2001. In 2013, the federal government allocated $52 billion to intelligence programs, a figure approximately double that of 2001 levels.[1] The Federal Bureau of Investigation now spends three times as much on national security as it did in 2001.[2] In all, 1,271 government organizations now work on programs related to counterterrorism, homeland security, and intelligence;

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[1] Barton Gellman & Greg Miller, *'Black Budget' Summary Details U.S. Spy Network's Successes, Failures and Objectives*, WASH. POST (Aug. 29, 2013), http://www.washingtonpost.com/world/national-security/black-budget-summary-details-us-spy-networks-successes-failures-and-objectives/2013/08/29/7e57bb78-10ab-11e3-8cdd-bcdc09410972_story.html, *archived at* http://perma.cc/3LCH-U783.

[2] FED. BUREAU OF INVESTIGATION, FISCAL YEAR 2015 AUTHORIZATION AND BUDGET REQUEST TO CONGRESS 4–5 (2014), *available at* http://www.justice.gov/sites/default/files/jmd/legacy/2013/10/03/fbi-justification.pdf, *archived at* http://perma.cc/VYG6-W3QK; FED. BUREAU OF INVESTIGATION, REPORT TO THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: THE FBI'S COUNTERTERRORISM PROGRAM SINCE SEPT. 11, 2001 at 10 (2004), *available at* http://www.fbi.gov/stats-services/publications/fbi_ct_911com_0404.pdf, *archived at* http://perma.cc/WSP9-77QT.

854,000 people hold top-secret security clearances; and analysts publish 50,000 intelligence reports each year.[3] If numbers fail to capture it, Edward Snowden's disclosures of sweeping National Security Agency ("NSA") surveillance drove home the Executive's colossal power to reach into the lives of individuals worldwide. Snowden's revelations reignited a debate on reconciling security and rights that had played out repeatedly since September 11, in highly charged controversies over targeted assassinations, indefinite detention, profiling, and torture.

Alongside the massive growth of the national security state, another set of institutions has grown more quietly: institutions within the executive branch charged with monitoring individual rights and liberties. On September 11, 2001, a handful of national security institutions existed with a role in rights protection. Today, such offices have proliferated. Civil liberties offices, inspectors general, compliance offices, complaint mechanisms, presidential commissions, and an independent civil liberties board advise agencies and investigate allegations of security overreach. Compared to the national security agencies they oversee, these new institutions are tiny; compared to what existed in 2001, they represent a dramatic but little-noticed change.

This rise of internal rights oversight raises immediate questions. Why did these institutions arise? How do they operate? How *well* do they operate? Ultimately, how do they affect the protection of rights at risk from the national security state? This Article begins to answer these questions. Three in-depth case studies, based on public documents and original interviews, illuminate the divergent and sometimes surprising paths these institutions have taken. An office for civil rights and civil liberties struggled to exert influence and even to maintain its mandate, partially redirecting its civil rights outreach efforts to serve the agency's counterterrorism mission. Meanwhile, for at least a decade, one agency inspector general investigated policies affecting rights regularly, critically, and with consequence, despite a general mandate to address inefficiency and mismanagement in government. That office, however, has recently expressed significant concerns over delayed access to information in some of its rights-related reviews. Finally, a long neglected civil liberties board capitalized on the Snowden-inspired surveillance debate to manifest its independence and push for reform. But it did so while fracturing on the pivotal liberty-security questions it addressed.

Together, these case studies suggest that internal rights oversight is constantly threatened, yet occasionally succeeds. What makes the difference? The presence of committed and credible leaders helps explain why some institutions achieved even measured success, but it is not the whole story. This Article draws on the case studies and additional theory and evidence to

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[3] Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010), http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control, *archived at* http://perma.cc/7U3U-LHTS.

present three broader claims on rights protection within the national security state.

First, the Article contends that rights-oversight institutions fall into two categories — "internal advisors" and "external reviewers" — and that the latter may have greater potential to reform policy. Internal advisors, such as civil liberties offices within agencies, are relatively integrated within national security decisionmaking structures, are mandated to advise on policy, and are often involved at earlier stages of executive decisionmaking. They are premised on the attractive notion that rights-consciousness should be embedded within decisionmaking structures — an idea I call "rights by design." Nonetheless, where executive officials lack the political incentives to revisit liberty-security policy choices, internal advisors are limited in their ability to change policy. Such institutions may be able to adjust policy at the margins or improve compliance with existing policy, but are hard-pressed to instigate more significant reform.

By contrast, a second category of institutions — external reviewers — have a limited but real opportunity to affect policy by bringing to bear external pressure on executive decisionmakers. External reviewers are more independent from security agencies and the White House, focus on reviewing program implementation, and communicate relatively unhindered with Congress and the public. On occasion, these institutions manage to disseminate information from within agencies that affects public discourse on rights and security — enabling sympathetic lawmakers, courts, and the public to push for a different resolution of liberty and security. I call this approach "rights by disruption" because it relies on external pressure to *disrupt* the assumptions or political incentives of national security officials. Achieving rights by disruption is difficult for a variety of reasons: only certain issues will be salient enough to external constituencies; only certain institutions will manage to maintain independence; and where secrecy is greatest, rights by disruption is largely unavailable. Nonetheless, external reviewers have surmounted such challenges in limited but meaningful instances.

Second, this Article turns to a narrower question, but one of immense importance to legal scholars. It argues that rights-oversight institutions — of either category — face considerable limitations in shaping executive legal interpretation on contested questions of power and rights. Many legal scholars have asked whether executive lawyers can push legal interpretation toward greater rights protection, and have often concluded that lawyers within the Department of Justice Office of Legal Counsel ("OLC") or general counsel offices lack either the independence or incentives to do so. Could rights-oversight institutions promote rights-conscious interpretations of the law where primary legal offices fail to do so? After all, these institutions are often led and staffed by lawyers; many are charged with reviewing the legality of executive conduct; and some are relatively independent. Nonetheless, the Article concludes that where these institutions challenge executive legal interpretation, they often lose out to the conflicting perspectives of agency

counsel or OLC. As "second-tier" legal offices, they are unlikely to constrain national security agencies in interpreting their legal authority or the legal scope of rights.

Third, this Article points to a key challenge for rights-oversight institutions: the peril of "mission drift" from protecting rights to serving the security missions of national security agencies. These institutions face substantial pressures to reorient and reframe their work to match security goals. Indeed, in one striking example, the Department of Homeland Security's Office for Civil Rights and Civil Liberties has shifted the focus of some of its civil rights outreach from addressing concerns over rights to serving the Department's counterterrorism objectives. This drift to security not only risks diverting resources from rights protection, but potentially leads to other troubling consequences, such as increasing distrust in the communities at greatest risk of rights deprivations. While all rights-oversight institutions are vulnerable to mission drift, internal advisors appear particularly susceptible.

Together, these insights advance legal scholarship in multiple respects. First, this Article fills an important gap in existing literature by assessing the growth of rights oversight within the national security executive. While legal scholars have extensively debated executive accountability in national security matters, that literature is chiefly concerned with the separation of powers. Only recently have scholars begun to assess directly how institutions within the national security executive address the protection of individual rights and liberties.[4] Reaching further, this Article presents the larger story of the post-9/11 growth of rights oversight and explores how design affects the capacity of institutions to shift policy, interpret the law, and resist mission drift.

Second, this Article extends scholarship on executive legal interpretation and the articulation of rights within the executive branch. While legal scholars have richly debated the role of elite legal offices, such as OLC, they have devoted far less attention to lawyers and legal interpretation elsewhere in the executive branch.[5] In addressing legal interpretation by newly emergent rights-oversight institutions, this Article heeds the call to understand executive legal interpretation across wider institutional contexts.

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[4] *See generally, e.g.*, Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 U. CHI. L. REV. 75 (2008); Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3 (2014); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014) [hereinafter Schlanger, *Offices of Goodness*]; Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 HARV. NAT'L SEC. J. 112 (2015) [hereinafter Schlanger, *Intelligence Legalism*]; Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013). By and large, these accounts have focused on individual institutional forms, rather than comparison. Schlanger's 2015 article on intelligence legalism, *supra*, is an important exception.

[5] *See* text accompanying *infra* notes 246–249; *see also* David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 21, 21–23 (2012).

Furthermore, this Article contributes to a separate literature on the interpretation and articulation of individual rights by administrative agencies. Recent work, some of it under the banner of "administrative constitutionalism," points to the role of agency officials in advancing new understandings of constitutional rights.[6] Like that literature, this Article asks how executive officials understand, articulate, and influence rights, but it does so in a rather different context: in the present day, with respect to advisory rather than operational offices, and in the politically fraught context of national security. In that context, internal rights protection emerges as considerably more challenged than in celebratory accounts of administrative officials advancing constitutional norms "ahead of" courts and society.[7]

The Article proceeds as follows. Part I describes how internal rights oversight arose in response to dual post-9/11 political impulses to protect rights and expand national security power. Part II presents detailed, descriptive case studies of three important institutions: (1) the Department of Homeland Security Office for Civil Rights and Civil Liberties; (2) the Department of Justice Inspector General; and (3) the Privacy and Civil Liberties Oversight Board. Part III, the analytical heart of the Article, supplies three key insights on institutional design, executive legal interpretation, and mission drift.

I. The Rise of Internal Rights Oversight

A. *New Institutions, New Mandates*

On September 11, 2001, a handful of executive institutions existed with a role in protecting individual rights and liberties from national security abuses. Legal offices throughout the executive branch, including OLC and national security agencies' offices of general counsel, advised the President or agencies on legal matters related to individual rights. Inspectors general ("IGs") throughout federal agencies audited agency programs and investigated abuses, including those related to the treatment of individuals.[8] Within the Justice Department, the Office of Professional Responsibility investi-

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[6] *See generally, e.g.*, Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 Berkeley J. Afr.-Am. L. & Pol'y 146 (2008); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 Colum. L. Rev. 1083 (2014); Gillian E. Metzger, *Administrative Constitutionalism*, 91 Tex. L. Rev. 1897 (2013); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 Yale L.J. 314 (2012); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 Va. L. Rev. 799 (2010).

[7] For a critical account of administrative constitutionalism in the national security context, see Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 Mich. St. L. Rev. 61, 63–64 (2014).

[8] *See* Sinnar, *supra* note 4, at 1032–34.

gated allegations of misconduct by prosecutors and other department lawyers.[9]

Other offices that existed on September 11, 2001, focused specifically on intelligence oversight. A three-member White House Intelligence Oversight Board, created by President Gerald Ford in response to revelations of widespread and often lawless domestic intelligence gathering, reviewed the legality and propriety of intelligence activities.[10] And Defense Department intelligence units had internal structures for the reporting of intelligence violations to Department counsel and the Intelligence Oversight Board.[11]

Thirteen years later, the number and variety of national security institutions overseeing matters of rights and liberties has dramatically increased. Table I catalogs the institutions that now exist, separately noting those established since September 11 and others that acquired new roles and powers in the post-9/11 period.

Table I. Rights-Oversight Institutions Within the National Security Executive (2015)

Institutions created since 9/11 are *italicized*; institutions assigned new powers since 9/11 are starred (*).

Type of Institution	Examples
Legal Office	Department of Justice Office of Legal Counsel White House Office of Counsel Offices of General Counsel within agencies
Privacy and Civil Liberties Office	*Department of Homeland Security Office for Civil Rights and Civil Liberties* *Department of Homeland Security Privacy Office* *Department of Justice Office of Privacy & Civil Liberties* *Department of Defense Privacy & Civil Liberties Office* *Department of the Treasury Chief Privacy & Civil Liberties Officer* *Office of Director of National Intelligence Civil Liberties and Privacy Office* *CIA Official for Privacy and Civil Liberties* *NSA Civil Liberties and Privacy Office*

[9] *See* Norman W. Spaulding, *Independence and Experimentalism in the Department of Justice*, 63 STAN. L. REV. 409, 440 (2011).

[10] *See* KENNETH MICHAEL ABSHER ET AL., PRIVILEGED AND CONFIDENTIAL: THE SECRET HISTORY OF THE PRESIDENT'S INTELLIGENCE ADVISORY BOARD 192–93 (2012).

[11] *See* U.S. DEP'T OF DEFENSE, DIRECTIVE NO. 5240.1: DOD INTELLIGENCE ACTIVITIES (1988), *available at* http://fas.org/irp/doddir/dod/doddod.htm, *archived at* https://perma.cc/V34Z-HNGZ.

Table I (cont'd)

Inspector General	Presidentially Appointed: Department of Justice IG* Department of Homeland Security IG* Department of Defense IG* State Department IG* CIA IG* *Intelligence Community IG* Agency Appointed: NSA IG* Defense Intelligence Agency IG* National Geospatial-Intelligence Agency IG* National Reconnaissance Office IG*
Independent Agency	*Privacy and Civil Liberties Oversight Board*
Interagency Complaint Mechanism	*Department of Homeland Security Traveler Redress Inquiry Program*
Compliance Office	*FBI Office of Integrity and Compliance* *NSA Compliance Office*
Presidential Commission	*President's Review Group on Intelligence and Communications Technologies (Aug.–Dec. 2013)*
Other	Department of Justice Office of Professional Responsibility White House Intelligence Oversight Board

Some of these institutions exist within individual agencies. For instance, pursuant to a congressional mandate, new privacy and civil liberties officers advise the Departments of Justice, Defense, State, Treasury, Health & Human Services, and Homeland Security, as well as the Office of the Director of National Intelligence and of the Central Intelligence Agency.[12] The President established a similar civil liberties position in 2013 within the NSA.[13] Meanwhile, national security IGs have expanded in number, statutory independence, and mandates: IGs in intelligence agencies have greater authority than they once did, and the IGs in the Departments of Justice and Homeland Security have explicit mandates to investigate allegations of rights violations.[14] In addition, following revelations of legal violations that

[12] *See* 42 U.S.C. § 2000ee-1 (2012) (requiring Departments to designate senior officers to serve as primary advisors on privacy and civil liberties matters).

[13] Press Release, Nat'l Sec. Agency, NSA Announces New Civil Liberties and Privacy Officer (Jan. 29, 2014) [hereinafter NSA Press Release], *available at* http://www.nsa.gov/public_info/press_room/2014/civil_liberties_privacy_officer.shtml, *archived at* http://perma.cc/S74V-VKVK.

[14] *See* 50 U.S.C. § 403-3h (2012) (establishing a presidentially appointed IG for the intelligence community as a whole); 5 U.S.C. app. at 32–33, § 8G(d) (2012) (expanding the powers of IGs at the National Security Agency, Defense Intelligence Agency, National Geospatial Intelligence Agency, and the National Reconnaissance Office); *id.* at 29–30, § 8E (requiring DOJ IG to designate an official to review civil rights and civil liberties complaints); 6 U.S.C. § 345(a) (2012) (requiring an officer for civil rights and civil liberties within Department of Homeland Security to review civil rights and civil liberties complaints); 5 U.S.C. app. at

affected privacy, agencies including the FBI and NSA have established compliance offices, modeled on corporate compliance programs, to improve and monitor adherence to law and internal policy.[15]

Other new mechanisms reach beyond a single agency. The Privacy and Civil Liberties Oversight Board, created by Congress in 2004 and made an independent executive agency in 2007, reviews and provides advice on counterterrorism policies throughout the executive branch.[16] An interagency Traveler Redress Inquiry Program serves as a complaint mechanism for individuals who feel they have been improperly linked to terrorist watchlists.[17] Beyond these standing institutions, the President or agencies occasionally create others to respond to specific allegations of abuse, such as a high-level panel appointed by President Obama to review NSA surveillance following Edward Snowden's revelations.[18]

Despite their diversity, these institutions have this in common: in the post-9/11 period, Congress or the Executive tasked them with addressing individual interests in liberty, privacy, equality, or fairness that might be compromised by the national security state. I provisionally call these interests "rights." The term "rights" is imperfect given its contested meanings in scholarship and popular discourse. In addition, the extent to which these organizations' mandates reference "rights" varies, as does the extent to which these institutions actually analyze legally recognized rights or use the language of rights.[19] Nonetheless, I use "rights" as a shorthand reference for a broad set of individual interests in liberty, privacy, equality, and fairness, whether or not legally protected.

In fact, the formal mandates of these institutions refer to such interests in varying and often underspecified terms. Some explicitly reference rights: Congress required the Department of Justice IG after the September 11, 2001 attacks to review complaints alleging "abuses of civil rights and civil liberties,"[20] and followed suit when it created the Department of Homeland

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44–45, § 8I(f) (2012) (requiring DHS IG to designate an official to investigate allegations of civil rights abuse).

[15] *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION'S INTEGRITY AND COMPLIANCE PROGRAM i (2011) [hereinafter DOJ IG COMPLIANCE REPORT]; Gregory J. Millman, *Compliance in Government: Q&A with John DeLong of the NSA*, WALL ST. J. (Jan. 23, 2014), http://blogs.wsj.com/riskandcompliance/2014/01/23/compliance-in-government-qa-with-john-delong-of-the-nsa [hereinafter Millman, *Q&A with John DeLong*], *archived at* http://perma.cc/QQE6-Q83S; Gregory J. Millman, *Compliance in Government: Q&A with Patrick W. Kelley, FBI*, WALL ST. J. (Jan. 22, 2014), http://blogs.wsj.com/riskandcompliance/2014/01/22/compliance-in-government-qa-with-patrick-w-kelley-fbi [hereinafter Millman, *Q&A with Patrick W. Kelly*], *archived at* http://perma.cc/V628-FDE7.

[16] *See* 42 U.S.C. § 2000ee (2012).

[17] *See DHS Traveler Redress Inquiry Program (DHS TRIP)*, U.S. DEP'T OF HOMELAND SEC. (last updated Oct. 29, 2012), http://www.dhs.gov/dhs-trip, *archived at* http://perma.cc/DW7F-DGJ6.

[18] *See* Reviewing Our Global Signals Intelligence Collection and Communications Technologies, 78 Fed. Reg. 49,653 (Aug. 12, 2013).

[19] I explore the latter point in detail *infra* Part III.

[20] *See infra* note 86 and accompanying text.

Security Office for Civil Rights and Civil Liberties the following year.[21] By contrast, Congress chose the label of "privacy and civil liberties" rather than "rights" for the oversight board it first created in 2004 and the officers it required agencies to designate in 2007.[22] Congress did not define these terms, leaving key questions unanswered over the scope of interests they should address.

B. Dual Political Impulses

Rights-oversight institutions arose and developed in post-9/11 America amid dual political impulses to expand executive national security power and protect rights. In fact, Congress often created these institutions in the very course of authorizing the significant expansion or consolidation of national security powers. For instance, the Department of Justice IG obtained its mandate to investigate rights violations from the USA PATRIOT Act, which gave the federal government substantial new detention and surveillance powers.[23] Congress created the Department of Homeland Security Office for Civil Rights and Civil Liberties while consolidating twenty-two disparate agencies into a colossal agency to protect the "homeland."[24] And the Privacy and Civil Liberties Oversight Board first arose as part of the sweeping intelligence reform and centralization enacted in the 2004 Intelligence Reform and Terrorism Prevention Act.[25] In many cases, establishing such mechanisms to investigate potential rights concerns helped broaden political support for legislation expanding national security powers.[26]

On some occasions, Congress explicitly articulated a quid pro quo understanding of executive power and internal rights oversight. The authorizing statute for the Privacy and Civil Liberties Oversight Board, for instance, affirmed the 9/11 Commission's findings that while the war on terrorism might require enhanced governmental power, such a "shift of power and authority to the Government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life."[27]

When the President or agencies established new offices on their own initiative, they often did so in the shadow of threatened external regulation. For instance, the FBI established its compliance office after an Inspector General audit, which showed major problems with the Bureau's use of na-

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[21] *See infra* notes 41–42 and accompanying text.

[22] *See infra* note 130 and accompanying text.

[23] *See infra* note 87 and accompanying text.

[24] *See infra* notes 40–42 and accompanying text.

[25] *See infra* notes 129–136 and accompanying text.

[26] *See* Sinnar, *supra* note 4, at 1080 & n.316 (noting statements by Members of Congress that the inclusion of IG audit requirements helped ease the passage of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 192 (2006), and the FISA Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2436 (2008)).

[27] 42 U.S.C. § 2000ee(b)(1)–(2) (2012).

tional security letters, triggered intense congressional reaction.[28] Similarly, the NSA significantly revamped its compliance office after a Foreign Intelligence Surveillance Court judge ordered the government to show that it had fixed failures to comply with the court's previous orders.[29] Most recently, President Obama announced a new civil liberties and privacy officer for the NSA following public and congressional fallout over the Snowden surveillance revelations.[30] In each of these cases, the Executive created rights-oversight institutions to protect civil liberties but also to ward off the prospect of greater congressional or judicial intervention.

The dual political interests in enabling executive power and protecting rights is reflected in these organizations' mandates, which often called for balancing rights and liberties against countervailing needs, rather than simply protecting them. For instance, Congress tasked the Privacy and Civil Liberties Oversight Board with ensuring that "the need for [counterterrorism] actions is balanced with the need to protect privacy and civil liberties" and that "liberty concerns" are "appropriately" considered in the development of counterterrorism policy.[31] Even the name of the Board suggested a mandate to "oversee" privacy and civil liberties, rather than to champion them.[32] Congress likewise invoked the need for "balance" in setting out the responsibilities of privacy and civil liberties officers in national security agencies.[33] The relative neutrality of such language towards rights contrasts with the mandates and mission statements of certain rights-focused executive institutions outside the national security context. For instance, Congress established the U.S. Commission on Civil Rights and the Department of Justice Civil Rights Division in a 1957 civil rights law directed at "securing and protecting the civil rights of persons" in the United States.[34] It created the U.S. Commission on International Religious Freedom to "strengthen United

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[28] *See* DOJ IG COMPLIANCE REPORT, *supra* note 15, at i (describing the impetus for the Office's creation); Millman, *Q&A with Patrick W. Kelley*, *supra* note 15 (same). *See also* Sinnar, *supra* note 4, at 1046 (noting the congressional reaction).

[29] *See, e.g.*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 47–54 (2014), *available at* https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf, *archived at* https://perma.cc/FUV3-2NAP; Millman, *Q&A with John DeLong*, *supra* note 15. In 2010 Congress recognized the NSA Director of Compliance as an Agency-appointed position that "shall be responsible for the programs of compliance" over NSA activities. 50 U.S.C. § 3602 (2012).

[30] *See* NSA Press Release, *supra* note 13.

[31] 42 U.S.C. § 2000ee(c)(1) (2012).

[32] A later-established government review panel on surveillance activities proposed expanding PCLOB's mandate and changing its name to the "Civil Liberties and Privacy *Protection* Board." *See* PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 35 (2013) (emphasis added), *available at* https://www.nsa.gov/civil_liberties/_files/liberty_security_prgfinalreport.pdf, *archived at* https://perma.cc/GU9N-LARS.

[33] *See* 42 U.S.C. § 2000ee-1(a)(4)(A) (2012).

[34] Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, 634 (1957) (statement of purpose).

States advocacy" on behalf of persecuted individuals.[35] In affirmative language, these organizations describe their missions as championing rights.[36] By contrast, national security rights-oversight institutions were not charged with advancing rights so much as reconciling them with the expansion of executive power.[37]

II. Interpreting Mandates, Seeking Influence: Three Institutional Accounts

Arising out of dual political interests to protect rights and executive power, rights-oversight institutions could take any number of paths. How did these institutions interpret and implement their mandates for rights oversight? How did they seek influence within the national security executive — and either achieve or fail to obtain it? This Part offers a close study of the post-9/11 experiences of three rights-oversight institutions: (1) the Department of Homeland Security Office for Civil Rights and Civil Liberties; (2) the Department of Justice Inspector General; and (3) the Privacy and Civil Liberties Oversight Board. The accounts draw on a wide range of primary material, including interviews with over forty executive officials, congressional staff members, and public interest lawyers.[38]

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[35] International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787, 2787 (1998) (statement of purpose).

[36] *About Us*, U.S. Comm'n on Civil Rights, http://www.usccr.gov/about/index.php (last visited Mar. 7, 2015), *archived at* http://perma.cc/35YH-GXMD (describing the U.S. Commission on Civil Rights as playing "a vital role in advancing civil rights"); *About the Division*, U.S. Dep't of Justice, Civil Rights Div., http://www.justice.gov/crt/about (last visited Mar. 7, 2015), *archived at* http://perma.cc/S5YR-TH4L (describing Civil Rights Division mission as "uphold[ing] the civil and constitutional rights of all Americans"); *About USCIRF*, U.S. Comm'n on Int'l Religious Freedom, http://www.uscirf.gov/about-uscirf (last visited Mar. 7, 2015), *archived at* http://perma.cc/YPJ3-7J6D (describing the Commission as "dedicated to defending the universal right to freedom of religion or belief abroad").

[37] In other contexts, some historians have argued that rights-protection in the United States expanded as a quid pro quo for the expansion of national power. *See, e.g.*, Tani, *supra* note 6, at 373–74 (referencing historians who make that claim). The post-9/11 national security context appears both analogous and distinct in this respect: the development of internal institutions, not the recognition of new substantive rights enforceable in court, occurred alongside (and arguably facilitated) the expansion of national security power.

[38] I interviewed over forty individuals from 2011 to 2014 in connection with this project, including individuals who serve or served in the following positions: twelve IGs; three senior IG staff; seven leaders or staff members of civil liberties offices; five Members of Congress or staff thereof; seven public interest lawyers; three national security officials outside rights institutions; and two board members of the Privacy and Civil Liberties Oversight Board. Not all of these interviews are cited, especially because some informants agreed to be interviewed only "on background." In addition, I reached out to over twenty other individuals in similar positions who either declined or did not respond to interview requests. In general, I identified potential interviewees by contacting senior officials at rights-oversight institutions, and then using a "snowball methodology" to identify other potential sources. A small number of interviewees came to my attention more opportunistically, such as through contact in academic venues, or as a result of prior contact during my experience as a civil rights lawyer from 2004 to 2009.

I focused on these particular institutions for several reasons. First, they represent three significant but distinct organizational forms: an internal agency civil liberties office, an agency Inspector General, and an independent civil liberties board. The first two are examples of categories of rights-oversight institutions now found in many national security agencies; the third is sui generis, an important new civil liberties board structured as an independent executive agency. Second, all three had explicit mandates to address individual rights or civil liberties, and thus represent institutions that are at the "core" of internal rights-oversight. Third, all three institutions were created or assigned rights-focused mandates relatively early in the post-9/11 period, enabling analysis over multiple political administrations.[39]

Together, they illustrate how leaders, institutional structures, and political environments interacted to shape rights oversight within the national security executive. These case studies also serve as the primary raw material for Part III's thematic treatment.

A. Department of Homeland Security Office for Civil Rights and Civil Liberties ("CRCL")

CRCL is the first of new civil liberties offices established within national security agencies upon congressional direction.[40] Despite its relatively early creation and substantial size, the Office has often struggled to influence national security policy.

Mandate and Functions. Established in 2002 as part of the new Department of Homeland Security ("DHS"), CRCL obtained a relatively unusual mandate to examine the Department's own actions implicating rights, rather than those of external actors.[41] Congress initially required the Secretary to designate a senior Officer for Civil Rights and Civil Liberties within the Department who would "review and assess information" alleging civil

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[39] I do not argue that these institutions are necessarily representative of rights-oversight institutions as a whole; in fact, as I discuss explicitly below, certain institutions diverged significantly from predecessor institutions or others of the same category. Future work could further address certain categories of institutions that are not represented in these case studies, such as oversight institutions located within "core" intelligence agencies like the NSA or CIA, and "compliance offices" created by national security agencies themselves.

[40] *See* 6 U.S.C. § 345 (2012) (creating CRCL); 42 U.S.C. § 2000ee-1 (2012) (requiring designation of one or more senior privacy and civil liberties officers in the Departments of Justice, Defense, State, Treasury, Health and Human Services, Homeland Security, Office of the Director of National Intelligence, Central Intelligence Agency, and other departments designated by the Privacy and Civil Liberties Oversight Board).

[41] *See* Schlanger, *Offices of Goodness*, *supra* note 4, at 64 (describing differences between CRCL and existing federal civil rights offices). *See also* U.S. DEP'T OF HOMELAND SEC., REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 705 OF THE HOMELAND SECURITY ACT AND THE ESTABLISHMENT OF THE OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES 11 (2004) [hereinafter DHS § 705 REPORT], *available at* http://www.dhs.gov/xlibrary/assets/CRCL-ReportJun04.pdf, *archived at* http://perma.cc/8D5Y-9Z4L.

rights or civil liberties abuses or profiling by Department officials.[42] In 2004 and 2007, Congress expanded CRCL's mandate to explicitly include the review of Department policies and oversight of compliance with constitutional, statutory, and other requirements related to rights and liberties.[43] It also provided for presidential appointment (though not Senate confirmation) of the CRCL Officer.[44] Today, CRCL has three core functions: resolving external rights complaints against DHS personnel, advising on policy, and managing internal equal employment compliance.[45]

Powers and Capacity. A 2007 law requires the DHS Secretary to ensure that CRCL is "given access to material and personnel" the Office determines necessary, although CRCL does not have independent subpoena authority.[46] CRCL must report quarterly to congressional committees, in unclassified form "to the greatest extent possible," and inform the public of its activities.[47] As an internal office, CRCL is restricted in communicating directly with Congress: it is subject to the Department's standard processes for clearing congressional testimony, which in certain circumstances require White House review,[48] and to internal Department processes for clearing its reports.[49] In 2014, the Office employed a total of 104 staff mem-

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[42] Homeland Security Act of 2002, Pub. L. No. 107-296, § 705, 116 Stat. 2135, 2219 (2002) (codified as amended at 6 U.S.C. § 345(a)(1) (2012)).

[43] *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 803, 121 Stat. 266, 360–62 (2007) (codified as amended at 42 U.S.C. § 2000ee-1 (2012)); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 8303, 118 Stat. 3638, 3867 (2004) (codified as amended at 6 U.S.C. § 345(a)(4) (2012)).

[44] 6 U.S.C. § 113(d)(3) (2012).

[45] *See* Schlanger, *Offices of Goodness*, *supra* note 4, at 62.

[46] 42 U.S.C. § 2000ee-1(d) (2012).

[47] *Id.* § 2000ee-1(f)–(g).

[48] Written Questions for Megan Mack, Civil Rights & Civil Liberties Officer, U.S. Dep't of Homeland Sec., at 2 (May 2014) (on file with author) [hereinafter CRCL Responses to Written Questions]. This document constitutes CRCL Officer Megan Mack's responses to written questions I submitted. Executive agencies are generally required to clear legislative proposals and congressional testimony related to legislation with the White House Office of Management and Budget ("OMB"). *See* OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-19 (1979), *available at* https://www.whitehouse.gov/omb/circulars_a019, *archived at* https://perma.cc/6X6Z-MBTF; Memorandum No. M-13-12 from Jeffrey D. Zients, Acting Director, Office of Mgmt. & Budget, to the Heads of Departments and Agencies 3 (Apr. 15, 2013), *available at* https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-12.pdf, *archived at* https://perma.cc/3EJK-KK6G. DHS policy on legislative clearance requirements applies to all DHS offices except the Agency IG. U.S. DEP'T OF HOMELAND SEC., MANAGEMENT DIRECTIVE NO. 0420: LEGISLATIVE PROCEDURES 1 (2005), *available at* https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_0420_legislative_procedures.pdf, *archived at* https://perma.cc/EJ9W-YRUP.

[49] CRCL Responses to Written Questions, *supra* note 48, at 2. In response to questions asking which offices review CRCL's impact assessments prior to public release, how CRCL responds to other offices' disagreements regarding its findings, and whether agreement among DHS offices is required to finalize an impact assessment, CRCL Officer Megan Mack stated:

> Impact assessments are generally shared in draft form with the DHS Component(s) involved in the subject of the impact assessment. In recent years, this process has led to consensus with the involved Component(s) prior to seeking further clearance. Routine clearance within the Department, assuming consensus was reached with the Component(s), would generally involve the Office of the General Counsel and may

bers.[50] Its annual budget has hovered just over $20 million from 2010 to the present.[51]

History. In its first strategic plan, CRCL described its mission as providing proactive legal and policy advice to enable the Department to achieve national security goals while protecting rights and liberties.[52] It described its approach as "constructive" and emphasized the need for integration within the Department.[53] In fact, the Office was structured to be subservient to other Department components in giving policy advice: the CRCL official in charge of providing policy advice reported to the General Counsel of DHS.[54]

Dan Sutherland, who served as the first CRCL Officer from 2003 to 2008, prioritized disability rights and engagement with U.S. Muslim and Arab communities.[55] Sutherland had a preexisting background in disability rights litigation and took a special interest in communicating with, and

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> also include the Office of Legislative Affairs (if the impact assessment was requested or directed by Congress), the Office of Public Affairs, or other offices within the Office of the Secretary. The [White House] Office of Management and Budget would not routinely review an impact assessment before it is released, though there could be circumstances in which its approval (or that of other agencies or offices) might be sought.

Id. Former CRCL Officer Margo Schlanger characterizes the Departmental process for reviewing impact assessments as coordination, not clearance:

> While I was the CRCL Officer, our impact assessments were widely shared across the agency in draft form, to receive feedback. And of course, if the impact assessment recommended policy changes, I wanted the affected components to agree to those recommendations. But the CRCL Officer was listed on the cover of each report as the reviewing official, and my signature appeared on each one. It was my decision what those reports said.

E-mail from Margo Schlanger, Fmr. Officer of Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec., to author (Jan. 29, 2015, 1:11 PM PST) (on file with author). Schlanger states that the Office's annual reports were, however, subject to formal clearance by the Secretary's Office and the White House OMB, and that the Secretary's Office decided whether to proactively make public CRCL impact assessments drafted for the Secretary. E-mail from Margo Schlanger, Fmr. Officer of Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec., to author (Feb. 17, 2015, 11:38 AM PST) (on file with author).

[50] CRCL Responses to Written Questions, *supra* note 48, at 1.

[51] OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2012 ANNUAL REPORT TO CONGRESS 6 (2013) [hereinafter CRCL FY2012 REPORT], *available at* http://www.dhs.gov/sites/default/files/publications/crcl-annual-report-fy-2012_4.pdf, *archived at* http://perma.cc/EH4T-G9MD.

[52] *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT TO CONGRESS ON THE ACTIVITIES OF THE OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES 2005–2006 at 11 (2007) [hereinafter CRCL FY2006 REPORT], *available at* http://www.dhs.gov/xlibrary/assets/crcl-fy0506annualreport.pdf, *archived at* http://perma.cc/7DTY-SQJH.

[53] *Id.*

[54] DHS § 705 REPORT, *supra* note 41, at 4, 13–14. In 2004, Congress expanded the Office's jurisdiction, but "civil rights issues concerning legal review" continued to fall under the jurisdiction of a Chief Counsel, who reported to the Department's General Counsel. CRCL FY2006 REPORT, *supra* note 52, at 8.

[55] CRCL's annual reports to Congress issued for fiscal years 2005–2008 list disability and special needs issues and "engagement" with Arab and Muslim communities as the top two priorities for the Office. *See, e.g.*, CRCL FY2006 REPORT, *supra* note 52, at 11–25.

"messaging" government policy to, Muslim and Arab communities.[56] During his tenure, however, the Office was widely perceived as being unable or unwilling to address systemic policy concerns, such as civil liberties concerns arising from DHS counterterrorism policies. Fourteen civil rights and community organizations wrote to the Department in 2009 to protest the Office's lack of "meaningful efforts to address numerous substantive concerns," including discriminatory immigration policies, ethnic and religious profiling by law enforcement, and mismanagement of terrorist watchlists.[57] Beyond civil rights organizations, policymakers also publicly questioned its effectiveness. The Chair of the House Committee on Homeland Security described the Office as struggling to be "more than an afterthought."[58] And a senior Bush Administration DHS official dismissed the Office's relevance to decisionmaking within the Department, describing it as an office that "doesn't have a line responsibility for anything at DHS."[59]

After President Obama's election, the position lay vacant for an extended period before the President appointed Margo Schlanger, a law professor known for her work on prison reform and civil rights litigation.[60] During her two-year term, Schlanger revamped the Office's process for addressing individual complaints, institutionalized its community engagement program, and helped DHS devise more rights-protective policies on issues such as language access and religious accommodations.[61] Nonetheless, CRCL frequently struggled to influence policy on national security.

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[56] DHS § 705 REPORT, *supra* note 41, at 11 (describing Sutherland's prior experience); *see also Threat of Islamic Radicalization to the Homeland: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Cong. 191–204 (2007) (written testimony of Daniel W. Sutherland) (emphasizing communication and relationship-building).

[57] Letter from Asian Law Caucus et al. to Sec'y Janet Napolitano, U.S. Dep't of Homeland Sec. (July 21, 2009), *available at* http://archive.bordc.org/letters/2009-07-21-ocrcl.pdf, *archived at* http://perma.cc/77HW-EQ9D; *see also Homeland Security Intelligence: Its Relevance and Limitations: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 39–40 (2009) (statement by Caroline Frederickson, Director, ACLU Legislative Office) (criticizing CRCL and other privacy and civil liberties offices for lacking independence and authority within their departments).

[58] *See, e.g.*, *Working with Communities to Disrupt Terror Plots: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 35 (2010) [hereinafter *Communities Hearing*] (statement of Rep. Bennie G. Thompson).

[59] JEFFREY KAHN, MRS. SHIPLEY'S GHOST: THE RIGHT TO TRAVEL & TERRORIST WATCHLISTS 190 (2013) (quoting former DHS Deputy Secretary Michael Jackson).

[60] Press Release, U.S. Dep't of Homeland Sec., Margo Schlanger Chosen as DHS Officer for Civil Rights and Civil Liberties (Jan. 27, 2010), *available at* http://www.aila.org/File/DownloadEmbeddedFile/51640, *archived at* http://perma.cc/FF6Z-U3EC.

[61] *See generally, e.g.*, Message from Sec'y Janet Napolitano, U.S. Dep't of Homeland Sec. 1 (Apr. 3, 2012), *available at* http://www.dhs.gov/xlibrary/assets/crcl/crcl-language-access-plan-s1-message-english.pdf, *archived at* http://perma.cc/Q3CV-DF7G (announcing new Language Access Plan for FY 2012); *Guidance for Accommodating Religious Beliefs in DHS Policies Requiring Fingerprinting or Photographic Identification*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/guidance-accommodating-religious-beliefs-dhs-policies-requiring-fingerprinting-or-photographic (last updated July 23, 2012), *archived at* http://perma.cc/X8YW-SN6B.

According to interviews with former DHS and CRCL personnel, Schlanger positioned herself as a pragmatic advocate, seeking to build the Office's credibility by taking moderate positions and avoiding conflict. Schlanger may have feared that pushing too hard would undermine the Office's credibility or cause senior leadership to exclude the Office from decisionmaking processes.[62] Some former staff members, however, believe that Schlanger unduly resisted asking the DHS Secretary to resolve conflicts between the Civil Rights Office and other DHS components, ensuring that CRCL would lose out to other components that resisted its advice.[63] They state that law enforcement components of DHS — particularly Customs and Border Protection and Immigration and Customs Enforcement — ignored CRCL policy recommendations and stalled in responding to complaints against those agencies.[64] One former staffer described the Office as having "zero influence" over most of the policy areas in which it engaged.[65] The decentralized structure of DHS, a behemoth created from the merger of twenty-two separate agencies, likely contributed to this dynamic: the DHS "front office" itself apparently struggled to exercise authority over Department heavyweights such as Customs and Border Protection and Immigration and Customs Enforcement.[66]

On a civil liberties issue that attracted significant public interest, the Office acceded to Customs and Border Protection's position that it should be able to search travelers' electronic devices at U.S. borders without individualized suspicion. Civil liberties groups and some Members of Congress had criticized suspicionless searches of Americans' laptop computers, mobile phones, and other devices at U.S. borders as undermining privacy and First Amendment rights,[67] leading DHS to ask the Civil Rights Office to produce

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[62] *See* Schlanger, *Offices of Goodness*, *supra* note 4, at 97, 105 (noting the threat of marginalization facing such offices and describing appeal to the Secretary as an "unattractive" option that requires "a large expenditure of political capital").

[63] Telephone Interview with Former CRCL Staffer (Feb. 5, 2014) [hereinafter Feb. 5 CRCL Phone Interview]; Telephone Interview with Former CRCL Staffer (Jan. 24, 2014) [hereinafter Jan. 24 CRCL Phone Interview].

[64] Feb. 5 CRCL Phone Interview, *supra* note 63; Jan. 24 CRCL Phone Interview, *supra* note 63.

[65] Jan. 24 CRCL Phone Interview, *supra* note 63.

[66] Feb. 5 CRCL Phone Interview, *supra* note 63; Jan. 24 CRCL Phone Interview, *supra* note 63; *see also* MARIANO-FLORENTINO CUÉLLAR, GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES 125–52 (2013) (describing the creation of DHS and its "flat" structure); Chuck Brooks, *DHS Secretary Jeh Johnson Revitalizes the "One DHS" Vision*, FED. TIMES (May 13, 2014, 11:29 AM), http://archive.federaltimes.com/article/20140513/BLG04/305130012/DHS-Secretary-Jeh-Johnson-revitalizes-One-DHS-vision, *archived at* http://perma.cc/57T5-GFPX (describing "One DHS" campaign to centralize DHS management).

[67] *See, e.g.*, Ellen Nakashima, *Travelers' Laptops May be Detained at Borders*, WASH. POST (Aug. 1, 2008), http://www.washingtonpost.com/wp-srv/content/article/2008/08/01/laptops.html, *archived at* http://perma.cc/C964-J6TD. In the interest of disclosure, I note that I coauthored a report by the Asian Law Caucus and the Stanford Law School Immigrants' Rights Clinic that criticized excessive border searches, including laptop searches, and the questioning of returning U.S. travelers. *See* ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERN-

an impact assessment on the issue.[68] Many reform efforts sought to limit electronic device border searches to cases in which border agents had reasonable suspicion of a legal violation or national security threat. The Office's impact assessment, not publicly released except through a Freedom of Information Act request eighteen months after its completion, made certain procedural recommendations that the Department accepted.[69] But it concluded that requiring individual suspicion could be "operationally harmful without concomitant civil rights/civil liberties benefit."[70] The Office apparently reached this conclusion, however, without any independent analysis of the claimed security need for suspicionless searches. In a single sentence, the Office noted only that it had been "presented with some noteworthy . . . success stories based on hard-to-articulate intuitions or hunches based on officer experience and judgment."[71] The report suggests no effort to examine those "success stories" through an independent review of the relevant data, despite substantial criticism of "hunch-based" law enforcement decisionmaking in other contexts.

Despite its mandate to assess whether the need for national security powers was balanced with civil liberties protection,[72] CRCL rarely evaluated whether Department programs actually achieved security objectives. For instance, CRCL's review of DHS-supported "fusion centers" — city and state-level operations designed to share intelligence across law enforcement agencies — suggested a narrow examination of data and no review of the centers' effectiveness. The assessment concluded weakly that the Office was "unaware of any current civil rights or civil liberties violations" and recommended modest "enhancements" to existing safeguards.[73] A nearly contemporaneous bipartisan Senate Committee Report based on much wider data analysis, by contrast, devastatingly concluded that DHS support for intelligence-gathering fusion centers produced intelligence that was "often

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MENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP (2009), *available at* http://www.advancingjustice-alc.org/sites/asian-law-caucus/files/Returning%20Home.pdf, *archived at* http://perma.cc/W275-X6UP.

[68] OFFICE OF CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., CIVIL RIGHTS/CIVIL LIBERTIES IMPACT ASSESSMENT: BORDER SEARCHES OF ELECTRONIC DEVICES 1 (2011) [hereinafter CRCL ELECTRONIC DEVICES REPORT], *available at* http://www.dhs.gov/sites/default/files/publications/crcl-border-search-impact-assessment_06-03-13_1.pdf, *archived at* http://perma.cc/6J4P-L8M2.

[69] For instance, Customs and Border Protection agreed to have border agents record the reasons for searching an electronic device, without requiring individualized suspicion. See Schlanger, *Offices of Goodness*, *supra* note 4, at 74–81, for her account of the dispute and defense of the Office's recommendations.

[70] CRCL ELECTRONIC DEVICES REPORT, *supra* note 68, at 17.

[71] *Id.*

[72] *See* 42 U.S.C. § 2000ee-1(a)(4) (2012).

[73] U.S. DEP'T OF HOMELAND SEC., CIVIL RIGHTS/CIVIL LIBERTIES IMPACT ASSESSMENT: DHS SUPPORT TO THE NATIONAL NETWORK OF FUSION CENTERS ii (2013), *available at* http://www.dhs.gov/sites/default/files/publications/DHS%20Support%20to%20National%20Network_0.pdf, *archived at* http://perma.cc/DK8W-52GD.

shoddy, rarely timely, sometimes endanger[ed] citizens' civil liberties . . . and more often than not [was] unrelated to terrorism."[74]

The Office's reluctance to probe security claims may have stemmed, in part, from its lack of security expertise. Although DHS was established to protect the nation from terrorism, none of the Office's three successive leaders had prior experience with national security matters from either a security or civil liberties background. Sutherland had litigated disability and immigrants' rights cases at the DOJ Civil Rights Division; Schlanger had specialized in prison reform as an attorney and law professor; and Megan Mack, appointed in 2014, had directed the American Bar Association's Commission on Immigration.[75] Several former staff stated that because the Office's leaders and staff lacked security credentials, law enforcement agencies within and outside the Department lacked respect for the Office.[76]

On another occasion, CRCL and the separate DHS Privacy Office unsuccessfully lobbied against changes to federal information-sharing policy permitting the National Counterterrorism Center to retain vast quantities of data on U.S. citizens and residents.[77] There, it faced opposition less from the Department, which reportedly allowed the DHS Privacy Office to make its case in an interagency meeting, than from other national security agencies leading the rules change.[78]

The Office's involvement in other intra-Departmental discussions may have contributed to more rights-protective policy, although isolating its impact in many areas is challenging.[79] For instance, according to CRCL, the input it conveyed from community groups "significantly contributed" to DHS's 2011 decision to suspend nationality-based registration requirements

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[74] STAFF OF PERM. SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC., 112TH CONG., REP. ON FEDERAL SUPPORT FOR AND INVOLVEMENT IN STATE AND LOCAL FUSION CENTERS 27 (Comm. Print 2012), *available at* http://www.fas.org/irp/congress/2012_rpt/fusion.pdf, *archived at* http://perma.cc/88VR-H79L.

[75] DHS § 705 REPORT, *supra* note 41, at 11 (describing Sutherland's prior experience); *Megan H. Mack*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/person/megan-h-mack (last updated Nov. 5, 2013), *archived at* http://perma.cc/B9GQ-J2C8 (describing Mack's prior experience); *Schlanger, Margo*, UNIV. OF MICH. LAW SCH., http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=mschlan (last visited Mar. 8, 2015), *archived at* http://perma.cc/G4YU-NPWV (describing Schlanger's prior experience).

[76] Feb. 5 CRCL Phone Interview, *supra* note 63; Telephone Interview with Former CRCL Staffer (Feb. 4, 2014); Jan. 24 CRCL Phone Interview, *supra* note 63.

[77] Schlanger, *Offices of Goodness*, *supra* note 4, at 88–92; Julia Angwin, *U.S. Terrorism Agency to Tap a Vast Database of Citizens*, WALL ST. J. (Dec. 13, 2012), http://www.wsj.com/articles/SB10001424127887324478304578171623040640006, *archived at* http://perma.cc/YL88-XYMZ.

[78] Schlanger, *Offices of Goodness*, *supra* note 4, at 90–92.

[79] CRCL's annual reports state that the Office's participation in such policy discussions ensured the consideration of civil liberties in ongoing and prospective programs. *See, e.g.*, OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2013 ANNUAL REPORT TO CONGRESS 22–23 (2014) [hereinafter CRCL FY2013 REPORT], *available at* http://www.dhs.gov/sites/default/files/publications/crcl-fy-2013-annual-report.pdf, *archived at* http://perma.cc/E9X3-TU2J. For reasons that I describe below, *see infra* note 208 and accompanying text, the successes and failures of such internal processes are particularly difficult to observe.

under the National Security Entry-Exit Registration System.[80] That program, established in 2002, had required immigrants from twenty-five predominantly Muslim countries to submit to enhanced scrutiny.[81] CRCL's internal advocacy may have elevated the profile of the issue within the Department. At the same time, given substantial public opposition to the program from community groups, technological advances that made the program redundant, and the fact that senior DHS officials had considered terminating it since 2006, it is difficult to determine what role CRCL's advocacy may have played in the decision.[82]

Perhaps the Office's most significant intervention in national security matters stemmed from its role in monitoring DHS intelligence reports for First Amendment concerns. In 2009, the Office had objected to a DHS intelligence bulletin on "right-wing extremism" on civil liberties grounds, but the Department nonetheless issued the bulletin. When news of the bulletin reached (and infuriated) congressional Republicans,[83] DHS directed CRCL to review DHS intelligence analyses for First Amendment concerns. That authority, arising out of a unique convergence of civil liberties concerns and Republican political pressure, enabled the Office to review thousands of DHS intelligence reports and push back against the conflation of political or religious beliefs with threats of violence.[84]

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[80] OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2011 ANNUAL & FOURTH QUARTER REPORT TO CONGRESS 17 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/crcl-annual-report-fy-2012_4.pdf, *archived at* http://perma.cc/8XG8-6W75; *see also* Removing Designated Countries from the National Security Entry-Exit Registration System (NSEERS), 76 Fed. Reg. 23,830 (Apr. 28, 2011); Letter from Margo Schlanger, Officer for Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec., to Colleagues (Apr. 27, 2011), *available at* http://www.ilw.com/immigrationdaily/news/2011,0428-schlanger.pdf, *archived at* http://perma.cc/TQE3-E4V2 (reporting DHS announcement).

[81] Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Aug. 12, 2002) (establishing NSEERS program).

[82] *See* 76 Fed. Reg. 23,830 (Apr. 28, 2011) (noting that improved data systems and universal monitoring of foreign nationals' travel made the NSEERS program redundant and of no benefit to security); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., INFORMATION SHARING ON FOREIGN NATIONALS: BORDER SECURITY 9 (2012), *available at* http://www.oig.dhs.gov/assets/Mgmt/2012/OIGr_12-39_Feb12.pdf, *archived at* http://perma.cc/W6NB-F7NN ("Senior DHS officials had been weighing the possibility of terminating NSEERS since at least 2006."); RIGHTS WORKING GRP. & PENN. STATE U. DICKINSON SCH. OF LAW, THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR, AND SECRECY 4 (2012), *available at* https://pennstatelaw.psu.edu/_file/clinics/NSEERS_report.pdf, *archived at* https://perma.cc/38GD-ZDQ7 (describing political opposition to the program).

[83] Anthony L. Kimery, *DHS's Lexicon of 'Extremists': Also Released Without Approval*, HOMELAND SEC. TODAY (May 6, 2009), http://www.hstoday.us/channels/dhs/single-article-page/dhss-lexicon-of-extremists-also-released-without-approval/2da5c88c80cacdc2e7392e8ecd6d0863.html, *archived at* http://perma.cc/S7VK-M5V5.

[84] U.S. DEP'T OF HOMELAND SEC., REPORT TO CONGRESS ON THE OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES FISCAL YEAR 2009 AND FOURTH QUARTER 2009 at 7 (2010), *available at* http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2009.pdf, *archived at* http://perma.cc/TY3S-EGCY; STAFF OF PERM. SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC., *supra* note 74, at 36–38. CRCL also oversaw compliance with Department policy in certain other areas that have yet to become fully public. For instance,

Together, the available evidence suggests that CRCL acquired some influence within DHS, perhaps especially over program implementation, but that it often struggled to advocate successfully for policy reform.

B. Department of Justice Inspector General ("DOJ IG")

The DOJ IG offers a marked contrast with the DHS Civil Rights Office. In the first post-9/11 decade, DOJ IG conducted rigorous reviews of counterterrorism practices affecting individual rights, leading DOJ to end certain practices the IG had exposed. It did so despite a more general mandate to promote the efficacy of Department programs. In the last several years, however, it has lagged in completing reviews on individual rights, a development that the Office attributes to Departmental resistance to providing information.

Mandate and Functions. Like most IGs, DOJ IG derives its authority from the Inspector General Act of 1978.[85] Established in 1988, DOJ IG is charged broadly with promoting the "economy, efficiency, and effectiveness" of DOJ programs by conducting investigations and audits of Department activities.[86] But when it passed the USA PATRIOT Act six weeks after September 11, 2001, Congress also required DOJ IG to designate an official to "review information and receive complaints alleging abuses of civil rights and civil liberties" by Department officials and to report twice a year to Congress on its activities.[87] Although almost all national security agencies now have IGs, DOJ IG's standing mandate to review civil rights complaints remains relatively unique.[88] In addition, Congress has sometimes tasked DOJ IG, like others, with reviewing specific national security programs that raise civil liberties concerns.[89]

Powers and Capacity. Unlike civil rights offices, IGs are structured to be substantially independent of their host agencies, so much so that executive officials often complain that they are more closely aligned with Con-

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according to Schlanger, CRCL since 2010 has routinely reviewed the Department's use of nationality as a screening or investigative criterion to ensure that all such uses are justified. Margo Schlanger, *When Is It Okay to Racially Profile?*, POLITICO (Dec. 18, 2014) http://www.politico.com/magazine/story/2014/12/government-racially-profile-113676.html, *archived at* http://perma.cc/R2FA-ZNXS. Little information exists on the efficacy of the Office's oversight in such areas.

[85] 5 U.S.C. app. at 11–58 (2012).

[86] *Id.* at 12, § 2.

[87] USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 1001, 116 Stat. 272, 391 (codified at 5 U.S.C. app. at 30, § 8E notes (2012)).

[88] Congress also authorized the DHS IG to investigate civil rights allegations and work with the Department's Civil Rights Office on policy recommendations, but it did not require the DHS IG to report on rights complaints to Congress. *See* 5 U.S.C. app. at 44–45, § 8I(f) (2012).

[89] *See, e.g.*, USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 106A, 119, 120 Stat. 192, 200–02, 219–21 (2006); FISA Amendments Act of 2008, Pub. L. No. 110-261, § 301(b)(1), 122 Stat. 2436, 2471–72 (2008).

gress.[90] The Inspector General Act seeks to insulate IGs from presidential and bureaucratic control.[91] It provides for presidential appointment and Senate confirmation of IGs, requires the President to notify Congress before removing an IG, confers broad investigative powers on IGs, generally prohibits agency interference with investigations, and requires prompt congressional notification of serious problems within agencies.[92] Although national security agencies can invoke an exceptional power to interfere with IG investigations or reports in the interest of national security,[93] agencies have almost never used this power.[94] Moreover, IGs generally communicate directly with Congress without preclearance by the White House Office of Management and Budget.[95] In size, the DOJ IG office numbers about 400 staff and operates an annual budget of approximately $85 million.[96]

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[90] *See, e.g.*, JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 at 93–94 (2012).

[91] 5 U.S.C. app. at 13, § 2 (2012).

[92] *See id.* at 13–14, § 3 (regulating appointment, supervision, removal, and political activities of IGs); *id.* at 16–17, § 5(a) (listing requirements for IGs' semiannual reports); *id.* at 18, § 5(d) (requiring congressional notice of serious abuses); *id.* at 20, § 6(a)–(b) (granting IGs broad informational access including the power to subpoena). IGs in certain intelligence agencies are appointed by agency heads, rather than the President. *See* Sinnar, *supra* note 4, at 1034.

[93] *See* 5 U.S.C. app. at 23–24, § 8(b) (2012) (placing "national interest" limitations on the power of the Department of Defense IG); *id.* at 29, § 8E(a) (same, for DOJ IG); *id.* at 44, § 8I(a) (same, for DHS IG); *id.* at 32, § 8G(d)(2)(A)–(B) (allowing Secretary of Defense, in consultation with the Director of National Intelligence, to override an inspector general "of an element of the intelligence community"); 50 U.S.C. § 403-3h(f) (2012) (limiting the power of the Inspector General of the Intelligence Community); *id.* § 403q(b)(3)–(b)(4) (allowing the Director of the CIA to override the CIA IG for national security reasons).

[94] Only the Department of Justice has ever done so — and only once, in 1988. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, EPILOGUE: THE CIA-CONTRA-CRACK COCAINE CONTROVERSY: A REVIEW OF THE JUSTICE DEPARTMENT'S INVESTIGATIONS AND PROSECUTIONS 1 (1998) (reporting use). No other agency has used that power. *See* Letter from Susan Ragland, Dir. of Financial Mgmt. and Assurance, U.S. Gov't Accountability Office, to Rep. Diane E. Watson, Chair, Subcomm. on Gov't Mgmt., Org., and Procurement of the H. Comm. on Oversight and Gov't Reform 1, 3 (May 8, 2009) (reporting that, as of 2009, no agency besides DOJ had exercised the statutory authority to prohibit IG activities).

More recently, other IG offices confirmed to the author that their own agencies had not used exceptional Section 8 powers (with the exception of the 1988 DOJ instance). Interview with Richard Delmar, Counsel to U.S. Treasury Dep't Inspector Gen., in Wash., D.C. (June 24, 2013); E-mail from Bridget Serchak, Chief of Pub. Affairs, U.S. Dep't of Defense Inspector Gen., to author (Jan. 17, 2013) (on file with author); E-mail from Richard N. Reback, Counsel to the U.S. Dep't of Homeland Sec. Inspector Gen., to author (Mar. 11, 2011) (on file with author); E-mail from William R. Blier, Gen. Counsel to U.S. Dep't of Justice Inspector Gen., to author (Mar. 1, 2011) (on file with author).

[95] According to numerous IGs and IG counsel, OMB does not routinely review or clear IG reports or written testimony to Congress. *See* Interview with Richard Delmar, *supra* note 94; Telephone Interview with William R. Blier, Gen. Counsel to U.S. Dep't of Justice Inspector Gen. (Aug. 24, 2012); Telephone Interview with Phyllis Fong, U.S. Dep't of Agric. Inspector Gen. (Aug. 10, 2012); Interview with Harold Giesel, Acting U.S. Dep't of State Inspector Gen., in Wash., D.C. (June 15, 2012); Interview with Clark Kent Ervin, Fmr. U.S. Dep't of Homeland Sec. Inspector Gen., in Wash., D.C. (June 14, 2012); Telephone Interview with Britt Snider, Fmr. CIA Inspector Gen. (June 13, 2012).

[96] *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS, APR. 1, 2014 – SEPT. 30, 2014 at 14 (2014) [hereinafter DOJ IG 2014 SEMIAN-

History. IG Glenn Fine responded to the Patriot Act mandate by establishing the required complaint mechanism and publicizing it to ethnic communities.[97] But early on, he pursued more systematic investigations, beginning with a broad review of the detention of hundreds of mostly Muslim immigrants following the September 11 attacks. In 2003, DOJ IG issued two highly critical reports concluding that federal officials had indiscriminately labeled detainees as terrorism suspects, held many under harsh conditions, and physically abused some detainees.[98] The reports attracted tremendous public and congressional attention, triggered the disciplining of federal prison guards, and assisted some former detainees in obtaining compensation.[99]

Following the post-9/11 detention reports, the DOJ IG conducted several other influential reviews on liberty-security matters. Most importantly, DOJ IG issued three damning reports on the FBI's use of National Security Letters — administrative orders that allow agents to obtain phone records without judicial authorization.[100] Most pointedly, the reports concluded that the FBI had circumvented the law in issuing "exigent letters," which asked phone companies to hand over customer phone records based on false statements and in circumstances where no emergency existed.[101] These reports led the FBI to terminate the use of exigent letters and significantly reform internal procedures.[102]

NUAL REPORT], *available at* http://www.justice.gov/oig/semiannual/1411.pdf, *archived at* http://perma.cc/5GV3-Y7KC (reporting nationwide staff of "more than 400" and a fiscal year direct appropriation of $86.4 million).

[97] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 5, 10–17 (2002), *available at* http://www.justice.gov/oig/special/0207/pdf/full_report.pdf, *archived at* http://perma.cc/K2YA-WVTQ.

[98] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPT. 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPT. 11 ATTACKS 195–96 (2003), *available at* http://www.justice.gov/oig/special/0306/full.pdf, *archived at* http://perma.cc/R26P-KWCX; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPT. 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, N.Y. 46–47 (2003), *available at* http://www.justice.gov/oig/special/0312/final.pdf, *archived at* http://perma.cc/CAA4-RKUJ.

[99] *See* Sinnar, *supra* note 4, at 1043–44, 1061.

[100] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF EXIGENT LETTERS AND OTHER INFORMAL REQUESTS FOR TELEPHONE RECORDS (2010) [hereinafter DOJ IG PHONE RECORDS REPORT], *available at* http://www.justice.gov/oig/special/s1001r.pdf, *archived at* http://perma.cc/2TU3-U9KS; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (2008), *available at* http://www.justice.gov/oig/special/s0803b/final.pdf, *archived at* http://perma.cc/V29N-6ZQM; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007) [hereinafter DOJ IG NSL 2007 REPORT], *available at* http://www.justice.gov/oig/special/s0703b/final.pdf, *archived at* http://perma.cc/DPQ5-AHZT.

[101] DOJ IG NSL 2007 REPORT, *supra* note 100, at xxxiv, xxxviii.

[102] DOJ IG PHONE RECORDS REPORT, *supra* note 100, at 214.

Although Congress had asked DOJ IG to review the FBI's use of National Security Letters, the scope and number of the reports exceeded that congressional requirement.[103] Other reviews, whether challenging or vindicating Department practices, also provided unusual transparency on national security practices at a time when courts and Congress often lacked the means or will to do so.[104]

The extent of DOJ IG's attention to rights and liberties during the first post-9/11 decade appears to surpass that of most other national security IGs, with the possible exception of the Central Intelligence Agency IG.[105] A number of IGs are required to identify their department's top management challenges on an annual basis; DOJ IG designated the protection of rights and liberties as a key challenge every year since 2006, while the IGs of the Departments of State, Homeland Security, and Defense never did so.[106] Even the Abu Ghraib detainee abuse scandal in 2004, for instance, did not prompt the Defense Department IG to identify human rights or detainee treatment as a priority concern of the agency. Moreover, some IGs and senior IG staff at other agencies state that rights and liberties are not a core

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[103] *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 106A, 119, 120 Stat. 192, 200–02, 219–21 (2006).

[104] *See* Sinnar, *supra* note 4, at 1074. For two reports that at least partly vindicated the FBI from charges of violating rights, see OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVESTIGATION OF CERTAIN DOMESTIC ADVOCACY GROUPS 190 (2010) [hereinafter DOJ IG DOMESTIC ADVOCACY REPORT], *available at* http://www.justice.gov/oig/special/s1009r.pdf, *archived at* http://perma.cc/BS9G-LFY5; and OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ 370 (2008) [hereinafter DOJ IG DETAINEE INTERROGATIONS REPORT], *available at* http://www.justice.gov/oig/special/s0805/final.pdf, *archived at* http://perma.cc/ZTC2-SEE3.

[105] *See* Sinnar, *supra* note 4, at 1037–38, 1047–50 (describing CIA IG reporting on rights). Quantifying the number of rights-related reports issued by IGs is conceptually challenging, *see id.* at 1040 n.70, but the other factors discussed below also suggest differential attention to questions of rights.

[106] *See generally* Reports Consolidation Act of 2000, Pub. L. No. 106-531, 114 Stat. 2537 (2000) (requiring IGs to report annually on top challenges); *Top Management Challenges*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, http://www.justice.gov/oig/challenges (last updated Feb. 2015), *archived at* http://perma.cc/SM8T-G67C (listing "protecting civil rights and civil liberties" as a top challenge from 2006 to 2012, and "safeguarding national security consistent with civil rights and civil liberties" as a top challenge in 2013 and 2014).

Other annual financial reports can be found at *Financial Management Reports*, UNDER SEC'Y OF DEFENSE (COMPTROLLER), U.S. DEP'T OF DEFENSE, http://comptroller.defense.gov/financialmanagement/reports/afr2014.aspx (last visited Apr. 21, 2015), *archived at* http://perma.cc/BNF8-MNYP (archive of Department of Defense financial reports for FYs 2002–2014); *Performance & Accountability Reports*, U.S. DEP'T OF HOMELAND SEC. (Mar. 18, 2015), http://www.dhs.gov/performance-accountability, *archived at* http://perma.cc/E64R-VW4U (archive of DHS financial reports for FYs 2013–2014); *Previous Department of Homeland Security Performance and Accountability Reports*, U.S. DEP'T OF HOMELAND SEC. (Nov. 14, 2014), http://www.dhs.gov/previous-department-homeland-security-performance-and-accountability-reports, *archived at* http://perma.cc/5FCF-HQ2B (archive of DHS financial reports for FYs 2003–2012); and *Performance and Accountability Reports and Agency Financial Reports*, U.S. DEP'T OF STATE, http://www.state.gov/s/d/rm/rls/perfrpt (last visited Apr. 21, 2015), *archived at* http://perma.cc/4GNJ-AKMW (archive of State Department annual financial reports from FYs 2007–2014).

part of their mission.[107] Unsurprisingly, in the first post-9/11 decade, civil liberties groups cited DOJ IG reports in their advocacy on national security issues much more than those of any other IG.[108]

Given the narrowness of the Patriot Act mandate and of subsequent congressional requirements, DOJ IG's attention to rights and liberties was a matter of choice, not mandate. By statute, IGs have substantial autonomy to choose where to focus their attention and how thoroughly to investigate particular issues.[109] Although agency heads and Members of Congress frequently ask IGs to conduct particular reviews, some IGs say that the sheer number of such requests leaves IGs with substantial discretion in allocating attention among them.[110] Fine himself stated that the Patriot Act mandate was useful mostly in *explaining* why the IG office was reporting on civil liberties issues, particularly when it issued its first significant post-9/11 report.[111] But the decision to conduct broad and diverse rights-related reviews seems largely attributable to Fine himself. A Clinton appointee and former Rhodes Scholar, Fine served as IG from 2001 to 2011, an unusually long term even for IGs.[112] That term spanned the entire eight-year Bush Administration and coincided with the FBI's transformation into a domestic intelligence and counterterrorism agency — political circumstances that made questions of rights especially salient.

At the same time, DOJ IG had preexisting structures and norms that facilitated rigorous rights-related investigations. Most significantly, it had a special unit dedicated to high-level, sensitive investigations, a tradition of marked independence, and a history of investigating civil rights issues. Fine's predecessor as IG, Michael Bromwich, had created a distinct, prosecutor-led investigative unit within DOJ IG to pursue politically sensitive inves-

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[107] Telephone Interview with Uldric Fiore, Fmr. Counsel for U.S. Dep't of Defense Inspector Gen. (July 19, 2013) (stating that rights may be a "byproduct" of their work but not a primary focus); Interview with Harold Giesel, *supra* note 95 (stating that human rights issues only occasionally arose because the rights of Americans were peripheral to the Department's work).

[108] ACLU press releases from 2001–2011 posted on the organization's website under the topic of "national security" and using the keywords "inspector general" (in quotations) cited the DOJ IG on ninety-four occasions, the CIA IG eighteen times, the DHS IG four times, and the DOD IG twice. *See Search ACLU*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/search/%20?f%5B0%5D=field_issues%3A132&f%5B1%5D=type%3Apress_release (last counted Apr. 22, 2014), *archived at* http://perma.cc/72AW-PDHP.

[109] *See* 5 U.S.C. app. at 20, § 6(a)(2) (2012) (authorizing IGs to conduct investigations and issue reports that, in their judgment, are "necessary or desirable").

[110] Interview with Joseph Schmitz, Fmr. U.S. Dep't of Defense Inspector Gen., in Bethesda, Md. (June 25, 2013).

[111] Interview with Glenn Fine, Fmr. U.S. Dep't of Justice Inspector Gen., in Wash., D.C. (June 15, 2012).

[112] Between 1989 and 2009, IGs served for a median period of over four years, compared to 2.5 years for Senate-confirmed agency appointees as a whole. *See* Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009*, 39 PRESIDENTIAL STUDIES Q. 432, 436 (2009).

tigations.[113] Under Bromwich's tenure, that unit — led by none other than Glenn Fine[114] — conducted several reviews related to civil rights or liberties.[115] DOJ IG also acquired a reputation for assertiveness during the 1990s, particularly when it refused to delay the release of a high-profile investigative report without being legally compelled to do so.[116]

As IG, Fine significantly expanded the unusual investigative unit, now named the Oversight and Review Division.[117] He hired highly credentialed individuals to lead it, such as a former deputy assistant attorney general known for pushing back against government secrecy.[118] Fine staffed the unit with former prosecutors as well as several lawyers from the Justice Department Civil Rights Division.[119] The Oversight and Review Division led some of DOJ IG's most prominent rights-related reviews, including its reviews of the FBI's investigations of domestic advocacy groups, exigent letters, and abusive interrogations abroad.[120] And Fine himself credits the unit for the institution's ability to conduct rigorous reviews.[121]

After Fine left the IG position in early 2011, the position remained vacant until the appointment of Michael Horowitz a full year later.[122] Under

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[113] Telephone Interview with Michael Bromwich, Fmr. U.S. Dep't of Justice Inspector Gen. (Jan. 18, 2013).

[114] *Id.*

[115] *Id.* The IG examined allegations that federal law enforcement officers had participated in a racist private gathering and that immigration officials had concealed overcrowding at detention facilities from congressional visitors. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: APR. 1, 1996 – SEPT. 30, 1996 at 2 (1996); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: OCT. 1, 1995 – MAR. 31, 1996 at 4–5 (1996). The IG also regularly investigated individual complaints that U.S. border agents had abused immigrants. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SEMIANNUAL REPORT TO CONGRESS: OCT. 1, 1992 – MAR. 31, 1993 at 6 (1993).

[116] Telephone Interview with Michael Bromwich, *supra* note 113 (reporting refusal to delay investigative report unless Attorney General invoked exceptional statutory power to do so). *See also supra* note 94.

[117] Interview with Glenn Fine, *supra* note 111 (stating that the unit grew from five to thirty people during his tenure as IG).

[118] *See* Letter from Glenn Fine, Fmr. U.S. Dep't of Justice Inspector Gen., to Sen. Joseph Lieberman (Sept. 20, 2011), *reprinted in Nomination of Roslyn A. Mazer: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 127–28 (2011) (noting Mazer's leadership role in the Oversight and Review Division); Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 407–09 (2009) (describing Interagency Security Classification Appeals Panel, which Mazer chaired, as an "exceptionally independent and effective" check on excessive government secrecy).

[119] Interview with Glenn Fine, *supra* note 111. The DOJ IG appears to be relatively alone in hiring lawyers with civil rights or human rights experience. *See* Interview with Clark Kent Ervin, *supra* note 95 (stating he did not hire lawyers with human rights background); Telephone Interview with Fred Hitz, Fmr. CIA Inspector Gen. (Aug. 10, 2012) (same).

[120] DOJ IG DOMESTIC ADVOCACY REPORT, *supra* note 104 (listing Oversight and Review Division on cover page); DOJ IG PHONE RECORDS REPORT, *supra* note 100 (same); DOJ IG DETAINEE INTERROGATIONS REPORT, *supra* note 104 (same).

[121] Interview with Glenn Fine, *supra* note 111.

[122] *Meet the Inspector General*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, http://www.justice.gov/oig/about/meet-ig.htm (last updated July 2014), *archived at* http://perma.cc/Y7C8-E8KR.

Horowitz, DOJ IG has continued to investigate politically sensitive matters. During his first two years, DOJ IG released reports of particular interest to the administration's congressional opponents, such as the Department's controversial "Fast and Furious" gun-running operation and the hiring practices of the Voting Rights Division.[123] In that time, DOJ IG completed only three reviews that it deemed related to its Patriot Act responsibilities.[124] By the end of 2014, DOJ IG had issued several other reports on national security matters affecting individual rights, including long-promised reports on the use of material witness warrants to detain individuals in terrorism cases and an updated review of the FBI's use of National Security Letters.[125] It also explained the delay in these reports as resulting from the FBI's assertion of legal objections to disclosing information from grand jury investigations and electronic surveillance.[126] Although the Department eventually ordered the FBI to provide access, DOJ IG objected — as it had in several congressional hearings — that the process resulted in significant delays and compromised the Office's independence.[127] In response to the dispute, DOJ requested an opinion from OLC on the interaction of the IG statute, which conferred broad access to agency records, and other statutes limiting disclosure of information, and suggested that it would work with DOJ IG on "legislative remedies" if OLC's review "does not assure the [DOJ IG] of the access it needs to do its job."[128]

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[123] *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION (2013), *available at* http://www.justice.gov/oig/reports/2013/s1303.pdf, *archived at* http://perma.cc/RPZ6-XMVH; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS (2012), *available at* http://www.justice.gov/oig/reports/2012/s1209.pdf, *archived at* http://perma.cc/VU4W-UMPF.

[124] *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 11–13 (Mar. 2014), *available at* http://www.justice.gov/oig/reports/2014/s1403.pdf, *archived at* http://perma.cc/A9EM-XZVD (noting only ongoing reviews and an "interim" report on domestic use of drones); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 12 (Aug. 2013), *available at* http://www.justice.gov/oig/reports/2013/s1308.pdf, *archived at* http://perma.cc/4PEU-W2EM (referencing a completed audit of the FBI's Foreign Terrorist Tracking Task Force); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT 11 (Apr. 2013), *available at* http://www.justice.gov/oig/reports/2013/s1304.pdf, *archived at* http://perma.cc/2JAC-4WX6 (noting completed, statutorily required report on the FBI's activities under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008).

[125] DOJ IG 2014 SEMIANNUAL REPORT, *supra* note 96, at 2. In its semiannual reports to Congress, the IG had been referencing an ongoing review of the FBI's use of Patriot Act Section 215 business records requests since August 2010.

[126] *Id.* at 11–12.

[127] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE DEPARTMENT'S USE OF THE MATERIAL WITNESS STATUTE WITH A FOCUS ON SELECT NATIONAL SECURITY MATTERS 4–5 (2014) [hereinafter DOJ IG MATERIAL WITNESS REPORT], *available at* http://www.justice.gov/oig/reports/2014/s1409r.pdf, *archived at* http://perma.cc/9VDT-BNZJ.

[128] Letter from James M. Cole, Dep. U.S. Att'y Gen., to Michael Horowitz, U.S. Dep't of Justice Inspector Gen. (Aug. 27, 2014), *reprinted in* DOJ IG MATERIAL WITNESS REPORT, *supra* note 127, at A-1 to A-2.

C. *Privacy and Civil Liberties Oversight Board ("PCLOB" or "Board")*

After a prolonged period of official neglect, the Privacy and Civil Liberties Oversight Board rode the coattails of the Snowden revelations to unprecedented national prominence. It demonstrated its independence in a sweeping critique of the NSA's bulk collection of Americans' phone records. But the ideological divides that contributed to the Board's long dormancy have resurfaced to thwart consensus on liberty-security questions.

Mandate and Functions. In 2007, Congress established the Board as an independent entity within the executive branch.[129] Its purpose is to ensure that the need for executive counterterrorism actions is "balanced with the need to protect privacy and civil liberties" and to ensure that "liberty concerns are appropriately considered" in developing and implementing counterterrorism policy.[130] It has two core functions: an "advice and counsel" function to assist the President and agencies in determining whether proposed legislation, policies, or actions comport with civil liberties and privacy, and an "oversight" function to review the implementation of counterterrorism measures.[131]

Powers and Capacity. PCLOB is composed of five members, including a full-time chairperson, who are all appointed by the President and confirmed by the Senate.[132] No more than three members may belong to the same political party, and the statute requires the President to consult with the leadership of the opposing party in appointing that party's members.[133] Members serve six-year terms.[134] The Board has the authority to access information within federal agencies but must request the Attorney General to issue subpoenas on its behalf; if a request is denied, the Attorney General must explain in writing and notify Congress.[135] In addition, a previous national security exception that permitted the Director of National Intelligence or the Attorney General to withhold information is no longer in the statute.[136]

According to Board Chair David Medine, the Board successfully bargained with the White House for the right to testify and report to Congress without White House clearance.[137] Unlike certain independent executive agencies, however, the Board cannot bypass the White House Office of

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[129] 42 U.S.C. § 2000ee(a) (2012).
[130] *Id.* § 2000ee(c).
[131] *Id.* § 2000ee(d).
[132] *Id.* § 2000ee(h)(1).
[133] *Id.* § 2000ee(h)(2).
[134] *Id.* § 2000ee(h)(4).
[135] *Id.* § 2000ee(g).
[136] *Compare* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1061(d)(4), 118 Stat. 3638, 3686 (2004) (reflecting the original national security exception), *with* 42 U.S.C. § 2000ee(g) (2012) (reflecting the removal of the national security exception).
[137] Interview with David Medine, Chair, Privacy and Civil Liberties Oversight Bd., in Stanford, Cal. (Feb. 27, 2014).

Management and Budget in submitting its budget requests to Congress.[138] The President's FY2014 budget provided for $3.1 million for PCLOB.[139] While small in absolute terms and microscopic compared to the intelligence community's $52 billion budget, Board members viewed this amount as commensurate with the first year of a developing agency.[140] As of May 2014, the Board had employed seven staff members, including five lawyers and a technologist.[141]

History. In 2004, the 9/11 Commission first recommended the creation of an institution within the executive branch to oversee the protection of privacy and civil liberties.[142] President Bush responded by establishing a twenty-two-member Board consisting of senior officials from law enforcement and intelligence agencies and chaired by the Deputy Attorney General.[143] In 2004, Congress rejected that Board as insufficiently independent, and established a second version by statute, although it retained its placement within the White House.[144]

One year after the congressionally established Board met, it fell under significant criticism: former 9/11 Commission chairs Thomas Kean and Lee Hamilton criticized it for interpreting its mandate to cover only U.S. persons, excluding Guantanamo detainees.[145] The only Democrat on the Board, Lanny Davis, resigned to protest that interpretation and the White House's significant "redlining" of its first annual report to Congress.[146] Davis's resignation reinforced efforts to strengthen the Board's independence, and after

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[138] *Id.* According to Medine, PCLOB did not fight for that right because the Board had received strong support in the budget process from the White House, which increased its funding despite the 2013 fiscal standoff between Congress and the Administration. *Id.*

[139] PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., SEMI-ANNUAL REPORT SEPT. 2012 – MAR. 2013 at 10 (2013), *available at* https://www.pclob.gov/library/Semi_Annual_Report-Jun2013.pdf, *archived at* http://perma.cc/T4SY-48JM.

[140] Interview with Elisebeth Collins Cook, Member, Privacy & Civil Liberties Oversight Bd., in Stanford, Cal. (May 3, 2014) (noting that budget was huge improvement over the past); Interview with David Medine, *supra* note 137.

[141] Interview with Elisebeth Collins Cook, *supra* note 140.

[142] *See* U.S. NAT'L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 395 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf, *archived at* http://perma.cc/6VH5-BUMD.

[143] Exec. Order No. 13353, Establishing the President's Board on Safeguarding Americans' Civil Liberties (Aug. 27, 2004).

[144] *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1061, 118 Stat. 3638, 3684–88 (2004).

[145] Letter from Thomas H. Kean & Lee H. Hamilton, Fmr. Chairs, 9/11 Comm'n, to Carol Dinkins, Chair, Privacy & Civil Liberties Oversight Bd. (May 8, 2007), *available at* http://maloney.house.gov/sites/maloney.house.gov/files/documents/homeland/CivilLibBoard/20070508LettertoPCLOB.pdf, *archived at* http://perma.cc/PCR5-78U2; *see* PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., FIRST ANNUAL REPORT TO CONGRESS MAR. 2006 – MAR. 2007 at 22–24 (2007), *available at* https://www.hsdl.org/?view&did=472660, *archived at* https://perma.cc/56QL-7XYP (construing PCLOB mandate as focused on U.S. persons and issues occurring on U.S. soil).

[146] Lanny Davis, *Why I Resigned From the President's Civil Liberties and Oversight Board — and Where We Go From Here*, HUFFINGTON POST (May 18, 2007), http://www.huffingtonpost.com/lanny-davis/why-i-resigned-from-the-p_b_48817.html, *archived at* http://perma.cc/D93B-XSPR.

Democrats took control of both the House and Senate, Congress reconstituted it as an independent agency.[147]

After its reconstitution as an independent agency, PCLOB lay dormant for several years. Partisan standoffs between the President and Democratic Senate prevented the confirmation of any Board members during President Bush's last year in office.[148] President Obama did not appoint a single member for almost two years and did not name a full Board for close to three years, and only after repeated congressional entreaties.[149] Then the Senate stalled: Republican Senator Charles Grassley objected to proposed Chair David Medine because Medine hedged on saying that the United States was in a "war" on terrorism and because he opposed profiling foreigners based solely on their national origin.[150] The Senate finally confirmed Medine in May 2013 without a single Republican vote in support.[151] Only after that point could the Board fully get off the ground, because only the Chair served full-time and had the statutory authority to hire staff.[152]

One week after Medine started, the *Guardian* published its first news story based on documents leaked by former contractor Edward Snowden.[153] That news story revealed that the NSA was collecting "metadata" on millions of Americans' phone records — information on the date and time of calls, their duration, and the participating phone numbers — to identify connections between known terrorism suspects and others in the United States.[154] Snowden's disclosures also focused attention on a second classified NSA program that intercepted the actual content of communications between U.S. persons and intelligence targets abroad.[155] Amid spectacular domestic and international attention, a group of Senators and the President

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[147] *See* Implementing Recommendations of the 9/11 Comm'n Act of 2007, Pub. L. No. 110-53, § 801, 121 Stat. 266, 352–58 (2007).

[148] Ellen Nakashima, *Lawmakers, Advocates Push Administration for Appointments to Privacy Board*, WASH. POST (Apr. 9, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/08/AR2010040805470.html, *archived at* http://perma.cc/J8HE-3XM2.

[149] GARRETT HATCH, CONG. RESEARCH SERV., RL34385, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: NEW INDEPENDENT AGENCY STATUS 8 (2012), *available at* http://www.fas.org/sgp/crs/misc/RL34385.pdf, *archived at* http://perma.cc/C9J8-ZTAD.

[150] 159 CONG. REC. S3104–08 (daily ed. May 7, 2013) (statement of Sen. Charles Grassley).

[151] *Id.*; Jeremy W. Peters, *G.O.P. Delays on Nominees Raise Tension*, N.Y. TIMES (May 11, 2013), http://www.nytimes.com/2013/05/12/us/politics/gop-delays-on-nominees-raise-tension.html, *archived at* http://perma.cc/V8SN-WY74.

[152] 42 U.S.C. §§ 2000ee(h)(1), (j) (2012).

[153] Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (June 5, 2013), http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order, *archived at* http://perma.cc/L5JH-H6CW. Although the *Guardian* did not name Snowden in the first article, it later revealed his identity in *NSA Whistleblower Edward Snowden: "I Don't Want to Live in a Society that Does These Sort of Things"*, GUARDIAN (June 9, 2013), http://www.theguardian.com/world/video/2013/jun/09/nsa-whistleblower-edward-snowden-interview-video, *archived at* http://perma.cc/J536-V99E.

[154] Greenwald, *supra* note 153.

[155] *See, e.g.*, Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-

asked PCLOB to review the two NSA surveillance programs.[156] The phone records program caused particularly intense controversy within the United States because it involved the bulk collection of information on Americans not suspected of any involvement in terrorism and because Congress had not specifically authorized it.[157]

Over the next eight months, the Board simultaneously operationalized as an agency and investigated the NSA phone records program. PCLOB received private briefings from intelligence agencies, met with White House staff, reviewed classified information, and held public forums with "academics, . . . civil liberties advocates, technology and communication companies," and government officials.[158] According to Medine, it obtained full cooperation from government officials, including obtaining the highest level of security clearances for its members and staff and achieving a "clear understanding" that the White House would not review the substance of its report.[159]

In January 2014, PCLOB released a highly critical 234-page report that called for an end to the phone records program.[160] The Board reached this judgment on both legal and policy grounds: it concluded that the program was unauthorized by statute and that it had shown "minimal value" in protecting the nation from terrorism.[161] PCLOB assessed twelve incidents the intelligence community had cited as "success stories," but concluded from them that the phone records collection had not identified a previously unknown plot, disrupted a single terrorist attack, or identified an unknown terrorist suspect plotting an attack.[162] In addition, it rejected a claim repeatedly made by government officials that, had the NSA phone records program existed in September 2001, it might have prevented the 9/11 attacks.[163] The

companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html, *archived at* http://perma.cc/57MK-RXTK.

[156] PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 1–2 (2014) [hereinafter PCLOB PHONE REPORT], *available at* https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf, *archived at* http://perma.cc/5LEQ-FDVC.

[157] *See* PCLOB PHONE REPORT, *supra* note 156, at 10. Congress had provided statutory authorization for the second NSA program in the FISA Amendments Act of 2008, Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2438–48 (2008).

[158] PCLOB PHONE REPORT, *supra* note 156, at 4–5.

[159] David Medine, Chair, Privacy & Civil Liberties Oversight Bd., Public Lecture at the Stanford Center on Internet & Society: Privacy and Civil Liberties in the Post-Snowden Era (Feb. 27, 2014).

[160] PCLOB PHONE REPORT, *supra* note 156, at 16.

[161] *Id.* at 10–12.

[162] *Id.* at 145–46. *But see id.* at 146 (noting one instance in which program "arguably contributed to the identification" of alleged terrorist).

[163] *Id.* at 153–55. *See also* Ellen Nakashima, *Independent Review Board Says NSA Phone Data Program Is Illegal And Should End*, WASH. POST (Jan. 23, 2014), http://www.washingtonpost.com/world/national-security/independent-review-board-says-nsa-phone-data-program-is-illegal-and-should-end/2014/01/22/4cebd470-83dd-11e3-bbe5-6a2a3141e3a9_story.html, *archived at* http://perma.cc/7HNJ-4ADP (noting that claim had been made by officials "from Obama on down").

report went further than that of the President's Review Group, a separate panel of prominent individuals that the President had named to review surveillance programs; the Group had left open the possibility that bulk phone record collection could continue if a private organization maintained the records.[164]

The report attracted significant media and congressional attention: The *Washington Post* called it "arguably the most extensive analysis to date of the program's statutory and constitutional underpinnings, as well as of its practical value."[165] The *New York Times* described the report as providing "what may be the most detailed critique" of the program's legality and as "likely to inject a significant new voice into the debate over surveillance."[166] The Board testified before congressional committees on its report and on legislative proposals to end bulk phone records collection.[167]

Two months after the report, the President announced substantial changes to the program, proposing that the government would no longer collect phone records in bulk but would obtain needed records through narrower court orders from the Foreign Intelligence Surveillance Court.[168] He called on Congress to adopt legislation to accomplish that goal.[169] Although the PCLOB report's impact cannot be isolated from other sources of pressure to change the program, it likely further pushed the administration to agree to change course.

The report, however, had not been unanimous: two members of the Board dissented from the report's most significant conclusions. Rachel Brand and Elisebeth Collins Cook, the two Republican members, each wrote

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[164] *See* PRESIDENT'S REVIEW GRP. ON INTELLIGENCE & COMMC'NS TECHS., *supra* note 32, at 2, 17.

[165] Nakashima, *supra* note 163.

[166] Charlie Savage, *Watchdog Report Says N.S.A. Program Is Illegal and Should End*, N.Y. TIMES (Jan. 23, 2014), http://www.nytimes.com/2014/01/23/us/politics/watchdog-report-says-nsa-program-is-illegal-and-should-end.html, *archived at* http://perma.cc/XLR4-QEWN.

[167] *See generally Examining Recommendations to Reform FISA Authorities: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 49–71 (2014) (statement of David Medine, Chair, Privacy & Civil Liberties Oversight Bd.); Press Release, Sen. Patrick Leahy, Privacy and Civil Liberties Oversight Board To Appear Before SJC Next Month (Jan. 29, 2014), *available at* http://www.leahy.senate.gov/press/privacy-and-civil-liberties-oversight-board-to-appear-before-sjc-next-month, *archived at* http://perma.cc/H2EV-6655.

[168] Press Release, White House Office Press Secretary, Fact Sheet: The Administration's Proposal for Ending the Section 215 Bulk Telephony Metadata Program (Mar. 27, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m, *archived at* http://perma.cc/Q9JS-B43B.

[169] Congress adjourned in 2014 without adopting surveillance reform. *See* Chris Strohm, *Senate Blocks Vote on Curbing NSA's Bulk Data Collection Program*, BLOOMBERG NEWS (Nov. 18, 2014), http://www.bloomberg.com/politics/articles/2014-11-19/senate-blocks-vote-on-curbing-nsas-bulk-data-collection-program, *archived at* http://perma.cc/8STK-WSEW. As of March 2015, the outcome of congressional efforts to reform surveillance authorities, in connection with a June 2015 deadline to renew an expiring provision of the Patriot Act, was uncertain. *See, e.g.*, Tom Risen, *Would NSA Data Surveillance End with Patriot Act?*, U.S. NEWS & WORLD REP. (Mar. 25, 2015, 4:38 PM), http://www.usnews.com/news/articles/2015/03/25/would-nsa-data-surveillance-end-with-patriot-act, *archived at* http://perma.cc/FH9X-ZLW9.

a statement disagreeing with the conclusion that the program was not legally authorized, objecting to the majority's decision to analyze its legality, and supporting the program's national security value.[170]

Six months later, the Board released a second report on the other classified NSA program that Snowden's disclosures had addressed: the NSA's interception of the *content* of phone calls and e-mails under the 2008 FISA Amendments Act, which authorizes surveillance where the target is a non-U.S. person "reasonably believed to be located outside the United States."[171] Like the first report, this review presented a comprehensive narrative on the program's operations and history, drawing on and making public significant new information, including previously classified material.[172] But this time, the Board unanimously found that the program was authorized by statute, "valuable and effective," and subject to extensive oversight, although it further concluded that "certain aspects" raised privacy concerns.[173]

The fact that five Board members agreed on the program's efficacy, despite splitting on that question in the first review, gave that conclusion singular weight. Yet on other key questions, the Board seems to have obtained unanimity only by narrowly defining or dodging the issues at stake. For instance, the report concluded that the "core" of the surveillance program was constitutionally reasonable under the Fourth Amendment, but that other aspects "push the entire program close to the line of constitutional reasonableness."[174] Those other aspects, however, included some fundamental issues, such as the scope of collection of U.S. persons' communications under the program, which the Board said could not be fully assessed because of a "present lack of knowledge."[175] Suggesting that the scope of such collection was "likely significant," two members of the Board wrote separately to recommend purging NSA databases of Americans' communications that lacked foreign intelligence value.[176] In addition, the report dodged the question of privacy impacts on non-U.S. persons, noting that a U.S.-ratified international covenant had recognized privacy as a human right, but deferring

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[170] PCLOB PHONE REPORT, *supra* note 156, at 209–10, 212 (separate statement of Rachel Brand); *id.* at 214–15, 217 (separate statement of Elisebeth Collins Cook).

[171] *See* PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 5 (2014) [hereinafter PCLOB § 702 REPORT], *available at* https://www.pclob.gov/library/702-Report.pdf, *archived at* https://perma.cc/7CFR-4SAV. In the intelligence context, "U.S. persons" refers to U.S. citizens, U.S. lawful permanent residents, corporations incorporated in the United States, and unincorporated associations with a substantial number of U.S. citizens or permanent residents. *See, e.g.*, 50 U.S.C. § 1801(i) (2012).

[172] According to Medine, the Board's requests to intelligence agencies to declassify information led to the disclosure of over 100 new facts. *See Privacy & Civil Liberties Oversight Board Hearing: Government Surveillance and Privacy*, C-SPAN (July 2, 2014), http://www.c-span.org/video/?320264-1/government-surveillance-privacy, *archived at* http://perma.cc/XS6E-N4UP (statement of Medine at 0:04:53).

[173] PCLOB § 702 REPORT, *supra* note 171, at 2.

[174] *Id.* at 88.

[175] *Id.* at 116.

[176] *Id.* at 151 (separate statement of Chair David Medine and Member Patricia Wald).

further analysis.[177] Civil liberties groups applauded the report's contribution to transparency but found its recommendations too minimal to protect privacy.[178]

In both reviews, the most significant disagreements on liberty-security questions tracked partisan lines. Brand and Cook, the two Board members nominated at the request of congressional Republicans, staunchly defended the security agencies against claims of illegality and privacy infringement. Even though the second report had largely endorsed the surveillance program, for instance, the two members wrote an additional statement to underscore its "bottom-line conclusion" that the program was legal and an "extremely valuable and effective intelligence tool."[179] In a public hearing adopting that report, Cook further stressed that the Board offered only a few "targeted and focused recommendations for relatively slight changes at the margins of the program."[180] The disagreement extended not only to conclusions, but to the Board's overall focus: Cook, for instance, believed that the Board had emphasized oversight at the expense of collaboratively building relationships with national security agencies.[181]

The two Republican members' defense of the security agencies aligned with their professional backgrounds: both had served in the Bush Administration DOJ in roles that involved expanding counterterrorism power. Brand had worked with Congress to reauthorize expiring provisions of the Patriot Act and had pushed to expand the FBI's subpoena powers.[182] Cook had spearheaded loosening Attorney General guidelines to permit expanded use of investigative tools at early stages of national security investigations.[183]

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[177] *Id.* at 98, 100 (noting that the Board would consider international privacy implications in a separate review process ordered by Presidential Directive PPD-28).

[178] *See, e.g.*, Cindy Cohn, *Flawed Oversight Board Report Endorses General Warrants*, ELECTRONIC FRONTIER FOUNDATION BLOG (July 1, 2014), http://www.eff.org/deeplinks/2014/07/flawed-oversight-board-report-endorses-general-warrants, *archived at* http://perma.cc/HTQ5-LWE9; Neema Singh Guliani, *Government Privacy Panel: One Step Behind Congress, the Courts, and the American People*, ACLU BLOG (July 3, 2014, 12:00 AM), https://www.aclu.org/blog/national-security/pclob-one-step-behind-congress-courts-and-american-people, *archived at* http://perma.cc/ZN59-T2VH.

[179] PCLOB § 702 REPORT, *supra* note 171, at 161 (separate statement of Members Rachel Brand and Elisebeth Collins Cook).

[180] *Privacy & Civil Liberties Oversight Board Hearing: Government Surveillance and Privacy*, *supra* note 172 (statement of Cook at 0:11:40).

[181] *See* Interview with Elisebeth Collins Cook, *supra* note 140.

[182] *Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention of Terrorists: Hearing Before the Subcomm. on Terrorism, Tech., and Homeland Sec. of the S. Comm. on the Judiciary*, 108th Cong. 5–7 (2004) (statement of Rachel Brand, Principal Dep. Asst. U.S. Att'y Gen., Office of Legal Policy, U.S. Dep't of Justice); Rachel Brand, *Ask the White House*, PRES. GEORGE W. BUSH WHITE HOUSE ARCHIVES (Mar. 9, 2006), http://georgewbush-whitehouse.archives.gov/ask/20060309.html, *archived at* http://perma.cc/VU4W-Y6GJ.

[183] *See Attorney General Guidelines for FBI Criminal Investigations, National Security Investigations, and the Collection of Foreign Intelligence: Hearing Before S. Select Comm. on Intelligence*, 110th Cong. 6–7, 9–15 (2008) (statement of Elisebeth Collins Cook, Asst. Att'y Gen., Office of Legal Policy, U.S. Dep't of Justice, and joint written statement of Collins Cook & Valerie Caproni, Gen. Counsel, Fed. Bureau of Investigation); Letter and Completed Senate Judiciary Committee Questionnaire from Elisebeth Collins Cook, Nominee to Privacy & Civil

Those backgrounds contrasted sharply with, say, that of Jim Dempsey, a member who came from a nonprofit privacy advocacy background.[184] Although the Board did not appear racked by overtly partisan hostility,[185] it did not manage to surmount ideological division on fundamental liberty-security questions. These divisions made clear that changes in membership could easily lead to a very different role for the Board.

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These accounts suggest that rights-oversight institutions face substantial challenges in shaping national security policy to better protect rights. Occasionally, they manage to do so: DOJ IG's investigation prompted the Department to end the use of "exigent letters" to circumvent the law, while PCLOB's report on phone records collection likely helped push the President to announce major reforms. Yet they often fail: few IGs display as strong an interest in individual rights as DOJ IG, for instance, and CRCL frequently loses out to law enforcement interests within DHS. What makes the difference? The case studies indicate a few, necessarily provisional, suggestions.

As an initial matter, the individuals leading rights-oversight institutions appear to matter significantly to their direction and effectiveness. One factor is commitment to rights. Leaders influence how much attention an institution with a broad mandate accords to questions of rights in the first place. Glenn Fine's leadership, for instance, seems critical to explaining why the DOJ IG Office issued systematic reviews on liberty-security issues during the first post-9/11 decade. Moreover, those who lead an institution strongly influence, if not determine, how far an institution will go in advocating reform: The split among PCLOB's members suggests that changes in leadership composition will dramatically alter conclusions.[186]

Another factor is the credibility of leadership: successive leaders of CRCL may have struggled partly because they lacked national security credentials. Of course, identifying leaders who both demonstrate a commitment to rights and enjoy credibility on national security is not easy, even assuming that appointing officials are sufficiently interested in seeking the combination. Where institutions seek to bring together these qualities

Liberties Oversight Bd., to Sen. Patrick Leahy 10 (Jan. 16, 2014), *available at* http://www.judiciary.senate.gov/imo/media/doc/ElisebethCook-PublicQuestionnaire.pdf, *archived at* http://perma.cc/4PAD-U8BR.

[184] *See James X. Dempsey*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., https://www.pclob.gov/about-us/board/dempsey.html (last visited Mar. 7, 2015), *archived at* https://perma.cc/AE2U-QA3S.

[185] Elisebeth Collins Cook, for instance, believes the members have "strong respect" for each other and work in "good faith." Interview with Elisebeth Collins Cook, *supra* note 140.

[186] Even with respect to multimember independent commissions intended to reflect bipartisan views, presidents generally obtain majority representation of their political party fairly soon after their terms begin. *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 469–70 (2008).

through multimember structures, they invite conflict: PCLOB has individuals with differing professional backgrounds and reputations on liberty and security, for instance, but these members often fracture in their views on resolving the "balance." In addition, the above accounts suggest a certain path-dependence. Leaders of institutions with strong existing reputations have an easier path to influence than those compelled to build respect from the ground up. Fine benefited from an IG Office already known for its hard-hitting investigations; Schlanger inherited an office frequently dismissed as ineffective.

But leadership is only part of the story. The case studies also suggest that leaders work within institutional structures that profoundly shape their opportunities. This Article turns next to questions of institutional design.

III. The Possibilities and Limits of Rights Protection

Expanding outwards, this Part addresses the possibilities and limits of internal rights oversight. It draws on the three case studies presented above as well as additional examples to make three larger claims. First, I address how institutional design affects the ability of rights-oversight institutions to reform policy to protect rights. I argue that rights-oversight institutions fall into two categories — "internal advisors" and "external reviewers" — and that the latter group may have greater potential to meaningfully shift policy. Second, I turn from the relationship between institutional design and policy change to address a narrower question of core interest to legal scholars: can rights-oversight institutions constrain the Executive's national security conduct through influencing its interpretation of the law? I contend that, given these institutions' secondary status relative to the primary legal offices of the executive branch, they will only rarely be able to do so. Third, I show how rights-oversight institutions face pressures to shift their focus from rights to the security interests of executive agencies. This threat of "mission drift" challenges all of these bodies, but particularly internal advisors.

A. Institutional Design

Rights-oversight institutions differ in their locations, structures, substantive jurisdiction, and functions within the executive branch. Abstracting from this diversity, an important distinction runs between "internal advisors" and "external reviewers." Broadly speaking, internal advisors are integrated within national security agencies or the White House. They focus on advising on policy and preventing policy violations, and their primary audiences are executive officials. By contrast, external reviewers are more independent from security agencies and the White House. Their focus is reviewing programs and investigating abuses, and their primary audiences include Congress and the public.

While the distinctions between these categories are not binary, some institutions fall closer to one or the other end of the continuum. Among the three institutions discussed above, CRCL is an internal advisor, although not the purest example; DOJ IG is an external reviewer; and PCLOB is structured like an external reviewer but, rather unusually, mandated to act in both capacities. Table II encapsulates some of the key differences between internal advisors and external reviewers, which I further explain and qualify below.

Table II. Internal Advisors v. External Reviewers

	Internal Advisors	External Reviewers
Structure	More internal to agencies and/or the White House	More independent from agencies and/or the White House
Functions	Greater role in advising on policy formation	Greater role in reviewing policy implementation
Audiences	Primarily executive officials; secondarily Congress and the public	Executive officials, Congress, and the public
Approach to Rights Protection	"Rights by design"	"Rights by disruption"
Examples	1. Civil rights and civil liberties offices, such as DHS CRCL 2. Privacy and Civil Liberties Oversight Board (Internal role)	1. Presidentially appointed IGs, such as DOJ IG 2. Privacy and Civil Liberties Oversight Board (External role)

1. Internal Advisors v. External Reviewers.

Internal advisors differ from external reviewers in their structures, functions, and audiences. These classes of institutions reflect two different ideas about how to protect rights within the executive branch: "rights by design" and "rights by disruption."

(a) Structure: Integrated v. Independent.

First, at the level of design, internal advisors are relatively integrated within executive decisionmaking structures, such as national security agencies or the White House; external reviewers are more independent from them. Explicit mandates as well as unwritten conventions affect institutional

independence,[187] and, as in other contexts, formal independence does not guarantee functional independence.[188]

Table III compares CRCL, DOJ IG, and PCLOB along eight features commonly associated with independence. As a whole, the table shows that, along several dimensions, DOJ IG and PCLOB are designed to be relatively more independent than CRCL.

Table III. Institutional Independence[189]

	DHS Civil Rights Office (CRCL)	DOJ Inspector General (DOJ IG)	Privacy and Civil Liberties Oversight Board (PCLOB)
Stand-Alone Agency?	No, within DHS	No, within DOJ	Yes
Head(s) appointed by President?	Yes	Yes; to be appointed "without regard to political affiliation"	Yes; five-member Board appointed by President, with no more than three members from President's party; President must consult with congressional opposition before appointing members of opposing party
Senate confirmation?	No	Yes	Yes
Explicit statutory protection against removal of leaders except "for cause"?	No	No, but President must inform Congress of reasons thirty days prior to removing IG	No, but members appointed to serve six-year terms

[187] *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013).

[188] *See* Devins & Lewis, *supra* note 186, at 459–62; Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 274 (1993).

[189] Information within this table comes from the following statutes, except where otherwise stated: 42 U.S.C. § 2000ee-1 (2012); 6 U.S.C. §§ 113(d), 345 (2012); Inspector General Act of 1978, codified as amended at 5 U.S.C. app. at 11–58 (2012); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 801, 121 Stat. 266, 352–58 (2007).

Table III (cont'd)

Congressional Reporting Requirements?	Yes, must report quarterly on reviews conducted, advice provided, and complaints received	Yes, must report semiannually, including on recommendations not addressed by DOJ and on disagreements with "significant management decisions"; DOJ must also report within seven days of IG reporting particularly serious problems	Yes, must report semiannually, including on policies adopted against the advice of the Board and on any denied subpoena requests
Congressional Testimony Cleared by White House?	Yes[190]	No[191]	No[192]
Budget Submitted to White House Prior to Congressional Consideration?	Yes[193]	Yes, but President's budget submission to Congress must include statement if IG believes amount allocated would "substantially inhibit" performance	Yes[194]
Subpoena Powers?	No, but Department head required by statute to "ensure" access to Department records and personnel	Yes, over documents (not testimony) outside federal agencies; Department head required to furnish all Department records and materials	No, but may request a subpoena from the Attorney General for documents or testimony outside executive branch; authorized to access all records and testimony from federal agencies

[190] *See supra* notes 48–49 and accompanying text (describing CRCL clearance requirements).

[191] *See supra* note 95 and accompanying text.

[192] *See supra* note 137 and accompanying text.

[193] Schlanger, *Offices of Goodness*, *supra* note 4, at 110. According to Schlanger, an administration rule requires all executive officials to support publicly the President's budget, so that if an official "is asked in a congressional briefing whether the Office needs more money than the President's budget provides, the explicit public answer, at least, must be no." *Id.*

[194] *See supra* note 138 and accompanying text (describing PCLOB's unsuccessful negotiation for "budgetary bypass" rights).

(b) Functions: Advice v. Review.

Second, internal advisors are mandated to advise in the development of policy, while external reviewers are mandated to oversee policy implementation. Thus, internal advisors may address questions of rights ex ante, before the adoption of a policy, while external reviewers generally review a program after it has been in operation.

The distinction between the advice and review functions is a matter of emphasis, rather than a bright line. Thus, civil liberties offices such as CRCL are charged with assisting departments in "appropriately considering privacy and civil liberties concerns" when they propose, develop, or implement counterterrorism programs, as well as overseeing the implementation of those policies and programs.[195] Such an office might fulfill its advisory role by participating in working groups, commenting on proposals from other agency offices, advising department leadership directly, and providing training and technical assistance.[196] By contrast, IGs are tasked with conducting audits and investigations on agency programs and with keeping agencies and Congress informed about "problems and deficiencies" in program administration.[197] Although they offer recommendations for policy changes based on these reviews, their primary role is to audit and investigate, not to formulate policy in the first instance.

(c) Audiences: Internal v. External.

Internal advisors serve first and foremost the executive officials to whom they report, although some may also be required to report to Congress or the public. External reviewers count Congress and the public among their core audiences.

In the case of civil rights offices and IGs, both are required to report to Congress and the public, where possible, but there are important differences. First, the statutes suggest a difference in the relative importance of executive and external audiences. For example, while civil liberties officers are designated as the "principal advisor[s]" to their department heads on civil liberties issues, one of the three core statutory purposes of IGs is to keep department heads *and* Congress "fully . . . informed" about problems within agencies.[198] Second, as Table III sets out, civil liberties offices are not required to provide nearly the level of detail in reports to Congress as IGs. The latter must particularly indicate where they disagree with significant management decisions and where their recommendations have not been fulfilled, and must (via their agencies) notify Congress within seven days of

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[195] 42 U.S.C. § 2000ee (2012).
[196] *See* Schlanger, *Offices of Goodness*, *supra* note 4, at 94–95.
[197] 5 U.S.C. app. at 12, § 2(3) (2012).
[198] *Id.*

uncovering a particularly serious problem or flagrant violation.[199] Third, CRCL's communications to Congress are subject to Department and White House clearance requirements, unlike those of DOJ IG or PCLOB.[200] Moreover, other internal advisors, such as agency-established compliance offices, may have no requirement to report to Congress, further restricting their audiences to executive officials.

(d) Approach: Rights by Design and Rights by Disruption.

Internal advisors and external reviewers differ in design. But these differences also reflect two different ideas about how institutions within the Executive can best protect rights. Internal advisors reflect the facially appealing idea of integrating rights consciousness within decisionmaking structures — an idea I call "rights by design." The term borrows lexically from the "privacy by design" concept increasingly popular in the private sector, which involves embedding privacy considerations into the design and architecture of technology systems and business practices.[201] In recent years, some rights-oversight institutions have championed the value of "baking in" rights protections within agency systems[202] and even explicitly invoked privacy by design as a model.[203] Legal scholars have likewise advocated integrating rights consciousness within national security organizations by giving rights-focused offices a "seat at the table" in policy making.[204]

By contrast, external reviewers reflect the idea that delivering information from within executive agencies to external supporters can support threatened values.[205] External reviewers rely less on national security offi-

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[199] 5 U.S.C. app. at 17, § 5(d) (2012).

[200] *See supra* notes 48–49 and accompanying text.

[201] Dr. Ann Cavoukian, former Information and Privacy Commissioner of Ontario, Canada, has marketed the "privacy by design" concept since the late 1990s. *History*, PRIVACY BY DESIGN, http://www.privacybydesign.ca/index.php/about-pbd/applications (last visited Mar. 7, 2015), *archived at* http://perma.cc/4GHG-EXM9. *See also Seven Foundational Principles*, PRIVACY BY DESIGN, http://www.privacybydesign.ca/index.php/about-pbd/7-foundational-principles (last visited Mar. 7, 2015), *archived at* http://perma.cc/X6XF-DG9C (summarizing the principles of the "privacy by design" concept).

[202] *Inside NSA, Part II — Wherein We Interview the Agency's Chief of Compliance, John DeLong*, LAWFARE (Dec. 17, 2013, 7:00 AM), http://www.lawfareblog.com/2013/12/lawfare-podcast-episode-53-inside-nsa-part-ii-wherein-we-interview-the-agencys-chief-of-compliance-john-delong, *archived at* http://perma.cc/KH7K-U32Z (statement of DeLong at 0:39:00).

[203] Medine, *supra* note 159 (describing PCLOB's internal advisory role as akin to "privacy by design").

[204] *See* Berman, *supra* note 4, at 74–76 (advocating the inclusion of an entity focused on rights protection in FBI decisionmaking processes); *see also* LAURA A. DICKINSON, OUTSOURCING WAR & PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS 129 (2011) (recommending integration of compliance agents within military services organizations to inculcate public values and affect organizational behavior). *See generally* Schlanger, *Offices of Goodness*, *supra* note 4 (supporting but recognizing limitations of "offices of goodness").

[205] Political scientists have theorized at length about the means by which Congress can mitigate information asymmetries that result in principal-agent problems with respect to bureaucratic behavior. *See generally* Jeffrey S. Banks & Barry R. Weingast, *The Political Con-*

cials' willingness to protect rights on their own and more on mobilizing outside pressure for reform, whether that pressure stems from lawmakers, courts, interest groups, or other segments of the public. I call this approach "rights by disruption," as it turns on oversight institutions generating and publicizing the information to trigger external reaction and thereby "disrupt" national security officials' existing decisional incentives.[206]

2. Institutional Design and Policy Reform.

Rights by design has a natural appeal: it suggests the front-end, continuous, and comprehensive integration of rights and liberties concerns into national security decisionmaking. To state the obvious, achieving good policy in the first instance is obviously preferable to correcting mistakes once they occur. Despite the desirability of the objective, I suggest that in practice, external reviewers, pursuing rights by disruption, may be better equipped to prompt serious policy reform. In making this claim, I address only one of two essential goals for rights protection: setting policy to sufficiently protect rights and liberties, rather than ensuring compliance with that policy.[207] In addition, I make this claim provisionally: because each set of institutions faces key challenges, described below, comparing their potential requires difficult judgments on their relative ability to overcome these challenges. Furthermore, assessing efficacy, as a matter of fact rather than theory, is complicated by the fact that the successes (and failures) of rights by design are generally less observable than those of rights by disruption.[208] Without offering conclusive judgments, I question the intuitive appeal of

trol of Bureaucracies Under Asymmetric Information, 36 AM. J. POL. SCI. 509 (1992) (analyzing a model of interest group influence arising from a group's ability to monitor agency performance); Sean Gailmard & John W. Patty, *Stovepiping*, 25 J. OF THEORETICAL POLITICS 388 (2013) (discussing "stovepiping" as a means by which decisionmakers can obtain information directly from bureaucratic subordinates).

[206] Lexically, the phrase may call to mind the business theory of "disruptive innovation" championed by Clayton Christensen. *See generally* CLAYTON CHRISTENSEN, THE INNOVATOR'S DILEMMA (1999). But the only commonality between the theories is the notion that actors external to an industry or agency trigger the most substantial transformations.

[207] Legal scholars frequently distinguish between the two goals. *See, e.g.*, Schlanger, *Intelligence Legalism*, *supra* note 4, at 113–14; Christopher Sprigman, *The NSA's Culture of "Legal Compliance" Still Breaks the Law*, JUST SECURITY (Feb. 14, 2014, 9:28 AM), http://justsecurity.org/7485/nsas-culture-legal-compliance-breaks-law, *archived at* http://perma.cc/3A9H-D8YH.

[208] Internal advisors rely much more heavily on internal agency meetings, confidential memos, and other nonpublic channels of influence. The evidence of such policy inputs might not be obtainable even through Freedom of Information Act requests given the deliberative process privilege. *See* 5 U.S.C. § 552(b)(5) (2012). Not only are such contributions less public, but they may also involve a series of smaller inputs over time, rather than a single notable intervention (such as the publication of a report). As a result, even participants in such deliberations may not be able to identify the precise contributions of an internal advisor to policy development. Finally, internal advisors may be more limited than external reviewers for political and institutional reasons from fully taking credit for their work, perhaps especially when their work averts a policy misstep. Although interviews with the staff of these institutions can help evaluate their performance, they do not fully overcome the problem.

rights by design, and invite further assessment of these distinct approaches to internal rights protection.

(a) Prioritizing Security.

A growing body of legal scholarship elaborates on the challenges that government agencies face in achieving "secondary mandates" — a set of goals secondary to the primary mandate accorded by Congress or other "principals."[209] Several scholars have applied this literature to national security agencies, arguing that these agencies will generally prioritize their security missions at the expense of competing considerations.[210] But the dominance of security over rights is likely to be even stronger here than in other "secondary mandate" scenarios, for at least two reasons. First, the protection of individual rights often serves as a *constraint* on security agencies rather than as a secondary, affirmative mandate.[211] These agencies are generally charged with protecting security *without violating* rights, not protecting security *and protecting* rights. Thus, both the diagnosis of the problem facing national security agencies and an explanation of possible solutions diverges from other secondary mandate contexts.[212] Second, where security agencies prioritize their mission against competing considerations, they often do so in line with the perceived direction of the President or Members of Congress. Elsewhere, an agency's prioritization of a primary mission might be seen as a principal-agent problem, perhaps the result of agency dysfunction; here, it might result from zealous pursuit of the goals apparently prioritized by powerful principals. As many have argued, both Congress and the executive have strong incentives to weigh security interests over conflicting claims of rights deprivations.[213]

For national security agencies, the protection of security is not just a "primary" mandate but an overwhelming command. Numerous national security officials have written about the tremendous political and psychological pressures they face to prevent the "next" terrorist attack.[214] Intense

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[209] J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2221 (2005); *see, e.g.*, Rachel Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 307–09 (2013); Berman, *supra* note 4, at 66–67; Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 6–13 (2009); Schlanger, *Offices of Goodness*, *supra* note 4, at 103–05.

[210] *See, e.g.*, Berman, *supra* note 4, at 67.

[211] *Cf.* Schlanger, *Offices of Goodness*, *supra* note 4, at 103.

[212] For instance, certain proposed solutions to the problem of secondary mandates, such as splitting agencies so that a different agency is responsible for a primary and secondary goal, *see, e.g.*, Biber, *supra* note 209, at 33–35, are less applicable where the agency's efforts to realize the primary goal are the source of the threat to the secondary interest.

[213] *See, e.g.*, Aziz Huq, *Political Psychology of Counterterrorism*, 9 ANN. REV. L. & SOC. SCI. 1, 6 (2013); Aziz Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 921–24, 933–40 (2012).

[214] *E.g.*, JACK GOLDSMITH, THE TERROR PRESIDENCY 12, 71–75 (2009); JOHN RIZZO, COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA 187 (2014).

political recriminations follow any failure to prevent a terrorist incident. After the "underwear bomber" attempted to bring down a Detroit-bound airliner in 2009, political officials excoriated Obama Administration officials for not having previously placed the suspect on a terrorist watchlist.[215] After the Boston Marathon bombing, Members of Congress and the media widely blamed the FBI for failing to intercept one of the bombers, whom foreign intelligence agencies had earlier reported as a threat.[216] Nor does the intense focus on security occur only as the result of political firestorms from security failures. In addition to political demands for "total prevention," the daily experience of reading terrifying, voluminous threat assessments impels top officials to prioritize security.[217]

(b) Internal Advisors.

Given national security officials' singular focus on their security mandate, internal advisors are hard-pressed to make policy more rights-protective when senior officials otherwise lack the incentive to do so. Internal advisors might persuade national security officials to make relatively small policy adjustments or improve compliance with agreed-upon rules, but they are unlikely to persuade officials to enact substantial reforms where security and rights appear to conflict.

In the face of perceived conflicts between rights and security goals, internal advisors might seek to argue that the law requires a more rights-protective policy, so that the "balancing" is out of the Executive's hands. Legal constraints might indeed influence policy change, but as section III.B. argues, rights-oversight institutions will often be either redundant or ineffective in arguing the law, given their secondary position to the Executive's primary legal offices.

More often, internal advisors might seek to persuade executive officials that either the consequences of a policy on rights are greater or the security benefits of a program less than previously thought. Internal advisors might be able to raise the profile of existing rights concerns within an agency. Perhaps CRCL succeeded in doing so with respect to the nationality-based immigrant registration program that DHS ultimately suspended. In that case, however, DHS officials had already determined that new systems for tracking foreign nationals rendered the program obsolete.[218] In cases where there is a plausible national security argument for retaining a program or policy, political incentives for national security officials often strongly point

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[215] Philip Rucker & Michael D. Shear, *Political Attacks Over Christmas Day Airline Incident Heat Up*, WASH. POST (Dec. 31, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/12/30/AR2009123001231.html, *archived at* http://perma.cc/BD9J-XNDN.

[216] *See, e.g.*, Dalal, *supra* note 7, at 100–01.

[217] *See* GOLDSMITH, *supra* note 214, at 71–73; KAHN, *supra* note 59, at 185–87 (describing the impact on security officials from reading daily threat assessments).

[218] *See supra* notes 80–82 and accompanying text.

to erring on the side of security. Security officials frequently adopt or continue a program not out of lack of knowledge of its impact on rights, but because they have determined that the security (or political) benefits outweigh those costs.

Alternatively, internal advisors might bring to light new information questioning the security benefits of a program. To do so, they must have sufficient access to information, which may itself be a challenge, especially since these institutions cannot easily appeal outside their agencies if their access is restricted. In addition, evaluating security claims persuasively might require expertise and credibility in making security judgments, which some rights-oversight institutions lack. Both of these problems may help explain why CRCL did not push back against security claims in its impact assessments. But even if internal advisors have the requisite data and expertise, new information alone may not sway decisionmakers without public disclosure of that information and resulting political pressure to revisit liberty-security choices. For instance, where there is mixed information or there are opposing views within an agency on the efficacy of a program, and little public knowledge, security officials will often prefer to resolve the uncertainty in favor of security.

Where "win-win" solutions do not seem available, internal advisors will often be relegated to suggesting changes around the edges of policies — perhaps minor procedural reforms to improve documentation of how a power is used, rather than constriction of the power itself.[219] This dynamic is familiar from other contexts in which agency staff have striven to inject countervailing values into an agency focused on its core mission. Some scholars have argued, for instance, that environmental proponents within federal agencies have often been "relegated to tinkering at the margins of destructive projects by finding the few changes that would improve environmental quality without harming the underlying project goals."[220] Here, given the political dominance of "security," the risk that internal advisors would be relegated to making small adjustments at the margins of a policy is even more pronounced.[221]

Margo Schlanger, who headed CRCL, argues that reinforcement by Congress, the White House, other agencies, or advocacy groups can protect

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[219] Of course, the tendency of decisionmakers to favor process reforms in the high-risk context of national security, rather than reductions in the substantive powers of national security officials, is not unique to oversight institutions. *See* Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1028–31 (2008) (discussing the tendency of federal courts to resolve national security challenges on procedural grounds).

[220] Biber, *supra* note 209, at 38.

[221] I do not suggest that liberty and security are always at odds, such that an increase to one will only come at the expense of the other. *Cf.* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE 21–30 (2007) (presenting the "tradeoff" thesis). Some national security programs affecting rights may involve real tradeoffs, while others do not. For my argument, it is sufficient that national security officials *believe* that the security policies they have adopted are necessary for security reasons and cannot be made more liberty-protective without harming security interests.

advisory offices from impotence.[222] But Schlanger's account does not satisfactorily explain how advisory offices obtain leverage to promote reform in the first place, at least with regard to scenarios where rights and security appear to collide and where security officials are not already open to shifting course. Most crucially, where security officials are disinclined to accept their suggestions, internal advisors have limited ability to appeal outside the Executive.

To some extent, that limitation results from formal policy: for instance, clearance requirements may prevent an internal advisor from issuing certain reports or written testimony to Congress without approval from agency leadership, general counsel, or other agency offices.[223] In such cases, the office can hardly threaten to go public with a disagreement with senior leadership. Even in circumstances where formal policy does not require an internal advisor to clear its reports before release to Congress or the public, both structural constraints and pragmatic considerations limit the objections that can be voiced. For instance, if a civil liberties officer may be removed by the head of an agency, that design feature structures expectations about deference within the agency.

Moreover, the need for internal advisors to cultivate a reputation as "team players" creates pressure to soften disagreements. Internal advisors, lacking independent sources of authority, depend on the trust of agency leadership to maintain influence. They need that trust to access information, retain a "seat at the table" in agency deliberative processes, and convince leadership to adopt their recommendations. Internal advisors generate trust by positioning themselves as moderates who understand the security perspectives of their agencies; indeed, they win points by publicly defending their agencies against external charges of malfeasance or rights abuses.[224] Publicly embarrassing the agency, by contrast, invites exclusion from decisionmaking. That need for trust, no less than formal rules limiting independence, makes it difficult for such offices to call out an agency where it violates rights or resists reform.

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[222] *See generally* Schlanger, *Offices of Goodness*, *supra* note 4.

[223] *See, e.g.*, *supra* notes 48–49 and accompanying text.

[224] Indeed, civil rights offices have often publicly defended their agencies against external charges of rights violations. *See, e.g.*, Margo Schlanger, Letter to the Editor, *Homeland Security Dept., on Immigrant Detention*, N.Y. TIMES (Dec. 11, 2011), http://www.nytimes.com/2011/12/12/opinion/homeland-security-dept-on-immigrant-detention.html, *archived at* http://perma.cc/Y9DX-8ZXD (criticizing a *New York Times* editorial for "shortchang[ing] the important steps" DHS had taken to improve immigration detention). Outside DHS, Alexander W. Joel, the Civil Liberties Protection Officer of the Office of the Director of National Intelligence, publicly defended intelligence agencies after Snowden's revelations of secret surveillance programs. *See* Alexander W. Joel, Op-Ed., *The Job of Protecting Security and Privacy*, ST. PAUL PIONEER PRESS (Aug. 15, 2013), http://www.twincities.com/columnists/ci_23871491/alexander-w-joel-job-protecting-security-and-privacy, *archived at* http://perma.cc/3G6Z-Q84J; Alexander W. Joel, *The Truth About Executive Order 12333*, POLITICO (Aug. 18, 2014), http://www.politico.com/magazine/story/2014/08/the-truth-about-executive-order-12333-110121.html, *archived at* http://perma.cc/8XCH-VJZC.

Internal advisors might achieve some success in improving *compliance* with law or policy. Agencies do not benefit (and often suffer) from "rogue" violators, and agency heads may have sufficient incentive to prevent and curb violations of official rules. In addition, where official policy consists of open-textured standards, rather than clear rules, an internal advisor authorized to review implementation may serve an especially important role in shaping agency practice. CRCL's role in clearing DHS intelligence analyses suggests one example. But where policy reform — not compliance or implementation — is the goal, internal advisors must overcome security agencies' strong inclinations to prioritize security with little ability to generate and leverage external pressure.

(c) External Reviewers.

External reviewers operate against the same external political dynamics that make security so dominant in the first place, and those dynamics will sometimes be insuperable. In some cases, however, their ability to provide information to external allies — in Congress, courts, or interest groups — gives them an opportunity to shift the political and legal environment affecting national security decisionmakers. Crucially, external reviewers' reports do not undergo the executive clearance processes that might block internal advisors from uninhibited communication with Congress and the public, and other structural features make them less subservient to agency leadership. Their public reports can lead Congress to exercise "fire alarm" oversight over executive agencies.[225] They can also impel interest groups or motivated segments of the public to mobilize against policies and enable civil rights litigants to buttress their claims in court.

Several examples show "rights by disruption" in practice. First, DOJ IG's reviews on post-9/11 immigration detentions and "exigent letters," described in the case study above, exposed the mistreatment of individuals and the abuse of surveillance tools, respectively. These reports were remarkably transparent and comprehensive in scope and triggered significant congressional and public reaction that prompted the Executive to make policy changes and procedural reforms that it previously had little incentive to adopt.[226] Most significantly, a DOJ IG report led the FBI to stop issuing exigent letters, which the Bureau had used for several years to obtain phone companies' customer records under questionable legal premises.[227] Likewise, PCLOB's comprehensive public report on phone records collection,

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[225] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

[226] *See* Sinnar, *supra* note 4, at 1059–63.

[227] *Id.* at 1045–46; *see also* DOJ IG PHONE RECORDS REPORT, *supra* note 100, at 214. In a previous article, I noted that even this important policy change came with some key limitations: the FBI retained broad legal discretion to obtain phone records without a court order, especially because the agency and Congress refused the IG's invitation to further constrict the FBI's legal authority. Sinnar, *supra* note 4, at 1071. In several IG reviews I examined, the

described in the case study, likely added to pressure on President Obama to agree to reform the NSA program, despite his having publicly defended it for nine months.

In addition, external reviewers' reports have benefited litigants challenging national security practices in court. For instance, courts liberally cited DOJ IG's critiques of government terrorist watchlist processes in allowing constitutional due process challenges to those practices to proceed — and ultimately prevail — in court.[228] As a result of recent watershed decisions finding due process violations, the government agreed to devise a new procedure providing greater notice to individuals contesting their inclusion on the "No Fly List," a development it had long resisted.[229] Court challenges to a host of other counterterrorism practices — from the detention of immigrants after September 11 to the NSA call records program — have similarly relied heavily on external reviewers' reports to support their claims.[230]

To be sure, these interventions occurred at the back end; external reviewers are not well-positioned to avert policy missteps in the first instance. Nonetheless, compared to ex ante assessment, post hoc review enables reviewers to point to actual shortcomings, rather than the theoretical risks of an untested policy or program.

Three Challenges. These successes demonstrate the real opportunity for rights by disruption. The frequency of such successes, however, will be limited by three significant challenges. First, the extent of public concern for rights obviously limits the impact of external reviewers on policy change. Unlike internal advisors, external reviewers have opportunities to expose information that shifts public discourse. But revelations on a scale likely to trigger widespread public concern, like the Snowden disclosures or Abu Ghraib prisoner abuse scandal, do not occur frequently. Policies that significantly affect the rights of noncitizens or minority communities are not often salient to political majorities. Even then, rights by disruption may still succeed. In certain circumstances, external reviewers might move particular segments of society — *some* courts, *some* Members of Congress, and *some* segments of public opinion — enough to trigger change. An external reviewer's report might supply political cover for sympathetic but risk-averse lawmakers to press for reform. In addition, rights by disruption does not

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reviews led to greater reform of agency processes than to substantive constraints on future agency discretion. *Id.* at 1071–72.

[228] *See, e.g.*, Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 990 (9th Cir. 2012); Latif v. Holder, No. 3-10-CV-00750-BR, 2013 WL 4592515, at *12 (D. Or. Aug. 28, 2013). In 2014, both the *Latif* and *Ibrahim* courts found that existing administrative processes for contesting one's status on the "No Fly List" fell short of constitutional due process. *See* Latif v. Holder, 28 F. Supp. 3d 1134 (D. Or. 2014); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2014 WL 6609111 (N.D. Cal. Jan. 14, 2014).

[229] *See* Shirin Sinnar, *Towards a Fairer Terrorist Watchlist*, 40 ADMIN. & REG. L. NEWS, Winter 2015, at 4, 4–5.

[230] *See, e.g.*, Sinnar, *supra* note 4, at 1060–61; Opening Brief for Appellant at 7–8, 22–24, 29–34, Smith v. Obama, No. 14-35555 (9th Cir. Sept. 2, 2014).

rely only on majoritarian political channels of influence, but can also increase the stringency of judicial review. When external reviewers' reports help civil rights plaintiffs keep their court challenges alive, they can influence rights protection even where political majorities are unsympathetic.

A second challenge for external reviewers is that independent institutions within the Executive are politically difficult to establish and sustain. The Executive generally prefers institutions that are fully under its control, not those that report to Congress and the public.[231] By contrast, Congress may support the creation of independent agencies to monitor and restrain the Executive, particularly where a different political party controls the White House.[232] Even so, as the multiple incarnations and long dormancy of PCLOB suggest, the establishment and operationalization of independent institutions encounters significant resistance.

Even if such institutions are established, the Executive has strong incentives to compromise their independence. The President might lag in filling positions or appoint loyalists not likely to contest her decisions. IG offices and PCLOB alike have suffered long vacancies due to delays in presidential nominations (and sometimes additional delays in Senate confirmations).[233] Unlike other administrative vacancies, which may hinder the President's ability to accomplish her agenda, vacancies in oversight positions often *serve* presidential interests by delaying potentially critical review. When they do make appointments, Presidents obviously benefit from naming individuals who are personally loyal or politically inclined to support their agendas.[234] Moreover, even where institutions have robust formal protections for independence, agencies can and do undermine them: for instance, IGs have frequently had to fight to obtain information that they believe they are legally entitled to access.[235] DOJ IG's recent protests over delayed access to information, described in the case study, illustrate this challenge, and other agencies' IGs may be even less independent.

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[231] DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 91 (2003). Of course, in some circumstances, Presidents might support more independent institutions to bolster their own credibility and thereby enable greater executive power. *See* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 894 (2007).

[232] *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 151–54 (1999).

[233] *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 956 (2009) (noting lengthy vacancies in statutory IG positions).

[234] *See* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008) (arguing that, even without Presidents ordering agencies to adopt White House views, agencies are increasingly likely to do so because of Presidents' "novel and aggressive use of their powers of appointment to remake agencies in their own image").

[235] *See, e.g.*, Letter from Michael Carroll, Acting Agency for Int'l Dev. Inspector Gen., to Rep. Darrell Issa et al. (Aug. 5, 2014), *available at* http://www.grassley.senate.gov/sites/default/files/issues/upload/IG%20Access%20Letter%20to%20Congress%2008-05-2014.pdf, *archived at* http://perma.cc/S7QR-CRQH (reporting concerns of forty-seven IGs regarding several IGs' impeded access to records).

A third, and related, challenge for external reviewers is that the need for secrecy, real or perceived, with respect to certain national security programs limits the possibility of disclosure. Rights by disruption depends on the ability of institutions to obtain and publicize information. Even in the national security context, a great deal of information can be made public without disclosing appropriately classified or sensitive information: DOJ IG's reviews and PCLOB's phone records report illustrate this.[236] But that is obviously not always the case, particularly in the intelligence context. Although external reviewers can push back against overclassification, they cannot publicly disclose classified information. In addition, disclosure of IG or PCLOB reports may sometimes be limited to the agencies, the White House, and the relevant congressional committees.[237] In such cases, the opportunity for rights by disruption is severely qualified; while disclosure to executive officials or to Members of Congress may have some impact,[238] those officials' incentives and opportunities to push back may be limited without the realistic prospect of public attention.

These are formidable obstacles. External reviewers have a plausible mechanism by which to improve rights protection, more so than internal advisors, and have achieved concrete successes. Yet the challenges they face show the limitations of internal rights oversight on the whole.

(d) Design or Choice?

Although structure predisposes institutions to operate as internal advisors or external reviewers, rights-oversight institutions have some choice in where to position themselves along the spectrum. For instance, privacy and civil liberties offices can choose to be more or less transparent in their required reports to Congress. CRCL, while an internal advisor, has been less insular than many other civil liberties offices, providing greater detail in its statutorily required reports to Congress than other civil liberties offices.[239] At the same time, it asserted less independence than the separate DHS Privacy Office, which for a time positioned itself closer to the "external re-

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[236] The latter report, of course, benefited from the fact that Snowden had already revealed so much and prompted the Obama Administration to declassify other documents.

[237] For example, by law, the CIA IG is required to provide classified semiannual reports only to Congress. *See* 50 U.S.C.A. § 3517(d)(1) (West 2014).

[238] For instance, making available to White House or Justice Department officials an intelligence agency IG's report highlighting a previously unknown problem can trigger demands for change from executive officials outside the agency itself. *See* Sinnar, *supra* note 4, at 1060 (describing the impact of the CIA IG's torture report on CIA interrogation practices, despite the lack of contemporaneous public or congressional disclosure). Importantly, even though public disclosure of information was limited, the CIA IG had significant statutory protections for independence and wide information-gathering powers that distinguish the institution from internal advisors. *See supra* notes 91–92 and accompanying text.

[239] *See* PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., SEMI-ANNUAL REPORT MAR. 2013 – SEPT. 2013 at 13 (2013), *available at* https://www.pclob.gov/library/Semi_Annual_Report-Nov2013-Congress.pdf, *archived at* https://perma.cc/PW38-GCCU (critiquing most civil liberties offices' reports as uninformative).

viewer" side of the divide: under one leader, that office asserted a right to report directly to Congress without agency preclearance, despite the fact that its statute at the time did not clearly authorize it to do so.[240] A similar spectrum applies to IGs: while DOJ IG views its role as staunchly independent and even adversarial, other IGs position themselves as trusted advisors to agency heads.[241] Those who take the latter approach would view "disruption" as fundamentally contrary to their role. Institutions have some choice, then, in where to position themselves, but that choice is limited by design; institutions that assert themselves beyond what their mandates allow, for instance, may eventually be constrained even if they prevail for a time.

For PCLOB, however, the question of positioning is much more fraught. Internal advisors and external reviewers seek authority from such different sources — cultivating trust versus leveraging external support — that pursuing both roles *simultaneously* seems destined to fail. Surprisingly, with little recognition of the tension in roles created, Congress mandated that PCLOB both report publicly and robustly on existing programs and that it advise security agencies internally on the ongoing development and implementation of programs. Engaging in rights by disruption, however, threatens the trust required for rights by design. In its very first report, PCLOB publicly discredited the very agencies that it also hoped would accept its advice. After that report, Board Chair Medine voiced concern that intelligence agencies would be "put off" and become unreceptive to its suggestions[242] — a concern that perhaps even influenced the tone of the Board's second, far less critical, report.

Even if the Board's first report had not been so critical, the tension between the internal advisor and external reviewer roles appears to be both fundamental and little recognized. For instance, to the extent the Board broadly interprets its mandate to notify Congress whenever the Executive implements a proposal against its advice,[243] it will make agencies reluctant to receive informal advice. Or to the extent that PCLOB endorses certain programs in its advisory role, it may face a conflict of interest in later objec-

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[240] According to Kenneth Bamberger and Deirdre Mulligan, one DHS Privacy Officer pushed for a "forward-leaning interpretation of her office's independence" that excluded prior review of reports by the Secretary or Department before transmission to Congress. Bamberger & Mulligan, *supra* note 4, at 97–98. In 2007, Congress required direct reporting by the DHS Privacy Office without "any prior comment or amendment" by DHS or the White House Office of Management and Budget. *See* 6 U.S.C. § 142(e)(a)(1) (2012). The Bush Administration OLC, however, issued a formal opinion objecting to the statutory provision on constitutional grounds. Constitutionality of Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Comm'n Act of 2007, 32 Op. O.L.C., 2008 WL 4753234, at *1 (Jan. 29, 2008). The Obama Administration's resolution of that conflict has not been made public.

[241] For instance, former Defense Department IG Joseph Schmitz characterized the role as "an independent extension of the eyes, ears, and conscience of my commander." JOSEPH E. SCHMITZ, THE INSPECTOR GENERAL HANDBOOK: FRAUD, WASTE, ABUSE AND OTHER CONSTITUTIONAL "ENEMIES, FOREIGN AND DOMESTIC" 6 (2013).

[242] Interview with David Medine, *supra* note 137.

[243] *See* 42 U.S.C. § 2000ee(e)(2)(D) (2012).

tively reviewing the implementation of the same programs.[244] Indeed, at least one Board member believes that harmonizing the agency's advice and oversight roles will present its greatest challenge.[245] Ultimately, the Board, like other rights-oversight institutions that have features of both internal advisors and external reviewers, may have to choose which role to emphasize rather than expecting to succeed at both.

B. Executive Legal Interpretation

The rise of rights oversight within the national security executive prompts a set of questions of particular interest to legal scholars: What role do lawyers and law play in these institutions? Specifically, can these institutions push executive *legal interpretation* in a more rights-protective direction? This section draws on the three case studies and further examples to argue that rights-oversight institutions face serious limitations in shaping or contesting executive legal interpretation.

In homing in on "executive legal interpretation," this section addresses a narrower question than the overall capacity of internal rights oversight to protect rights. Not all questions facing rights-oversight institutions involve disagreements over legal interpretation. Some disputes center on the "facts" rather than the "law": an institution might agree with the Executive on the content of a law but dispute whether the facts in a given case amount to a violation. Other disagreements are over "policy" rather than "law": a rights-oversight institution might agree on the content of the law, but disagree as to whether a given program sufficiently protects rights. Only in a third set of cases — the focus here — is *legal* interpretation truly at issue: where an institution disagrees with an executive national security action *and* with the legal argument that the Executive has offered to justify it.

Since the infamous "torture memos" episode, legal scholarship has focused extensively on whether executive lawyers can constrain the Executive from exceeding its authority and violating rights.[246] In the most pointed re-

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[244] *See* Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 CARDOZO L. REV. 53, 80 (2007) ("An oversight body that has approved or not objected to a problematic national security action is not in a good position to review unanticipated harms caused by that action.").

[245] Interview with Elisebeth Collins Cook, *supra* note 140.

[246] *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 87–116 (2010) (discussing OLC and White House Counsel); DICKINSON, *supra* note 204, at 144–88 (discussing military lawyers); GOLDSMITH, *supra* note 90, at 122–60 (same); Trevor Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1688–1742 (2011) (reviewing ACKERMAN, *supra*). For other scholarship on OLC and the capacity of legal counsel to restrain the Executive, see GOLDSMITH, *supra* note 214; Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011); Fontana, *supra* note 5; Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Harold Hongju Koh, *The State Department Legal Adviser's Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747 (2012); Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62 (2011) [hereinafter Morrison, *Libya*]; Trevor W. Morri-

cent debate, Bruce Ackerman argued that executive lawyers, such as those in OLC, lack the independence or incentives to restrain the President from expansively interpreting his authority.[247] Ackerman argued that if it appears that OLC might push back against a desired action, the President can bypass the Office altogether in favor of more reliable assent from White House Counsel.[248] Trevor Morrison countered that OLC's norms of independence not only enable it to resist executive overreach but also make the Office valuable to the President: only the vote of an office that can say no has any power to legitimize.[249]

For the many legal scholars who deplored the willingness of executive lawyers to sign off on torture, NSA surveillance, and other dubious practices, the question might be whether rights-oversight institutions, which are often led and staffed by lawyers, might do better. Some have argued that executive lawyers outside OLC are less likely to ratify presidential overreach because they have incentives to outlast particular administrations.[250] Moreover, rights-oversight institutions display several factors that might incline them towards greater independence in their legal views: their mandates frequently centralize individual rights more so than those of primary legal offices; some are charged explicitly with reviewing the legality of executive conduct; and some are less likely to view their role as facilitating the interests of agency leadership.

Despite these features, these institutions are hard-pressed to make executive legal interpretation more protective of rights, because they lack either the independence or stature to prevail over the primary legal offices of the executive branch.

1. Civil Liberties Offices.

The experience of CRCL suggests how difficult it is for an internal civil liberties office to influence agency legal interpretation, despite its mandate to advise the agency on the protection of rights and liberties. The Office's weak stature, relative to General Counsel, and its lack of independence largely neutralize its capacity to do so. To be clear, a civil liberties office and general counsel are not always opposed; in fact, they may share a position in conflict with other operational components of the department. A civil

son, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); A. John Radsan, *Sed Quis Custodiet Ipsos Custodes: The CIA's Office of General Counsel?*, 2 J. NAT'L SEC. L. & POL'Y 201 (2008); and Norman Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931 (2008).

[247] *See, e.g.*, ACKERMAN, *supra* note 246, at 95–109.

[248] *Id.* at 114–15.

[249] *See* Morrison, *Constitutional Alarmism*, *supra* note 246, at 1722–23.

[250] Fontana, *supra* note 5, at 21–23.

liberties officer's advocacy may also strengthen a general counsel's willingness or ability to "say no." But where a civil liberties office believes the law constrains agency action more so than general counsel, it may have little influence to persuade leadership to adopt its view.

According to former CRCL staff who served during the first Obama Administration, the Office almost never asked the Secretary to choose its view over that of General Counsel.[251] Margo Schlanger, who led CRCL during that time, has argued that framing a policy choice as a legal question "can set up the losing side of an intra-agency conflict" given the general counsel's lead role on legal questions.[252] Even if another Officer might have been more inclined to raise legal disagreements up to the DHS Secretary, Schlanger raises an important point: given the traditional role and stature of General Counsel, only a rare Officer would have the "ear of the Secretary" enough to trump General Counsel's reading of the law.

Moreover, as discussed above, CRCL is limited in its ability to broadcast disagreements on the law directly to Congress or the public without Department clearance, largely eliminating any external channel for voicing dissent. In its early years, DHS actually structured the Office to rule out the possibility of legal dissent: CRCL's chief counsel in charge of policy advice reported to the Agency's General Counsel.[253] Although that reporting relationship no longer exists, DHS's Office of General Counsel maintains significant influence over the Office's work. The General Counsel's Office reviews the Civil Rights Office's draft impact assessments[254] and its recommendations for resolving individual complaints.[255] Six attorneys in the General Counsel's Office work principally or substantially on CRCL matters; three of those attorneys are physically stationed in CRCL offices.[256] Department counsel can thus influence both the content of CRCL analysis and delay or prevent the articulation of a different legal position outside the Department.

2. Inspectors General.

Compared to civil rights offices, IGs' greater independence enables them to assume a more critical posture on legal questions. IGs are statutorily guaranteed access to independent legal advice and most have had independent counsel for years.[257] Obtaining independent advice, of course, is

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[251] Jan. 24 CRCL Phone Interview, *supra* note 63; Feb. 5 CRCL Phone Interview, *supra* note 63.

[252] Schlanger, *Offices of Goodness*, *supra* note 4, at 111.

[253] *See supra* note 54 and accompanying text.

[254] CRCL Responses to Written Questions, *supra* note 48, at 2.

[255] Feb. 5 CRCL Phone Interview, *supra* note 63.

[256] CRCL Responses to Written Questions, *supra* note 48, at 2.

[257] 5 U.S.C. app. at 13, § 3(g) (2012). The Department of Defense IG was the last presidentially appointed IG to acquire independent counsel. *See* SCHMITZ, *supra* note 241, at 44–48; *see also* PROJECT ON GOV'T OVERSIGHT, INSPECTORS GENERAL: MANY LACK ESSEN-

different from asserting legal positions at odds with their agencies, especially on matters that do not directly concern the IG's own powers. In practice, IGs typically view their role as focused on factual investigations, and some even believe it inappropriate to challenge general counsel or OLC on legal questions.

On one exceptional occasion, DOJ IG used its independence to publicly challenge the FBI's legal interpretation of its authority. In condemning the FBI's use of "exigent letters," DOJ IG openly rejected the FBI General Counsel's argument that a provision of the Electronic Communications Privacy Act justified the practice.[258] In fact, even after the Department terminated the practice, the IG further warned Congress that the FBI might assert a new statutory argument to justify future requests to phone companies for customer records.[259] DOJ IG issued this warning in a public report despite the fact that OLC had already considered the question and largely supported the FBI's position.[260]

As striking as this challenge to the FBI General Counsel and OLC was, it was also limited and exceptional. It was limited in that DOJ IG had opened its inquiry to conduct a more conventional, and statutorily required, fact-based assessment of the agency's compliance with the law. When the FBI offered legal arguments to excuse conduct that the IG had uncovered — and which the General Counsel had not authorized ex ante — the IG rebutted those arguments. Yet this public rebuttal was exceptional even for DOJ IG: according to DOJ IG lawyers, the Office rarely questions the Department's legal positions in a public report.[261] Perhaps the only other public report in which DOJ IG discredited the Department's legal reasoning on a national security issue was a report on NSA surveillance activities issued five years after that reasoning had been disavowed.[262] More typically, DOJ IG steered clear of conflicts with the Department's legal position, especially where the Department faced litigation. For instance, in several reports, DOJ IG criticized the procedures used to add individuals to terrorist watchlists, including whether they sufficiently protected innocent individuals, without commenting on constitutional due process questions before the courts.[263]

TIAL TOOLS FOR INDEPENDENCE 22–23 (2008), *available at* http://pogoarchives.org/m/go/ig/report-20080226.pdf, *archived at* http://perma.cc/P2MF-5N4H.

[258] DOJ IG NSL 2007 REPORT, *supra* note 100, at 96–97.

[259] DOJ IG PHONE RECORDS REPORT, *supra* note 100, at 263–68.

[260] *See id.* at 264–65.

[261] Telephone Interview with William R. Blier, *supra* note 95.

[262] JOINT INSPECTOR GENS., REPORT NO. 2009-0013-AS: UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAMS 30–31 (2009), *available at* http://fas.org/irp/eprint/psp.pdf, *archived at* http://perma.cc/R6QM-3R6N (reporting the DOJ Inspector General's conclusion that OLC legal analysis of the President's Surveillance Program was "at a minimum . . . factually flawed"). That report appears to have largely focused on criticizing the process by which OLC's legal assessment was conducted, rather than the strength of the legal analysis itself. *See id.* at 10–14.

[263] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES iv–vi (2009), *available at* http://www.justice.gov/oig/reports/FBI/a0925/final.pdf, *archived at* http://perma.cc/SCQ3-

Although DOJ IG did not regularly challenge the law, its willingness to do so went beyond that of many other national security IGs.[264] In the event of a disagreement with agency counsel, some IGs defer to the general counsel's interpretation on the view that the latter ultimately decide questions of law for the agency.[265] Other IGs may ask OLC to resolve significant disagreements,[266] but view this as a "nuclear option" to be used sparingly.[267] Making public a legal disagreement after OLC has weighed in against the IG's position, as DOJ IG did in its exigent letters report, is even more rare — a gutsy move perhaps linked to the unusually dominant role of lawyers in DOJ IG leadership and investigative structure.[268]

QV8J; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE U.S. DEPARTMENT OF JUSTICE TERRORIST WATCHLIST NOMINATION PROCESSES 21–23 (2008), *available at* http://www.justice.gov/oig/reports/plus/a0816/final.pdf, *archived at* http://perma.cc/LY3N-4RAC; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER i–xxi (2007), *available at* http://www.justice.gov/oig/reports/FBI/a0741/final.pdf, *archived at* http://perma.cc/PYF7-NZ6W; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE TERRORIST SCREENING CENTER 48–67 (2005), *available at* http://www.justice.gov/oig/reports/FBI/a0527/final.pdf, *archived at* http://perma.cc/PL6W-ZGY3. For court cases raising procedural due process challenges to watchlists, see, e.g., *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012); *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250 (9th Cir. 2012); and *Mohamed v. Holder*, No. 1-11-CV-000500-AJT/TRJ, 2011 WL 3820711 (E.D. Va. Aug. 26, 2011).

[264] Indeed, the White House itself has pushed back against the prospect of IGs resisting the legal conclusions of agency counsel. In a signing statement issued after approving the Inspector General Reform Act of 2008, which guaranteed independent counsel for IGs, *see* 5 U.S.C. app. at 13, § 3(g) (2012), President Bush insisted that "within each agency, the determinations of the law remain ultimately the responsibility of the chief legal officer and the head of each agency." Statement on Signing the Inspector General Reform Act of 2008, 44 WEEKLY COMP. PRES. DOC. 1346 (Oct. 14, 2008). In response, a bipartisan group of Senators wrote to the President to defend the right of IGs to publicize legal disagreements with agency counsel. Letter from Charles E. Grassley, U.S. Senator, et al., to Pres. George W. Bush (Oct. 30, 2008), *available at* http://www.mccaskill.senate.gov/media-center/news-releases/senators-call-on-president-to-honor-congressional-intent-with-inspector-general-law, *archived at* http://perma.cc/UU2Z-QD2L.

[265] *E.g.*, Interview with Harold Geisel, *supra* note 95.

[266] Interview with Clark Kent Ervin, *supra* note 95 (noting one occasion on which the DHS IG approached OLC to resolve a disputed legal question); Telephone Interview with Britt Snider, *supra* note 95 (suggesting that the CIA IG would approach OLC a couple of times a year for resolution of legal disputes with Agency counsel and that the IG office was the only component within the CIA authorized to seek an OLC decision directly rather than through the General Counsel).

[267] Interview with Richard Delmar, *supra* note 94 (describing resort to OLC as a "big deal" and a "nuclear" option).

[268] Across presidentially appointed IGs, approximately half are now lawyers. *See* GOV'T ACCOUNTABILITY OFFICE, GAO-11-770, INSPECTORS GENERAL: REPORTING ON INDEPENDENCE, EFFECTIVENESS, AND EXPERTISE 17 (2011), *available at* http://www.gao.gov/assets/330/323642.pdf, *archived at* http://perma.cc/QS9Z-9ZZT. But no IG office seems to have an investigative division so heavily staffed by lawyers as the Oversight and Review Division.

3. PCLOB.

Compared to civil liberties offices and IGs, PCLOB has both a mandate clearly authorizing it to assess legality[269] and the structural independence to report its conclusions without being countermanded. Indeed, it assessed legality in both of its reports addressing NSA surveillance programs. In doing so, the Board addressed certain questions that courts might never have reached — arguably filling a "gap" in formal law created by judicial inability or unwillingness to probe national security affairs. For instance, at the time of the Board's phone records report, two federal district courts had already concluded that they lacked jurisdiction to consider the dispositive statutory question: whether Section 215 of the Patriot Act actually authorized the phone records collection.[270] Thus, the Board weighed in with a comprehensive discussion of a crucial question that courts conceivably might never resolve.[271]

Not all Board members agreed that the Board should analyze the programs' legality.[272] More generally, at least one Board member prefers to address the "treatment" of individuals, rather than "rights," to permit the protection of interests as a policy matter even where she believes there is no coherent source of applicable law.[273]

Even where the Board chooses to assess legality, its ability to influence legal interpretation is weakest where its contribution is arguably most important: in the internal interagency process prior to a time when other external actors can assess a program's legality. When PCLOB participates as an internal advisor, rather than reviewing legality after the fact, it has greater access to decisionmaking, but less leverage. If the Board seeks to be included, it must forfeit some willingness to broadcast disagreements. But without an external audience — Congress and the public — PCLOB loses

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[269] In reviewing "other executive actions" beyond executive counterterrorism "regulations, policies, and procedures" and information-sharing practices, PCLOB must evaluate whether these actions "are consistent with governing laws, regulations, and policies regarding privacy and civil liberties." 42 U.S.C. § 2000ee(d)(2)(C)(ii) (2012).

[270] ACLU v. Clapper, 959 F. Supp. 2d 724, 741–42 (S.D.N.Y. 2013); Klayman v. Obama, 957 F. Supp. 2d 1, 23 (D.D.C. 2013). While ruling that it lacked jurisdiction, the *Clapper* court considered the merits of the statutory argument in the alternative and found in favor of the government. *Clapper*, 959 F. Supp. 2d at 742–49. The Second Circuit heard oral arguments on the case in late 2014. *See* Orin Kerr, *Thoughts on the CA2 Argument on Section 215 in* ACLU v. Clapper, LAWFARE (Sept. 2, 2014, 5:09 PM), http://www.lawfareblog.com/2014/09/thoughts-on-the-ca2-argument-on-section-215-in-aclu-v-clapper, *archived at* http://perma.cc/MR8A-T3HM.

[271] The Foreign Intelligence Surveillance Court, composed of Article III judges but lacking adversarial processes, had considered the statutory question and found the phone records program to be authorized. *See* In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [redacted], No. BR 13-109, slip op. at 11–28 (FISA Ct. Aug. 29, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf, *archived at* http://perma.cc/LA64-GJGL.

[272] *See supra* note 170 and accompanying text.

[273] Interview with Elisebeth Collins Cook, *supra* note 140.

much of its leverage. PCLOB likely does not yet have the clout to prevail against opposition from general counsel of national security agencies, and OLC is viewed as the preeminent arbiter of legality for the executive branch.[274] In the interagency process, the Board's stature on legal questions may be no greater than that of a civil liberties office taking a position contrary to its agency's general counsel.

That stature may grow over time, and of all of these institutions, PCLOB is perhaps the most likely to influence executive legal interpretation on national security matters. For the most part, however, rights-oversight institutions' secondary status diminishes the prospect of prevailing on legal questions when first-tier legal offices disagree.

C. Mission Drift: From Rights to Security

Rights-oversight institutions within the national security executive face substantial pressures to orient their activities as well as to frame those activities to match national security goals. For institutions whose mandates do not require or emphasize attention to rights and liberties, the problem is not "mission drift," but rather an insufficient mandate. For instance, among national security IG offices, only DOJ and DHS IGs have standing mandates to investigate questions related to rights and liberties; other IG offices are periodically asked by Congress to do so with respect to particular policies, but not on a systematic and ongoing basis.[275]

But even institutions whose mandates centralize rights face substantial pressures to drift towards the security focus of national security agencies. This section describes an example of drift in CRCL with respect to the Office's community engagement efforts. The fact that such drift appears in an office clearly mandated to protect rights, envisioned by civil rights advocates, and staffed with a fair number of civil rights advocates is particularly noteworthy. Mission drift for rights-oversight institutions, as I argue below, not only diverts attention and resources from rights protection, but may also foster distrust in communities most affected by national security overreach. The section ends by considering how design affects the capacity of rights-oversight institutions to withstand the security pull of the national security executive.

1. Prioritizing Security.

Institutions that promote values in tension with those of the larger organization to which they belong will often face pressure to assimilate to the latter. Schlanger argues persuasively that both "collegial" and "careerist"

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[274] Morrison, *Libya*, *supra* note 246, at 63.

[275] Requiring other IGs to investigate the impact of national security policies on rights more explicitly and systematically could, as I have argued elsewhere, make IG oversight of rights protection more robust. *See* Sinnar, *supra* note 4, at 1082–83.

pressures will pull the staff of "offices of goodness" towards their larger organization's mission: working with mission-focused colleagues in the larger agency will influence staff perspectives, while the anticipation of career opportunities elsewhere in the agency will temper their zeal for the office's distinct commitments.[276]

Although Schlanger makes her argument in transubstantive terms, I have argued above that "national security" has a particularly magnetic pull. Where the tension between an institution and the larger agency is between individual rights and national security, resisting mission drift is particularly difficult. In fact, advocates have often sought not to resist the dominant place of security, but to advance less popular social causes by linking them to security. For instance, Mariano-Florentino Cuéllar has argued that, during the Roosevelt Administration, the Federal Security Agency advocated its domestic social programs — and thus its own budget and authority — by promoting a notion of "social, economic, and health-related security on par with traditional notions of national security."[277] Similarly, executive institutions during the Cold War leveraged national security reasoning to advance the rights of African Americans.[278] Extending Derrick Bell's theory of "interest convergence,"[279] Sudha Setty has recently argued that communities affected by counterterrorism practices benefit from showing a convergence between minority rights and security goals.[280] Given the dominance of the security frame, even an interest in rights promotion may lead institutions to explain, justify, and promote rights by appealing to security.

Together, this literature suggests that national security agencies will focus intensively on their security mandates, that rights-oversight institutions within these agencies will find their own commitment to rights tested, and that these institutions will face incentives to reorient and reframe their work as serving security goals. An example from CRCL illustrates all of these dynamics in practice, and also suggests some particular risks of security drift that have received little attention.

2. Civil Rights Outreach as Counterterrorism.

Almost since its inception, CRCL has conducted outreach with U.S. Muslim, Arab, and South Asian communities to understand concerns over counterterrorism policies and surface individual rights complaints to investigate. These efforts grew out of its statutory mandate to investigate com-

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[276] Schlanger, *Offices of Goodness*, *supra* note 4, at 115–16.

[277] Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953*, 76 U. CHI. L. REV. 587, 596, 678–79 (2009).

[278] *See, e.g.*, JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 21–22 (2002).

[279] Derrick Bell, Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that whites supported the rights of African Americans only when those rights coincided with white self-interest).

[280] Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185, 187 (2012).

plaints of rights violations and publicize its role in doing so.[281] But over time, CRCL has embraced new outreach programs in response to the Obama Administration's growing focus on "countering violent extremism." As a result, the Office's community engagement work has at least partially drifted from serving its rights-protection mandate to addressing the security priorities of DHS and the Administration.

In 2011, after several terrorist incidents perpetrated by U.S. citizens or residents, the Obama Administration issued a national directive on countering violent extremism ("CVE").[282] The directive called for targeting "radicalization" within the United States by enhancing federal engagement with communities deemed susceptible to terrorist recruitment, building expertise on the dynamics of radicalization, and countering violent extremist propaganda.[283] It emphasized that U.S. Muslim communities were part of the solution to combating terrorism and likened CVE to prior forms of community policing.[284] The White House tasked twelve agencies, led by the National Counterterrorism Center and including DHS, to implement the strategy.[285]

Although promoted as an effort to partner with Muslim communities, the initiative elicited mixed reactions from those communities and from civil rights and liberties groups. Critics charged that focusing law enforcement attention on extremist beliefs rather than threats of violence undermined freedom of speech and religion,[286] and that the strategy wrongly singled out the Muslim community for suspicion.[287] Some also criticized the theoretical foundations of CVE initiatives, such as the notion that individuals progressed through identifiable and relatively predictable stages of "radical-

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[281] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 705, 116 Stat. 2135, 2219–20 (2002) (codified at 6 U.S.C. § 345 (2012)).

[282] *See* WHITE HOUSE, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2011) [hereinafter EMPOWERING LOCAL PARTNERS], *available at* https://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf, *archived at* https://perma.cc/MM2L-JBUX.

[283] *Id.* at 1–3; EXEC. OFFICE OF THE PRESIDENT, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 3, 7 (2011) [hereinafter STRATEGIC IMPLEMENTATION PLAN], *available at* https://www.whitehouse.gov/sites/default/files/sip-final.pdf, *archived at* https://perma.cc/NZD9-LJX8.

[284] *Id.* at 3–4.

[285] *See id.*

[286] *See, e.g.*, Letter from Laura Murphy, Director & Naureen Shah, Legislative Counsel, Wash. Legislative Office, ACLU, to Lisa O. Monaco, Asst. to the President for Homeland Sec. & Dep. Nat'l Sec. Advisor (Sept. 19, 2014), *available at* https://www.aclu.org/files/assets/140919_wh_summit_final.pdf, *archived at* https://perma.cc/R2F3-B3R8; *see also* Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 129–33 (2012) (arguing that government attempts to intervene in religious ideology risk violating the Establishment Clause).

[287] *See, e.g.*, Amna Akbar, *Policing "Radicalization"*, 3 U.C. IRVINE L. REV. 809 (2013); Sahar Aziz, *Policing Terrorists in the Community*, 5 HARV. NAT'L SEC. J. 147 (2014); Press Release, Asian Law Caucus, Asian Law Caucus Questions Federal Plan to Fight Radicalization (Aug. 4, 2011), *available at* http://archive.constantcontact.com/fs013/1103244704062/archive/1106939442361.html, *archived at* http://perma.cc/Y3PG-DWUJ.

ization" ending in a willingness to commit terrorist acts.[288] Critics viewed such theories as flawed social science that sanctioned the monitoring of innocent religious and political activities as indicators of future violence.[289] In 2014, as the Obama Administration announced new CVE pilot programs, civil rights groups cited "serious human rights and civil liberties concerns about the premise, tracts and operations of CVE programs."[290]

Despite concerns, CRCL embraced the initiative. In 2010, a year before the issuance of the Administration's directive, the Office began briefing communities and training law enforcement on violent extremism and the threat of terrorist recruitment.[291] That year, it convened a national roundtable bringing together American Muslim, Arab, Sikh, Somali, and South Asian leaders with officials from counterterrorism agencies to discuss "the threat posed to those communities by terrorist attempts to recruit their members."[292] CRCL also co-chaired the National Task Force on CVE Engagement, which coordinated federal community engagement efforts and advised agencies on "best practices."[293] The Office began training state and local law enforcement officials on understanding violent radicalization, despite congressional concerns that the Office's existing civil liberties trainings were inadequate to guard against abuses of rights and liberties.[294]

In its 2012 report to Congress, CRCL claimed a "pivotal role" in the Department's CVE effort based on its cultivation of partnerships that could identify "behaviors, tactics, and other indicators of potential violent and terrorist activity."[295] It highlighted its participation in international exchange programs and speaker tours involving information-sharing on CVE.[296] Perhaps most surprisingly, CRCL took credit for combatting radicalization abroad through lending its policy advisors to the State Department's public

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[288] For an extensive critique of radicalization theory and counter-radicalization policing, see Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. (forthcoming 2015).

[289] *See, e.g., id.*

[290] *See* Letter from Laura Murphy & Naureen Shah, *supra* note 286, at 1.

[291] OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2010 ANNUAL AND CONSOLIDATED QUARTERLY REPORTS TO CONGRESS 15 (2011) [hereinafter CRCL FY2010 REPORT], *available at* https://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2010.pdf, *archived at* https://perma.cc/Z4UW-NL86. *See also* Pakistani Am. Ass'n of Conn. et al., Conference Agenda, *Understanding Radicalization and De-Radicalization Strategies* (June 19, 2010), *available at* http://pakpac.net/Newsletter/2010/June/Deradicalization_Conference_June_11_2010.doc, *archived at* http://perma.cc/HU2D-2SAD (reporting participation of Margo Schlanger in closed-door session, "What the Community Needs to Know").

[292] *Communities Hearing*, *supra* note 58, at 8–12 (statement of Margo Schlanger, Officer for Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec.).

[293] CRCL FY2012 REPORT, *supra* note 51, at 12.

[294] CRCL FY2010 REPORT, *supra* note 291, at 19 (reporting CVE trainings); STAFF OF PERM. SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC., *supra* note 74, at 47–50 (describing concerns with existing trainings).

[295] CRCL FY2012 REPORT, *supra* note 51, at 12.

[296] *Id.*

information campaigns in Pakistan.[297] Under a newsletter headline proclaiming, "CRCL Leads Countering Violent Extremism Effort in Pakistan," the Office made the remarkable claim that deploying social media, music videos, and a "dramatic webisode" had garnered a "30 percent increase in awareness and attitudes towards stopping violent extremism."[298] In 2014, as security agencies cited heightened concerns over European and North American Muslims joining extremist organizations abroad, CRCL convened new meetings with Muslim community groups on preventing terrorist recruitment, specifically targeting Syrian communities at the request of the DHS Counter-Terrorism Advisory Board.[299]

CRCL recognized possible tensions with a civil rights office's promotion of CVE. In 2010, Margo Schlanger told Congress that defeating violent extremism was neither the "principal reason" for CRCL engagement nor the "lens" through which the Office viewed its activities.[300] She also expanded the Office's regional roundtables to include Latino and East Asian communities, which meant that the Office's most routine outreach format did not single out the Muslim community for a security-specific discussion.[301] While leading some outreach sessions jointly with the FBI, the nation's lead domestic counterterrorism agency, CRCL sometimes agreed to exclude law enforcement agencies from sessions where community groups felt that their presence would inhibit trust.[302] Moreover, its "best practices" guide to training law enforcement, distributed to state and local DHS grantees, sought to mitigate potential harm from CVE programs by warning law enforcement

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[297] *CRCL Leads Countering Violent Extremism Efforts in Pakistan*, OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES NEWSLETTER (U.S. Dep't of Homeland Sec., Wash., D.C.), Jan. 2013, at 3, *available at* http://www.dhs.gov/sites/default/files/publications/crcl-newsletter-january-2013.pdf, *archived at* http://perma.cc/52QY-8GW5.

[298] *Id.*

[299] *See, e.g.*, CRCL FY2013 REPORT, *supra* note 79, at 17; *CRCL Hosts Secretary Johnson and Belgian Delegation for Townhall*, OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES NEWSLETTER (U.S. Dep't of Homeland Sec., Wash., D.C.), Sept. 2014, at 2–3, *available at* http://www.dhs.gov/sites/default/files/publications/crcl-newsletter-july-2014.pdf, *archived at* http://perma.cc/AQK7-CYNJ; *CRCL Hosts CVE Exchange Program to Belgium*, OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES NEWSLETTER (U.S. Dep't of Homeland Sec., Wash., D.C.), July 2014, at 3, *available at* http://www.dhs.gov/sites/default/files/publications/crcl-newsletter-july-2014.pdf, *archived at* http://perma.cc/7QHZ-EP8G.

[300] *Communities Hearing*, *supra* note 58, at 7 (statement of Margo Schlanger, Officer for Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec.).

[301] *See* CRCL FY2010 REPORT, *supra* note 291, at 15. Indeed, Schlanger viewed that reorganization as at least partly directed towards "de-securitizing" outreach. E-mail from Margo Schlanger, Fmr. Officer of Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec., to author (Feb. 17, 2015, 11:38 AM PST) (on file with author).

[302] CRCL Responses to Written Questions, *supra* note 48, at 3–4. Earlier, CRCL led outreach sessions in Detroit and Boston in partnership with the FBI. *See* U.S. DEP'T OF HOMELAND SEC., REPORT TO CONGRESS ON THE DEPARTMENT OF HOMELAND SECURITY OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES 8 (2008), *available at* http://www.dhs.gov/xlibrary/assets/crcl_annual_report_FY_2008.pdf, *archived at* http://perma.cc/7VFR-6G6V.

not to equate religiosity with extremism and to treat communities as partners.[303]

Had CRCL focused purely on advising the agency or training law enforcement on how to protect rights in CVE programs, its efforts might be viewed as seeking the most rights-friendly version of CVE possible, rather than as a deviation from its mission. But the Office went beyond that: it organized and led outreach to Muslim communities — and apparently only to Muslim communities — focused on identifying radicalization and preventing violent extremism.[304] Over time, this counterterrorism objective became an increasingly visible component of the Civil Rights Office's outreach efforts.

Explaining the Shift. What explains CRCL's growing emphasis on security concerns as a focus for community outreach? First, from the beginning, some leaders and staff of the Office found the security motivation for community engagement inherently compelling. For example, its first head, Dan Sutherland, was a true believer in the CVE idea who went on to lead the National Counterterrorism Center's global efforts to counter violent extremism.[305] Although he left CRCL before the White House issued its CVE strategy, his tenure initially oriented the Office towards a security justification for its engagement work.[306] Similarly, David Gersten, who directed CRCL's Program Branch, moved on to head the Department's CVE programs as a whole.[307]

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[303] *See generally* OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., COUNTERING VIOLENT EXTREMISM (CVE) TRAINING: GUIDANCE AND BEST PRACTICES (2011), *available at* https://training.fema.gov/emiweb/docs/shared/cve%20training%20guidance.pdf, *archived at* https://perma.cc/5HWE-26TR. *See also* GOV'T ACCOUNTABILITY OFFICE, GAO-13-79, COUNTERING VIOLENT EXTREMISM: ADDITIONAL ACTIONS COULD STRENGTHEN TRAINING EFFORTS 27–28 (2012), *available at* http://www.gao.gov/assets/650/649616.pdf, *archived at* http://perma.cc/2QZ6-M5MA.

[304] The Office's monthly newsletters from September 2010 to November 2014 do not report a single CVE-related outreach effort directed at other than Muslim communities. *See generally CRCL Newsletter*, U.S. DEP'T OF HOMELAND SEC. (last updated Feb. 25, 2015), http://www.dhs.gov/crcl-newsletter#wcm-survey-target-id, *archived at* http://perma.cc/698G-UAJ3 (archive of past CRCL newsletters). DHS curtailed its analysis of domestic extremism unrelated to Islam after political backlash from Republicans in 2009. R. Jeffrey Smith, *Homeland Security Department Curtails Home-Grown Terror Analysis*, WASH. POST (June 7, 2011), http://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html, *archived at* http://perma.cc/K68Y-K298.

[305] *See* Cullen Couch, *Q&A with Daniel Sutherland '85, National Counterterrorism Center*, UVA LAWYER, Spring 2010, at 30, 31, *available at* http://www.law.virginia.edu/pdf/alum/uvalawyer_spring.pdf, *archived at* http://perma.cc/B8DV-6SR5.

[306] During Sutherland's tenure, CRCL even advised on religious terminology to "diminish the recruitment efforts of extremists who argue that the West is at war with Islam." OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., TERMINOLOGY TO DEFINE THE TERRORISTS: RECOMMENDATIONS FROM AMERICAN MUSLIMS 1 (2008), *available at* http://www.dhs.gov/xlibrary/assets/dhs_crcl_terminology_08-1-08_accessible.pdf, *archived at* http://perma.cc/WY53-XW38.

[307] Eric Schmitt, *U.S. Is Trying to Counter ISIS' Efforts to Lure Alienated Young Muslims*, N.Y. TIMES (Oct. 4, 2014), http://www.nytimes.com/2014/10/05/us/us-is-trying-to-counter-isiss-efforts-to-lure-alienated-young-muslims.html, *archived at* http://perma.cc/35XE-GW4Y (noting Gersten's new role); *CRCL Leadership*, OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES

Aligning CRCL's work with security goals also served bureaucratic interests, particularly after the Obama Administration announced its CVE initiative. For an office that struggled to exert influence, embracing CVE offered an opportunity to demonstrate its usefulness. The Administration's CVE strategy called for using existing resources rather than creating new sources of funding,[308] and CRCL had a network of relationships with Muslim communities that could be repurposed to serve the new initiative. Regardless of whether they valued the Office's civil rights advocacy, DHS leaders and Members of Congress clearly valued the Office's contributions to counterterrorism. DHS officials routinely cited CRCL's outreach efforts in informing Congress of its work to counter extremism.[309] Moreover, the sole instance that Congress asked Schlanger to testify during her two-year term was in an Intelligence Subcommittee hearing on "working with communities to disrupt terror plots."[310]

An exchange during that hearing illustrates the political pressure on CRCL to prioritize security. Rep. Jane Harman, Chair of the Subcommittee, pressed witnesses to demonstrate how community engagement had "prevented" or "intercepted" acts of terrorism.[311] Schlanger responded that her office was a "civil rights office," and "not in the business of developing sources and leads."[312] Harman then asked whether outreach led to trust that made community members more likely to report threats to law enforcement.[313] Schlanger assented, but added that the Office also cared about "concerns that get expressed."[314] To this Harman responded, "This is not just a feel-good exercise. This is an exercise in protecting America."[315] Such an exchange could only reinforce the message that certain political overseers saw the Civil Rights Office's work as meaningful only to the extent that it "protect[ed] America."[316]

NEWSLETTER (U.S. Dep't of Homeland Sec., Wash., D.C.), Dec. 2010, at 4, *available at* http://www.dhs.gov/sites/default/files/publications/crcl-newsletter-december-2010.pdf, *archived at* http://perma.cc/PT4T-N52R.

[308] *See* EMPOWERING LOCAL PARTNERS, *supra* note 282, at 3; STRATEGIC IMPLEMENTATION PLAN, *supra* note 283, at 5.

[309] *See, e.g., Compilation of Hearings on Islamist Radicalization — Vol. III: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. 151 (2012) (written testimony of John Cohen, Principal Dep. Counterterrorism Coordinator and Senior Advisor to the Sec'y, U.S. Dep't of Homeland Sec.).

[310] *See Communities Hearing*, *supra* note 58, at 6. Indeed, congressional interest in CRCL's potential to mitigate extremism extended through multiple administrations. From the Office's establishment through 2013, four out of eight congressional hearings at which CRCL officials testified addressed engagement with communities to prevent terrorism. *See, e.g., Communities Hearing*, *supra* note 58, at 6–7.

[311] *Id.* at 31.

[312] *Id.*

[313] *Id.*

[314] *Id.* at 32.

[315] *Id.* at 32.

[316] *Id.* at 32.

3. Consequences of Mission Drift.

For rights-oversight institutions, which have few resources compared to the national security executive they oversee, a diversion in mission can undermine their ability to protect rights. Engaging communities and training law enforcement on "radicalization" can draw resources and attention away from addressing civil rights complaints and concerns. Moreover, to the extent that mission drift results from assimilation to the broader organization's goals, the problem is even deeper: it is a symptom of a reduced inclination to prize rights as against security considerations. A rights-oversight institution that comes to see the world the same way as the security agency it is designed to influence no longer sees a need to change policy. And as legal scholars have noted, ineffective rights-oversight institutions can even diminish pressure for more effective forms of rights protection by convincing policymakers that rights are sufficiently protected.[317]

But mission drift for rights-oversight institutions can also exacerbate a rights deficit by increasing distrust in communities affected by security policies. As Cuéllar has argued, sometimes the public notices not just what program the government has adopted but which agency is tasked with implementing it, influencing demand for the program.[318] If bureaucratic mandates prove salient in this way, a civil liberties office's public participation in a security initiative could affect perceptions of rights and security in at least two ways. For segments of the public resistant to rights, that participation could conceivably encourage support for the Office's civil rights goals by signaling the compatibility of rights protection with security promotion. As many have noted, the rights of minority groups often benefit from linkage to a dominant security goal.[319] For instance, if security-minded audiences are persuaded that civil rights outreach leads to greater reporting of potential threats, they might see rights and security as compatible, rather than invariably opposed.

At the same time, it seems likely that the segments of the public most likely to notice an agency civil rights office's work are those who are most directly affected by the agency's policies. In the case of CRCL, U.S. Muslim communities that engage regularly with the Office are particularly likely to notice how the Office pursues and explains its work. For those communities, the Office's promotion of engagement as a means to prevent violence could signal not only that the Office views those communities as prone to

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[317] *See, e.g.*, Schlanger, *Offices of Goodness*, *supra* note 4, at 104–05; Sinnar, *supra* note 4, at 1079–82.

[318] CUÉLLAR, *supra* note 66, at 40–41. For example, he asserts, some segments of the public might view a grant program for youth education more favorably if located within the Department of Justice, because "linking community grants with crime control might evoke more favorable associations among politically relevant constituencies." *Id.* at 40.

[319] *See, e.g.*, SKRENTNY, *supra* note 278, at 27 (arguing that executive institutions during the Cold War leveraged national security reasoning to advance the rights of African Americans).

violence, but also that the protection of their rights and liberties matters only for instrumental reasons. Security agencies' community outreach programs have already caused distrust due to revelations that the FBI, which co-chaired some outreach sessions with CRCL, used outreach programs to covertly gather intelligence on Muslim individuals and institutions.[320] Even where not used to gather intelligence, outreach programs have sometimes been perceived as occasions for government officials to tout constitutional commitments without addressing substantive concerns.[321] Where a civil rights office publicly touts its outreach as a means of defeating extremism, it further suggests to communities that *even the civil rights offices* of security agencies lack commitment to the intrinsic value of equal rights and fair treatment of all communities.

In 2014, after hosting several outreach sessions on countering violent extremism, CRCL sent an unusual message to community partners that appeared to acknowledge this diminished trust. CRCL Officer Megan Mack noted that the Office's relationship with partners might be "tested at times" but insisted that its "roundtables are not in place to gather personal information or engage in selective outreach."[322] Concern about CVE initiatives in general had grown: in December 2014, twenty-seven civil rights and Muslim, South Asian, and interfaith organizations wrote to federal officials expressing concern that the CVE push was encouraging communities to report lawful expressive activity and aggravating suspicion of Muslim communities without diminishing the "abusive counterterrorism practices that fuel[ed] distrust."[323]

In response to a series of critiques of "rights talk" in the 1980s, many legal scholars have persuasively argued that the language of rights has particular resonance for racial minorities and other marginalized groups, for whom invoking rights can transform consciousness and enable communities

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[320] *See* Maria L. La Ganga, *FBI Documents Reveal Profiling of N. California Muslims*, L.A. TIMES (Mar. 28, 2012), http://articles.latimes.com/2012/mar/28/local/la-me-fbi-california-mosques-20120328, *archived at* http://perma.cc/6TFG-6M4C; Cora Currier, *Spies Among Us: How Community Outreach Programs To Muslims Blur Lines Between Outreach And Intelligence*, THE INTERCEPT (Jan. 21, 2015), https://firstlook.org/theintercept/2015/01/21/spies-among-us-community-outreach-programs-muslims-blur-lines-outreach-intelligence, *archived at* https://perma.cc/XDJ7-P6CL.

[321] *See, e.g.*, Sahar Aziz, *The Contradictions of Obama's Outreach to American Muslims*, HUFFINGTON POST (Dec. 19, 2011, 6:15 PM), http://www.huffingtonpost.com/sahar-aziz/obama-american-muslim-outreach_b_1152359.html, *archived at* http://perma.cc/AE99-A5V6. Aziz writes, "Indeed, the government's cavalier disregard of community concerns is so pervasive that many leaders have concluded that meetings with federal officials are merely pro forma, check-the-box events providing political cover to a government they believe is systematically and unlawfully profiling Muslims." *Id.*

[322] E-mail from Megan S. Mack, Civil Rights & Civil Liberties Officer, U.S. Dep't of Homeland Sec., to Community Partners, Aug. 5, 2014 (on file with author).

[323] Letter from Am. Civil Liberties Union et al., to Lisa O. Monaco, Asst. to the President for Homeland Sec. & Dep. Nat'l Sec. Advisor 3 (Dec. 18, 2014), *available at* http://www.muslimadvocates.org/files/Countering-Violent-Extremism.pdf, *archived at*. http://perma.cc/YL9D-T4BC.

to demand the attention of those in power.[324] A civil rights office's move from "rights talk" to "security talk," rather than acknowledging these communities' grievances, reproduces narratives that community members may be seeking to dispel — such as the idea that certain communities are uniquely and collectively responsible for violence. When rights-oversight institutions drift towards security, the drift reinforces perceptions that national security agencies fail to take rights seriously.

4. Design Considerations.

The consequences of mission drift can be serious. Are all kinds of institutions equally susceptible? Both internal advisors and external reviewers face pressures to reorient their attention to security goals. But given their greater integration within national security structures, internal advisors are particularly vulnerable to the mission prioritization of their agencies. As argued above, influence within such institutions depends on trust and relationships with agency leadership. For offices to cultivate such trust, they must demonstrate that they are team players within the broader enterprise.[325]

In a series of articles, Lauren Edelman has addressed similar dynamics with respect to internal offices that employers establish to prevent and remedy employment discrimination.[326] According to Edelman:

> Although professionals within organizations who handle discrimination issues are often considerably more committed to the goals of civil rights laws than are the top administrators who hire them, their structural position as part of management operates as a seri-

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[324] *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK (1994); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). Such critiques responded to scholarship including MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991), STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS (1974); and Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). More recent critiques of rights include RICHARD THOMPSON FORD, RIGHTS GONE WRONG (2011), and William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004). For a summary of the "fractious, voluminous, 'rights talk' literature," see Tani, *supra* note 6, at 369–72 and accompanying notes.

[325] Even the mission statement of CRCL, for instance, emphasizes that broader enterprise: the Office describes its mission as "support[ing] the Department's mission to secure the nation while preserving individual liberty, fairness, and equality under the law." *About the Office for Civil Rights and Civil Liberties*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/office-civil-rights-and-civil-liberties (last updated Dec. 16, 2014), *archived at* http://perma.cc/BSJ3-MEG4. Protecting liberty, fairness, and equality appears linguistically not as the Office's goal but as a constraint on the Department's security mission.

[326] *See generally* Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888 (2011); Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) [hereinafter Edelman et al., *Diversity Rhetoric*]; Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993) [hereinafter Edelman et al., *Internal Dispute Resolution*].

> ous constraint on their ability to advocate and achieve significant reform.[327]

Edelman argues that the identification with management leads internal offices charged with resolving bias complaints to view employee grievances not as questions of individual rights, but as managerial problems.[328] Thus, internal structures set up to protect rights end up conceptualizing problems from the perspective of management rather than from the rights-based frame of affected individuals.

Although external reviewers are also subject to security drift, the pressures are one step removed and therefore perhaps easier to keep at bay. To be sure, IGs face pressure from external constituencies, particularly Congress, to prioritize issues that those constituencies value most. Because IGs need support from congressional patrons to counterbalance agency officials, their interest in satisfying these patrons limits their ability to set priorities autonomously. IGs will, and have, responded to the security concerns of political overseers.[329] Their relative independence from the Executive, however, provides some insulation against the mission orientation of the national security establishment. The "collegial" and "careerist" pressures that Schlanger describes may be less potent for external reviewers. IG staff, for instance, do not participate in collaborative meetings with other agency staff; their investigative role, if anything, may make staff elsewhere in the agency wary of them. Moreover, career opportunities for at least certain external reviewers may point outside government; those appointed as IGs, for instance, may expect to enter (or reenter) the private sector rather than seek further executive appointments. As a result of these factors, they may have greater potential to resist security drift.

CONCLUSION

Rights-oversight institutions within the executive branch face serious challenges in reforming national security policy. That much is evident from the experiences of CRCL, DOJ IG, and PCLOB, along with those of other institutions that I have referenced along the way. Yet the real impact that certain institutions have managed to achieve — in a political context where *all* strategies for expanding rights are limited — justifies the project of creating and sustaining these institutions.

These accounts of qualified success also suggest that design matters. External reviewers have the potential to shift policy through "rights by dis-

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[327] Edelman et al., *Internal Dispute Resolution*, *supra* note 326, at 501.

[328] *See id.*; Edelman et al., *Diversity Rhetoric*, *supra* note 326, at 1596–97.

[329] *See generally, e.g.*, INSPECTOR GENS. OF THE INTELLIGENCE CMTY., CIA, DEP'T OF JUSTICE & DEP'T OF HOMELAND SEC., UNCLASSIFIED SUMMARY OF INFORMATION HANDLING AND SHARING PRIOR TO THE APR. 15, 2013 BOSTON MARATHON BOMBINGS 1–3 (2014), *available at* http://www.dni.gov/files/documents/ICIG_Forum_Boston_Marathon_Bombings_Review_-_Unclassifed_Summary.pdf, *archived at* http://perma.cc/6LE8-2TMY.

ruption," channeling crucial information on national security practices to external constituents for rights protection. By contrast, where executive decisionmakers lack the incentive to revisit liberty-security choices, internal advisors are unlikely to improve policy. In two further respects, both categories of institutions are challenged. Rights-oversight institutions are unlikely to convince executive officials of their view of the law where primary legal offices, like general counsel or OLC, disagree. Furthermore, both sets of institutions are susceptible to mission drift from a focus on rights to the pursuit of security. The subservience of internal advisors to executive decisionmakers puts them at particular risk of cooptation.

To bolster rights-oversight institutions, policymakers and rights advocates could pursue several reforms. First, they could expand and entrench the mandates of external reviewers to address rights and liberties. Currently, most IGs do not have a standing mandate to investigate the impact of national security policies on individual rights. While Congress periodically requires IGs to investigate particular policies, only DOJ IG has a standing mandate to investigate rights and report to Congress biannually on how it has done so. No IG, even DOJ IG, has a statutorily required "Assistant IG for Civil Rights," an idea once floated by advocates but never adopted. Yet the idea of combining the power and prestige of IGs with a greater explicit focus on rights deserves consideration. Second, Congress could further expand the investigative capacity of PCLOB, allocating the resources to appoint not just full-time commissioners but also a cadre of experienced investigators and auditors. In its first review, PCLOB benefited enormously from riding the coattails of the Snowden controversy, but it needs deeper investigative capacity to "disrupt" national security tunnel vision on its own. Third, effective rights oversight depends on combatting overclassification, reinforcing whistleblower protection, and otherwise fortifying the pathways of information disclosure. Secrecy imperils all forms of rights oversight, including the potential for rights by disruption.

Beyond all of these reforms, the efficacy of internal rights oversight depends on concerted and consistent attention from external supporters. Rights advocates have rarely given these institutions much attention, perhaps because they doubt their value. But maintaining the independence of rights-oversight institutions and preventing mission drift requires more than sporadic attention. It depends on the active participation of civil society groups to identify strong nominees for leadership positions, protest executive attempts to shield information, monitor the performance of these institutions, and demand accountability for failures. This attention would not diminish the need for truly external oversight — via Congress and the courts — but would reinforce such oversight from within.