

THE COMPANY'S LAWYERS



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Illustration By JEAN-FRANÇOIS MARTIN

The torture memos have shone a light on the CIA's Office of General Counsel. The lawyers who work there would prefer to stay in the dark.

IT IS A DARK TIME FOR THE CENTRAL Intelligence Agency's Office of General Counsel. A CIA inspector general's report released last month reported that the OGC "took the lead" in determining the legal parameters for interrogation, determinations that led to "enhanced" techniques such as waterboarding. President Barack Obama blasted those techniques as the product of an "ad hoc legal approach that was neither effective nor sustainable." And in August, U.S. attorney general Eric Holder launched an investigation to determine whether the interrogations were a criminal offense. About two dozen current and former CIA lawyers are now represented by counsel according to one former OGC insider.

If the case lands in court, "blame the lawyers" is likely to be a defense, as it is in an inquiry into the destruction of videotapes of the interrogations. The destruction was ordered by Jose Rodriguez, Jr., head of the CIA's National Clandestine Service. Rodriguez's attorney, Robert Bennett of Hogan & Hartson, says his client sought assurances that destroying the tapes was legal: "The assurances came through lawyers in the OGC."

Despite the public furor, little attention has been paid to the CIA lawyers behind them. With about 120 attorneys, the OGC, based in Langley, Virginia, is one of the ten biggest firms in the state. Those who apply need to be dedicated. The screening process is exhaustive. Pay is relatively low (as low as \$67,000 to start), and advancement is slow. Attorneys sometimes spend years handling work like the case brought by Faraud Muhammad of Washington, D.C., who

accused the CIA of monitoring his brain waves. They also handle employee complaints and Freedom of Information Act requests.

Whether it's the hiring procedure or something else, the CIA tends not to attract the superstar lawyers that other elite government agencies do. Compared to lawyers in the U.S. Department of Justice, there are fewer attorneys at the CIA who have attended top ten law schools, according to A. John Radsan, a CIA attorney from 2002 to 2004, and another veteran OGC lawyer who wishes to remain anonymous. A Supreme Court clerkship is not often part of a resume at the CIA, as it is at the solicitor general's office. Radsan describes the OGC as "a place for good lawyers, not great lawyers."

Those who ride out their first few years, however, almost never leave. The most sought after positions are with the National Clandestine Service, where the agency gets down to the business of spying, covert action, and hunting terrorists. This is a 24-hour job. The agency thinks nothing about phoning at 2:30 in the morning, or directing lawyers to get on the next plane to a foreign country.

Lawyers working in the clandestine service are peppered with questions from agents: This is what I want to do. Can I? This is what happened to me. What should I do? The stakes are high, sometimes involving life and death, and the agents usually need answers fast. As a CIA spokesman puts it: "The Office of General Counsel is a high-impact unit, mastering challenges at attorneys elsewhere rarely encounter."

There is rarely any relevant case law. For answers, lawyers often turn to a manual of classified internal regulations that govern issues such as the recruiting of agents, covert missions, and "asset scrubs"—firing of agents. "Not every question is waterboarding," says Vicki Divoll, an attorney at the CIA's Counterterrorist Center from 1995 to 2000. "They're usually not complex legal issues."

The OGC undergoes periodic political pendulum swings. The first general counsel was Lawrence Houston, who served from 1947 to 1973. During the Cold War, the CIA prided itself on respect for the rule of law, something that distinguished the agency from

its historical adversary, the Soviet KGB, says Steven Cash, a former CIA attorney and operations officer in the 1990s. Houston, in fact, openly questioned the legality of covert paramilitary action.

Such skepticism fell out of favor during the Reagan administration, when agency lawyers were moved

Post-Reagan, lawyers returned to headquarters and the office expanded. Director R. James Woolsey, Jr., a partner at Shea & Gardner before joining the agency in 1993, wanted lawyers who had proven themselves outside the classified world. The new hires shook up the office, where many veteran law-

Agents pepper lawyers with questions on topics such as RECRUITING, COVERT OPERATIONS, AND "ASSET SCRUBS."

out of the Virginia headquarters. Director William Casey was concerned that the spy agency had become too legalistic in the wake of the embarrassing revelations of Watergate and the Senate's Church Committee, which made public the CIA's attempts to assassinate Fidel Castro and other foreign leaders. Casey wanted the operators to get back in business. "He just didn't think that every little thing had to be approved by lawyers," says Stanley Sporkin, who served as the CIA's general counsel during the period, who went on to be a judge on the Washington, D.C., district court.

yers had "gone native," according to Elizabeth Rindskopf Parker, the CIA's general counsel during the Clinton years, now dean of the University of the Pacific McGeorge School of Law. She says that the opposite was true at the National Security Agency, where she was general counsel before joining the CIA. NSA valued having an outsider in order to bring some perspective to the job, she says.

After September 11, however, the OGC, which had been criticized by Congress for being "risk-averse," suddenly faced unprecedented questions brought on by

LONG DAY'S NIGHT

LET US GAZE IN WONDER at Sunny Singh, an associate at Weil, Gotshal, who billed a mind-bending 988 hours on the Lehman Brothers bankruptcy for the four months ending in May. That's more than some M&A associates will bill all year. The time works out to more than 8 hours billed per day, even assuming that he worked every day of every month. That's a lot of delivery Hunan chicken. All told, Weil billed 86,000 hours for the period—about 700 hours per day—for just over \$45 million. Singh declined (or was too busy) to comment.

—DAVID LEVINE



LIVING IN PERILOUS TIMES

White-collar prosecutions are up in China, but defense lawyers aren't celebrating.

CHINA'S ECONOMY may soon be shaking off the recession, but some of the nation's business leaders now face a bigger worry: staying out of jail.

The Chinese government's arrest, on charges of spying and stealing state secrets, of four China-based executives of Anglo-Australian mining giant Rio Tinto Group made worldwide headlines in July. At press time they were still in prison. But they are far from the only executives who have felt the long arm of Chinese law in recent months. Huang Guangyu, founder

of electronics retailer GOME Electrical Appliances Holdings Ltd. and once China's richest man, has not been seen since last November, when he was detained on suspicion of stock fraud. In August, Shanghai infrastructure tycoon Liu Genshan, another of China's richest men, was sentenced to eight years for embezzling millions from a highway project. That same month, the former chairman of the group that runs Beijing's international airport was executed for embezzling around \$15 million from the company.

Anticorruption campaigns have been a feature of Chinese political life dating back to dynastic times, but those campaigns were usually focused only on government officials. Wu Wei, a litigation partner at Beijing firm King & Wood, credits the shift largely to increased sophistication among law enforcement officials, as well as growing awareness at the top levels of government that widespread corruption in business endangers the nation's long-term development.

But there hasn't been an analogous boom in big-firm white-collar

the war on terror. For most of that time, John Rizzo—with 33 years at OGC, the ultimate insider—served as acting general counsel. He was nominated for the permanent position in 2007, but resigned this year after the Senate refused to confirm him.

Opinion is fiercely divided on Rizzo. Supporters say few were better prepared to guide the OGC. Critics say that Rizzo stretched the law in order to loose the dogs of war at the CIA, and point to his name on Justice Department opinions as to whether waterboarding and other interrogation techniques constituted torture. “What I heard from attorneys, and what I experienced myself, is that OGC was used to bend the law the way agents wanted,” says Ilana Greenstein, an operations officer from 2001 to 2008 who now works for Mark Zaid, an attorney who litigates against the agency. In 2007, for example, an agent told Greenstein that she planned to conduct a search and seizure. When Greenstein pointed out that it would be illegal, the agent responded, “Well, we’ll go through OGC first.”

Rizzo declined to comment for this story. A CIA spokesman says, “To

suggest that a career agency attorney, someone with extensive knowledge of CIA operations, would somehow be soft on the law is both flat wrong and profoundly offensive.”

Former OGC attorneys say the office takes its ethical obligations seriously, including a duty to report serious crimes to the Justice Department for prosecution. Nevertheless, the OGC is ripe for conflicts. Senior lawyers face a dilemma that any in-house corporate counsel can relate to: The culture of the spy agency fosters accommodation. Those who play along get along. In addition, OGC lawyers are outsiders to a degree at the agency. “Almost all case officers try to avoid lawyers if they possibly can,” says Reuel Marc Gerecht, a former operative in the CIA’s clandestine service.

The office has also developed some cultural quirks that are now deeply ingrained. On the benign side, it has absorbed the CIA fetish for recording absolutely everything—every overseas cable, e-mail, and piece of paper is meticulously recorded and kept.



More malignant is the “arrogance” that Mark Zaid and others say permeates the place. Attorneys who litigate against the agency say this kind of behavior is nearly universal. Inside the CIA, it’s something of a joke. According to one former OGC hand, the head of the litigation division had a bumper sticker on his door that read, “Deny everything, admit nothing, and make counter-accusations.”

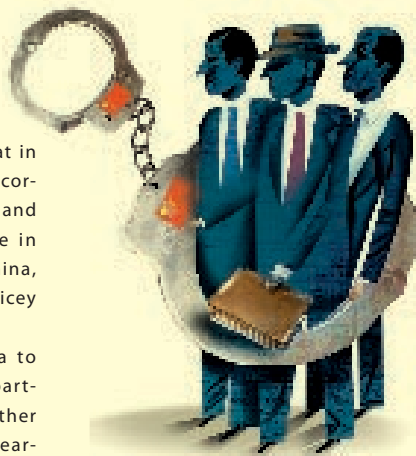
That attitude can get the OGC and the CIA in trouble. Earlier this year, the chief judge for the U.S. district court in Washington, D.C., took CIA lawyers to task for making material representations about the covert status of an agent. Judge Royce Lamberth is considering sanctions against five current and former CIA officials, including former director George Tenet, Rizzo, and Radsan.

President Barack Obama has announced intentions of developing a new legal framework “to fight terrorism while abiding by the rule of law.” At the same time that OGC helps chart a new course, however, criminal investigations will likely force the CIA lawyers to

confront the past. “The long-held view that our intelligence services operate within a framework of law has been called into question over the last eight years, and I think it’s going to take a long time to get us back on an even keel,” Cash says.

The job of restoring the office’s reputation falls to the new general counsel, Stephen Preston. The former Wilmer Cutler Pickering Hale and Dorr partner says, “There are few easy issues when your practice involves the work of a secret intelligence organization.”

In a statement to The American Lawyer, new director Leon Panetta nicely summed up the challenges facing the agency and the OGC: “The general counsel and the attorneys he leads play a crucial role for all of us. The place our agency holds in American society depends in large part on our adherence to American law. We insist on that ourselves. Intelligence and espionage are powerful national assets. As we refine and deploy them on behalf of the United States, we must have every lawful tool at our disposal.” ■



defense practices similar to that in the United States following the corporate scandals at Enron Corp. and WorldCom, Inc. Why? Because in an authoritarian nation like China, white-collar defense can be a dicey business.

“It is a very high-risk area to practice in,” says Tang Yue, a partner at Jun He Law Offices, another top Beijing firm. The lack of clear-cut evidentiary rules mean that defense lawyers may be defending their clients one day, and find themselves accused of abetting those clients’ crimes the next.

Indeed, in 2003, prominent Beijing lawyer Zhang Jianzhong was sentenced to two years in prison for helping to fabricate evidence in

his defense of two high-ranking officials in a corruption case. Other lawyers involved in controversial cases have faced harassment, detention, and disbarment.

The lawyers that typically defend such cases usually come from smaller firms. Rio Tinto’s Stern Hu, for example, turned to noted Shanghai lawyer Duan Qihua, who heads a 12-lawyer firm.

But not all big firms are backing off. King & Wood’s Wu says her 1,000-lawyer firm, China’s largest,

has built up a substantial criminal practice in recent years, although some of the work is collecting evidence for people who feel defrauded. The evidence is handed off to law enforcement officials.

As for foreign firms, local practice restrictions keep them out of Chinese courts, but Richard Chalk, a Hong Kong-based lawyer for Freshfields Bruckhaus Deringer, says they can play a part by making sure that trouble in China doesn’t spread. “You have to make sure not to blow up your whole global strategy,” he says. —ANTHONY LIN