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By Margo Schlanger

Draft (September 9, 2013**)**

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Introduction

Inducing governmental organizations to do the right thing is the central problem of public administration. Especially sharp challenges arise when "the right thing" means executing not only a primary mission but also constraints on that mission (what Philip Selznick aptly labeled "precarious values"[1]). In a classic example, we want police to prevent and respond to crime and maintain public order, but to do so without infringing anyone's civil rights. In the federal government, if Congress or another principal wants an executive agency to pay attention not only to its mission but also to some other constraining or conflicting value—I will call that additional value, generically, "Goodness"[2]—that principal has several choices. Congress can somehow impel the agency to try to seed the constraining value widely throughout its ranks—for example, by using supervision tools or incentives to get many agency employees to pay attention to Goodness.[3] Or Congress can empower some other federal organization more closely aligned with Goodness to play an augmented role in the agency's affairs.[4] This Article addresses a third

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* Professor of Law, University of Michigan. I had the privilege of serving as the U.S. Department of Homeland Security (DHS) Officer for Civil Rights and Civil Liberties for two years beginning 2010 and as an advisor to the Secretary of Homeland Security in 2012 and some of 2013. While those experiences obviously inform the views expressed here, those views are entirely personal and not in any way attributable to DHS. Thanks to my University of Michigan colleagues for helpful comments on presentations of the idea underlying this article in both a Fawley workshop and governance lunch, to Tino Cuéllar, Liz Magill, Gillian Metzger, and Sallyanne Payton for their generous and generative conversations with me on the topic, to participants in the 2013 Law & Society Association panel in which I presented it (especially Tom Baker, the session's discussant), and, as always, to Sam Bagenstos. All the primary documents cited below are attributed to their current locations on the Internet—but in order to preserve them for future years, I have assembled them and they are also posted at http://margoschlanger.net, in an Appendix to this Article. [Not posted yet]

[1] *See* PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION 119-33 (1957)

[2] I capitalize the term Goodness to indicate that the word is functioning as a stand-in for something of value, not as an endorsement of any particular normative judgment.

[3] *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 35 (2009) (describing a "range of methods [to induce an agency to pursue a secondary goal": changing the internal incentives structure of the agency by increasing the incentives provided for less measurable or otherwise secondary goals; working directly to change the mission of the agency through political and bureaucratic pressure; imposing procedures on the agency that require it explicitly to consider 'secondary' goals in its decision-making process; or hiring personnel in the agency who are professionally or personally committed to advancing one or more of the 'secondary' goals").

[4] This approach is the subject of a rash of articles in the past several years examining the rationales and results of "overlapping" and "underlapping" jurisdiction among agencies. *See, e.g.*, Jacob E. Gersen, *Overlapping and*

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approach: furthering Goodness by giving it an institutional home, a subsidiary agency office I call an "Office of Goodness." Offices of Goodness have often been created by Congress when it has sought to instill in particular agencies values that are important to the moving Members but less than central to the agencies; presidents, too, have created them for a variety of political ends.

Activities by Offices of Goodness possess a logic and function worthy of academic recognition and explication; both policymakers and scholars should care about how, and when, Offices of Goodness work. But while Offices of Goodness are frequently established in federal agencies, they are all but invisible in scholarship.[5] And the resulting knowledge gap is particularly problematic right now, because President Obama has just proposed a new Office of Goodness, within the National Security Agency, to increase oversight of surveillance activities.[6] An Office of Goodness's success is far from guaranteed. For such an Office to actually increase Goodness in its agency, its staff must skillfully use a toolkit constrained by the Office's placement within the agency they seek to influence, and they must avoid the twin shoals of impotence or capture/assimilation. This Article analyzes the relevant dynamics. I begin by describing a paradigmatic Office of Goodness, the Department of Homeland Security's Office for Civil Rights and Civil Liberties, and four issues in which it was involved between 2009 and 2012. These examples then inform a more general discussion of available tools, and how the Office's relationships with other stakeholders can increase or undermine its staff's influence and commitment, which I suggest are the prerequisites for effectiveness.

At an increased level of generality, the Article is in conversation with the "structure and process" strand of positive political theory. The germinal articles in this literature were by the

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Underlapping Jurisdiction in Administrative Law, 2006 SUP. CT. REV. 201; Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011); Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENV. L.J. 237 (2011); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183 (2013).

[5] An extremely useful exception is Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 U. CHI. L. REV. 75 (2008), which analyses the Privacy Offices at DHS and the Department of State, and offers thoughts about why, faced with similar issues, the former managed a far more robust set of interventions in its agency than the latter. It is, of course, also possible to find references here and there that acknowledge the strategy. *See, e.g.*, MARK H. MOORE & MARGARET JANE GATES, INSPECTORS-GENERAL: JUNKYARD DOGS OR MAN'S BEST FRIEND (1986) ("In sum [in passing the 1978 Inspectors General Act], Congress chose the usual governmental response to an emerging political demand for some new purpose or value to be expressed in the operations of government—the creation of a separate, strengthened administrative unit whose primary goal is to advance the purpose or value that justified its creation."); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 371 (1989) ("If the organization must perform a diverse set of tasks, those tasks that are not part of the core mission will need special protection. This requires giving autonomy to the subordinate tasks subunit (for example, by providing for them a special organizational niche) and creating a career track so that talented people performing non-mission tasks can rise to high rank in the agency.").

[6] President Barack Obama, Remarks by the President in a Press Conference (Aug. 9, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference (explaining that the National Security Agency is "taking steps to put in place a full-time civil liberties and privacy officer"). At the same press conference, the President also stated his support for a related, though slightly different, approach with respect to the Foreign Intelligence Surveillance Court, proposing to work with Congress to "make sure civil liberties concerns have an independent voice in appropriate cases" in front of that court. *Id.*

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three collaborators known collectively as McNollgast;[7] they argued that Congress can "stack the deck" in favor of agency outcomes it prefers, and facilitate its own focused oversight, by delineating the structure and process agencies must follow as they formulate policy. Structure and process theorists have analyzed numerous delegation choices through this lens, including notice and comment rulemaking,[8] choice of agency mission and jurisdiction[9]; use of "impact assessments,"[10] and constraints on appointment and removal of personnel.[11] Other political scientists studying agency design focus more on the president and less on Congress.[12] Either way, as a prominent recent article by Elizabeth Magill and Adrian Vermeule summarizes,

> this literature for the most part treats "the agency" as a unit and asks how and why institutions such as Congress and the President impose various structural and procedural requirements on agencies. In other words, this literature (for the most part) asks how the black box should be shaped, not what lies inside it.[13]

This Article (like Magill and Vermeule's piece) takes as its subject the complex interactions among agency personnel inside that black box, and how those interactions are affected by and themselves affect outsiders.

Scholarship written in the field of public administration or bureaucratic theory has a different blind spot. Research about how bureaucracies work[14] focuses almost entirely on

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[7] Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. & ECON. 243 (1987); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 341 (1989); *see also* Arthur Lupia & Matthew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. 91 (1994).

[8] *See* sources cited *supra* note 7.

[9] *E.g.*, Gersen, *Overlapping and Underlapping Jurisdiction*, *supra* note 4; Jonathan Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93 (1992).

[10] *E.g.*, McNollGast, *Administrative Procedures*, *supra* note 7, at 263-266; *see also* Bamberger & Mulligan, *Privacy Decisionmaking*, *supra* note 5.

[11] *See*, *e.g.*, Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 459 (2008) ("By placing limits on the President's power to appoint and remove independent agency heads as well as mandating limits on the number of the President's own partisans that can be appointed, Congress made use of an institutional design that sought to limit presidential control of independent agencies."). For a guide to the public choice literature on agency design, see Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

[12] *E.g.*, DAVID LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN (2003).

[13] Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011). (The point essentially holds for David Lewis's book, *Presidents and the Politics of Agency Design*, *supra* note 12, because Lewis treats individual bureaus separately, rather than as parts of agencies. *See infra* note 21.) Magill and Vermeule examined how administrative law doctrine empowers or disempowers particular actors within federal agencies.

[14] Classics include HERBERT KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR (1960); ANTHONY DOWNS, INSIDE BUREAUCRACY (1967); JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION SYSTEM (1978); MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE (1980); JAMES Q. WILSON, BUREAUCRACY,

operational bureaucracies—bureaus that themselves issue regulations or carry out programs, or offices that supervise such bureaus, not offices that operate by influence instead of chain-of-command authority.[15] Work in bureaucratic theory thus fails to offer a full account of the networks of authority and influence that comprise modern federal agencies. This Article's observations help to fill that gap, by focusing in particular on personnel who offer advice, rather than run agency operations, and elaborating some of the ways this distinction makes a difference.

Part I sets the stage, identifying definitional features of an Office of Goodness, and describing the structure and authorities of the Office I know best. For two years in the first term of the Obama Administration, I ran the Department of Homeland Security's Office for Civil Rights and Civil Liberties (CRCL) as the presidentially appointed (but not Senate confirmed) Officer for Civil Rights and Civil Liberties. CRCL sits in the DHS Office of the Secretary; it employs about a hundred civil servants, who carry out tasks ranging from administration of the Department's Equal Employment Opportunity program to civil rights inspection of immigration detention facilities to civil liberties review of classified information sharing agreements.[16] In Part II, I turn to four important controversies in which CRCL was a participant: the DHS role in information sharing relating to the Occupy movement; review of electronic device border search policy; Border Patrol's policy relating to interpretation assistance for local law enforcement; and the inter-agency negotiation over guidelines governing data ingestion and retention by the National Counterterrorism Center. (Of course the discussion here is my own and does not represent the views of the Department of Homeland Security or the Administration more generally. Also, while whatever insight I can bring to bear is obviously inseparable from my own work history and experiences, all the information reported comes from publically available sources, which are cited.) I tell these stories in some detail in order to ground the subsequent analysis.

Part III increases the analytic altitude and analyzes more systematically the ways in which Offices of Goodness intervene in agency operations. These interventions use a variety of methods, including:

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supra note 5. Or, more recently, see, e.g., Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? (John E. Chubb & Paul E. Peterson, eds., 1989); AMY BETH ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC (1999); DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928 (2001); Mariano-Florentino Cuéllar, *Coalitions, Autonomy, and Regulatory Bargains in Public Health Law*, in PREVENTING CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds. forthcoming); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008); DANIEL P. CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2010). Two sources providing helpful guides to the public choice part of the literature are Ronald Wintrobe, *Modern Bureaucratic Theory*, *in* PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 429 (Dennis C. Mueller ed., 1997), and Terry M. Moe, *The Positive Theory of Public Bureaucracy*, *in id.*, at 455.

[15] One insightful exception is ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY (1980).

[16] *See, e.g.*, DEP'T OF HOMELAND SEC. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES ANN. REP., FY 2011 (2012), *available at* http://www.dhs.gov/report-office-civil-rights-and-civil-liberties (last visited Aug. 17, 2013).

- Inclusion in policy formulation working groups
- Clearance authority
- Advice
- Training and technical assistance
- Program or operational review, including data analysis
- Complaint investigation
- Outreach to outside groups
- Generation of documents
- Congressional reporting

Each method comes with its own risks and benefits, which are discussed.

And increasing the elevation another 10,000 feet , in Part IV, I examine in more detail the relationships that either support or undermine Office influence and commitment to Goodness, its assigned value. Both influence and commitment, I argue, are continually under threat, and both depend crucially on external reinforcement, whether from Congress, the White House, non-governmental organizations, the courts, or other agencies. Again, I develop the dynamics in some detail.

It has recently become a commonplace observation that the power of the presidency has expanded to the point that tripartite separation of powers model, which relies on Congress and the courts to rein in the Executive Branch, may not be up to the task. Much scholarship (and perhaps even practice) now emphasizes, instead or in addition, internal accountability mechanisms.[17] Neal Katyal, for example, describes "internal separation of powers" methods, to "create checks and balances within the executive branch." He notes that "the apparatuses are familiar—separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts."[18] Likewise, Jack Goldsmith celebrates "something new and remarkable: giant distributed networks of lawyers, investigators, and auditors, both inside and outside the executive branch, that rendered U.S. fighting forces and intelligence services more transparent than ever, and that enforced legal and political constraints, small and large, against them."[19]

Both scholars and the American polity, would, to quote Gillian Metzger, "benefit[] from paying greater attention to internal administrative design, and in particular . . . analyzing

[17] As Gillian Metzger emphasizes, the various internal and external methods interact crucially. *See* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 Emory L.J. 423, 426 (2009). *See also, e.g.*, Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006) (analyzing the structure of federal intelligence offices); Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939-1953*, 76 U. CHI. L. REV. 587 (2009) (analyzing the structure of the Federal Security Agency).

[18] Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006)

[19] JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at xi-xii (2012).

what types of administrative structures are likely to prove effective and appropriate in different contexts."[20] In my view, the Office of Goodness strategy, already used by Congress and other principals, can be at least partially effective and appropriate. It is the ambition of this Article to raise the strategy's visibility, placing it more prominently on the menu of internal separation of powers devices for it to be further analyzed and assessed.

I. What is an Office of Goodness?

A. Key Characteristics

By "Office of Goodness" I mean an office within an operational agency that has each of three features:

First, Offices of Goodness are *advisory rather than operational*. Offices of Goodness help other parts of the agency get work done; they are not the offices (or bureaus, to use the nomenclature most common in scholarship[21]) that themselves carry out the agency's mission. This means that Offices of Goodness must operate by persuasion or coercion of others. Scholarship examining the dynamics of bureaucratic autonomy is highly relevant by analogy,[22] but for Offices of Goodness, power lies less in autonomy than in influence—the ability to thwart another office's autonomy.[23]

Second, Offices of Goodness are *value-infused*.[24] The observations here apply to offices that are explicitly assigned to further a particular value that is not otherwise primary for the agency in which they sit. That value could be civil rights, consumer welfare, fiscal rectitude, etc. The Article calls it Goodness, but is agnostic on whether Goodness is actually good. A note in this regard: Where the value in question is "lawfulness," the Office of Goodness is likely to be the agency's Office of General Counsel. Jack Goldsmith writes, for example, of "the CIA's 150 or so lawyers," naming them the "street-level bureaucrats" responsible for enforcing "compliance with the bevy of laws that Congress imposes and that the executive branch

[20] Metzger, *supra* note 17.

[21] *See* LEWIS, *supra* note 12, at 41 ("'Bureau' is a general term that refers to many different sub-units within larger departments that have different names such as the Federal Bureau of Investigation, Internal Revenue Service, or National Highway Traffic Safety Administration. Like departments, bureaus vary in size and significance. In many departments the sub-department bureaus have significant autonomy and authority; many departments are better characterized as holding companies of a number of distinct agencies rather than one large agencies. The autonomy of sub-department agencies derives from a number of sources. Most have legal authority delegated to the bureau chief directly by legislation, rather than to the department secretary or the President. Large bureaus are also generally headed by Senate-confirmed political appointees, making bureau chiefs accountable to congressional committees directly rather than through higher departmental officials.").

[22] The leading source on agency autonomy and the techniques used to obtain and sustain it is DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATIONS IN EXECUTIVE AGENCIES, 1862-1928 (2002).

[23] *See* PHILIP B. HEYMANN, THE POLITICS OF PUBLIC MANAGEMENT 150-152 (1987) (analyzing persuasion in federal agencies).

[24] *Cf.* PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION (1957).

translates into more detailed executive orders, regulations, and directives."[25] Valuable (though limited) work has been done on general counsels' offices[26]; this Article builds on that scholarship, adding detailed description of an Office of Goodness that is not an Office of General Counsel, and also moving up one level of generality, to think about this type of office as an analytic category.

Third, Offices of Goodness are *internal and dependent* on their agency. The dynamics of a fully internal office are very different from one that has structural separation and independence. I deal here with non-independent internal offices, although of course independence is not dichotomous but rather exists along a spectrum.[27] In my view, this is why the burgeoning work on the far more independent offices of Inspectors General is enlightening but distinct. As that work describes, notwithstanding their organizational chart placement, Inspectors General have, at least since 1978, answered much more to Congress than to their Department heads.[28]

B. What is the DHS Office for Civil Rights and Civil Liberties?

The head of the Department of Homeland Security Office for Civil Rights and Civil Liberties (CRCL)—a presidential appointee reporting directly to the Secretary of Homeland Security—is required by Congress to "oversee" DHS "compliance with constitutional, statutory, regulatory, policy, and other civil rights and civil liberties requirements." [29] The relevant statutes

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[25] GOLDSMITH, POWER AND CONSTRAINT, *supra* note 19, at 93. *See also, e.g.*, Afsheen John Radsan, *Sed Quis Custodiet Ipsos Custodes: The CIA's Office of General Counsel?* 2 J. Nat'l Security L. & Pol'y 201 (2008).

[26] For analysis of the dynamics of federal Offices of the General Counsel, see, for example, sources cited *supra* note 25; Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57 (1991); Magill & Vermeule, *Allocating Power*, *supra* note 13, at 1032, 1058-62, 1072-73; Harold Hongju Koh & Aaron Zelinsky, *Practicing International law in the Obama Administration*, 35 YALE J. INTL. L. ONLINE 4 (2009); Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1 (2010) (about Judge Advocate General's Corps lawyers).

[27] *See, e.g.*, Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Lisa S. Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010); Marshall J. Breger & Gary Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000).

[28] *See* Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. (2013); Ryan M. Check & Afsheen J. Radsan, *One Lantern in the Darkest Night: The CIA's Inspector General*, 4 J. NAT'L SEC. L. & POL'Y 247 (2010); Kathryn E. Newcomer, *The Changing Nature of Accountability: The Role of Inspector General in Federal Agencies*, 58 PUB. ADMIN. REV. 129 (1998); Michael R. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 GEO. L.J. 2027 (1998); PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993); INSPECTORS GENERAL: A NEW FORCE IN EVALUATION (Michael Hendricks et al. eds., 1990); Margaret J. Gates & Marjorie F. Knowles, *The Inspector General Act in the Federal Government: A New Approach to Accountability*, 36 ALA. L. REV. 473 (1984). CARMEN R. APAZA, INTEGRITY AND ACCOUNTABILITY IN GOVERNMENT: HOMELAND SECURITY AND THE INSPECTOR GENERAL (2011); MOORE & GATES, *supra* note 5.

[29] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 705, 116 Stat. 2135, 2219-20 (codified as amended at 6 U.S.C. § 345(a)), *amended by* Intelligence Reform and Terrorism Prevention Act of 2004, Pub L. No. 108-458, sec. 8303, § 705(a), 118 Stat. 3638, 3867; 42 U.S.C. § 2000ee-1; Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 803, § 1062, 121 Stat. 266, 360-362. The Homeland Security Act of 2002 established the office and directed the Secretary to appoint its head, who was instructed much more briefly to "review and assess information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees and officials of the Department." Pub. L. 107-296, Sec. 705, 116 Stat 2135, 2220 (2002).

empower the office to deal with both general policy development and review, and with more specific (and individual) civil rights complaints. CRCL's statutes instruct the office to assist the Secretary and Department offices in policy development and implementation, including by periodically reviewing policies and procedures "to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities." The statutes also require the office to review and assess information and investigate complaints concerning civil rights and civil liberties abuses by DHS employees—including, explicitly called out by statute—alleged "profiling on the basis of race, ethnicity, or religion." In addition, CRCL is required to more generally "ensure that [the Department] has adequate procedures to receive, investigate, respond to, and redress" civil liberties complaints.[30]

So that CRCL can carry out these tasks, the Secretary is instructed to ensure that the CRCL Officer:

> "(1) has the information, material, and resources necessary to fulfill the functions of such officer;
> "(2) is advised of proposed policy changes;
> "(3) is consulted by decision makers; and
> "(4) is given access to material and personnel the officer determines to be necessary to carry out the functions of such officer."[31]

And, crucially, Office is subjected to specific congressional reporting obligations. The CRCL Officer is required to file quarterly Congressional reports about the office's activities, including, most importantly, "the type of advice provided and the response given to such advice;" and "a summary of the disposition of . . . complaints, the reviews and inquiries conducted, and the impact of the activities of such officer."[32] Correspondingly, the Secretary is required to file an annual congressional report "detailing any allegations of [civil rights or civil liberties] abuses . . . of this section and any actions taken by the Department in response to such allegations."[33]

Congress has also made subsequent more specific use of CRCL and its head, instructing the Secretary to "consult" with the CRCL Officer in developing several specified programs,[34] requiring CRCL to develop or certify civil liberties training for particular personnel,[35] and asking

[30] 42 U.S.C. § 2000ee-1(a)(4).

[31] 42 U.S.C. § 2000ee-1(d).

[32] 42 U.S.C. § 2000ee-1(f)(2)(D).

[33] 6 U.S.C. § 345(b).

[34] *See* 6 U.S.C. § 124h (requiring the Secretary to consult with the CRCL Officer in establishing a DHS Fusion Center Initiative); 6 U.S.C. § 1138 (requiring the same in carrying out certain public transportation research and development projects); 6 U.S.C. § 1168 (requiring the same for railroad security research and development); 6 U.S.C. § 1185 (requiring the same for bus security research and development).

[35] *See* 6 U.S.C. § 124h(c)(4)(A)(ii) (requiring each DHS officer or intelligence analyst assigned to a fusion center to undergo civil liberties training "developed, supported, or sponsored by . . . the Officer for Civil Rights and Civil Liberties of the Department"); 6 U.S.C. § 124(i) (same for Information Sharing Fellows).

for CRCL-authored reports both before and after programs are implemented.[36] In addition, DHS Secretaries have publically assigned a variety of tasks to CRCL, declaring the office responsible for training, policy assessment and recommendations, and particular participation in specified Departmental tasks and processes. Several of these are discussed in part I.C, below.

CRCL is very different from the civil rights offices of most federal agencies. In contrast with CRCL's inward-looking advisory/review/watch-dog function, most agency offices of civil rights (OCRs) combine a more substantively limited role inside the agency—administering equal employment opportunity programs—with a more operational regulatory role outside the agency—enforcing the antidiscrimination obligations of supported organizations.[37] (The Department of Agriculture's Civil Rights Office, described in the Border Patrol Interpretation section below (part I.b.3), is a partial exception from this general pattern. And the most well-known of the federal civil rights offices, the Department of Justice's Civil Rights Division is different altogether; as a litigating office of the Justice Department, its primary mission is to sue non-federal defendants, so it is nearly entirely outwardly focused.) But while DHS CRCL is unusual among cabinet department civil rights offices, it is far from unique in its structure. DHS's foundational 2002 statute birthed not only CRCL but its DHS sibling, the Privacy Office, along similar lines.[38] And a 2007 statute that confirmed and expanded CRCL's authority similarly either confirmed or led to the creation of analogous offices—although generally combining privacy and civil liberties, and not mentioning civil rights—within the Departments of Justice, Defense, State, Treasury, Health and Human Services, the Central Intelligence Agency, and the Office of the Director of National Intelligence.[39] The structure of each office varies; some are led by presidential appointees, others by political appointees who must be approved by the Presidential Personnel Office but are technically appointed by the Department Head; still others are led by career staff.[40] Expanding the field of vision beyond either civil

[36] *See* 6 U.S.C. § 1138 (requiring the CRCL Office to conduct appropriate reviews of certain DHS public transportation research and development projects), 6 U.S.C. § 1168 (same, for railroad security research and development), 1185 (same, for bus security research and development); Pub. L. No. 110-53 (not codified in pertinent part), §§ 511 (requiring the CRCL Officer to submit a report to Congress and others on the civil liberties impact of the Fusion Center Initiative), 512 (same for Information Sharing Fellows Program), 521 (same for Interagency Threat Assessment and Coordination Group), 1523 (same for Northern Border Railroad Passenger program).

[37] *See, e.g.*, Stephen C. Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act (1995) (describing operations of Education OCR); Sara Rosenbaum & Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of* Alexander v. Sandoval, 3 YALE J. HEALTH POL'Y, L. & ETHICS 215 (2003) (same for HHS OCR); Olatunde Johnson, Beyond the Private Attorney General: Equality Directives in American Law, 87 N.Y.U. L. Rev. 101 (2012) (same for HUD Office of Fair Housing and Equal Opportunity); JEREMY RABKIN, JUDICIAL COMPULSIONS, HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989) (same for Health, Education and Welfare OCR).

[38] *See* Homeland Security Act of 2002, Pub. L. 107-296, Sec. 222, 116 Stat 2135, 2155 (2002) (codified as amended at 6 U.S.C. §142); *see also* 42 U.S.C. § 2000ee-2.

[39] 42 U.S.C. § 2000ee-1(a); *see also* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, §§ 1011, 1061, 118 Stat. 3638, 3658-59, 3688 (creating a Civil Liberties Protection Officer within the Office of the Director of National Intelligence and a Privacy and Civil Liberties Officer within the Executive Office of the President).

rights or civil liberties, offices that satisfy the three "Offices of Goodness" criteria set out above are scattered throughout government. They have titles like the Department of Energy's Office of Economic Impact and Diversity, or the Internal Revenue Service's Office of the Taxpayer Advocate.[41] Many are called Ombudsman's offices.[42] It is beyond the scope of this Article to either catalog or discuss all of these offices—the point here is only that their use by Congress is a general regulatory strategy worthy of analysis.

II. What do Offices of Goodness Do? Four CRCL Vignettes.

In this section, I describe four civil rights controversies in which CRCL played a role,[43] to thicken the description of available strategies and challenges. I look in turn at (1) the DHS role in information sharing relating to the Occupy movement in late 2011; (2) DHS electronic device border search policy; (3) Border Patrol's policy relating to interpretation assistance for Northern Border law enforcement agencies; and (4) the inter-agency negotiation over guidelines governing data retention by the National Counterterrorism Center. For each controversy, the narrative mentions the relevant tools, which are discussed more thoroughly in Part III.

A. DHS and Occupy

September 2011 saw the birth of the Occupy Wall Street protest movement in New York City; over subsequent weeks and months, Occupy grew and spread across the country. In many cities, Occupy began that fall with live-in encampments in parks and other public spaces. Nearly everywhere, city governments and law enforcement eventually enforced various curfew and anti-camping rules and shut down the Occupy camps. The Department of Homeland Security was involved in several ways. Occasionally a unit of DHS was a target of a protest. For example, an "Occupy Stewart" protest was held in November 2011 in front of the Stewart Detention Center,

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[40] For example, the Defense Department's Senior Agency Official for Privacy, and Civil Liberties Officer is a career member of the armed services. *See* Michael L. Rhodes, Director of Administration and Management, http://www.defense.gov/bios/biographydetail.aspx?biographyid=164; Defense Privacy and Civil Liberties Office, http://dpclo.defense.gov/civil/About_The_Office/dpclo_structure.html#leadership. The Department of Justice Chief Privacy and Civil Liberties Officer is a political appointee. And the Office of the Director of National Intelligence Civil Liberties Protection Officer is a career civil servant.

[41] For a discussion of the IRS Office of Taxpayer Advocate, see IRS OVERSIGHT BOARD, OVERSIGHT OF THE OFFICE OF TAXPAYER ADVOCATE: PRINCIPAL FINDINGS AND ACTIONS (Sept. 2002), available at http://www.treasury.gov/irsob/reports/taxpayer_advocate_oversight.pdf (last visited August 16, 2013).

[42] Outward-facing ombudsman's offices are embedded, for example, in, inter alia, the Securities and Exchange Commission; Department of Health and Human Services, Centers for Medicare and Medicaid Services, Office of Public Engagement; Consumer Product Safety Commission, Office of Education, Global Outreach and Small Business Ombudsman; and Small Business Administration. DHS also has a freestanding Ombudsman for Citizenship and Immigration Services. For background, see The Ombudsman in Federal Agencies, Admin. Conf. of the United States, Recommendation 90-2, 1 C.F.R. § 305.90-2 (1993); Office of the Chairman, Administrative Conference of the United States, The Ombudsman: A Primer for Federal Agencies (1991). On internal federal ombudsman's offices, for workers, see Leah Meltzer, *The Federal Workplace Ombuds*, 13 OHIO ST. J. ON DISP. RESOL. 549, 559-97 (1998).

[43] My own personal involvement in three of these controversies appears in the documents cited, however, I played no direct role in the Occupy issue.

an immigration detention facility in Lumpkin, Georgia.[44] The Coast Guard and CBP (and to a lesser extent ICE) also monitored what was going on at several sea port protests, which had the potential of affecting their operations.[45] And DHS's Federal Protective Service, which is the law enforcement agency with responsibility for most of the nation's federal buildings, took note of protests in the vicinity of those buildings[46] and was the agency that enforced encampment prohibitions in (apparently) one location.[47]

For the Federal Protective Service and for state and local law enforcement (often working through "fusion centers," entities that are not part of the federal government, but are partially funded by, and networked with, DHS), the civil liberties challenge was to maintain "situational awareness,"—that is, knowledge of what was going on sufficient to facilitate appropriate police planning and presence—without crossing over into more intrusive and objectionable monitoring of First Amendment protected protest activity.[48] Scattered throughout thousands of pages of relevant documents obtained via Freedom of Information Act request from DHS by Truthout, a non-profit independent news organization,[49] is evidence of efforts to meet that challenge. For example, one document describes the stance of the Northern California Regional Intelligence Center (NCRIC), a fusion center in San Francisco: "Other than a few smashed windows at a number of banks, today's events have remained First Amendment protected activities. NCRIC is not monitoring protected activity, but is in touch with the Oakland EOC in the event circumstances change."[50] And when in October 2011, a report summarizing the Occupy protests to date and attributed to the DHS National Protection and Programs Directorate's Office of Infrastructure Protection was posted (and then reported and reposted on *Rolling Stone*'s blog site); the report was immediately pulled down; senior Department officials explained it was unauthorized and out of compliance with DHS policy.[51]

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[44] Jim Mustian, *Crowd Calls for Closing of Stewart Detention Center; Two Arrested*, GA. LEDGER-ENQUIRER (Nov. 18, 2011), http://www.ledger-enquirer.com/2011/11/18/1824958/crowd-calls-for-closing-of-stewart.html.

[45] *See* E-mails Among DHS Staff During November and December 2011, *in* 5/3/2012 DHS FOIA DOCUMENT RESPONSE 95, 197, 292-94, 305-07, https://www.documentcloud.org/documents/353138-latest-batch-of-dhs-occupy-documents-contains.html (last visited Aug. 13, 2013) (discussing protests at several sea ports in November and December 2011).

[46] *See* Jason Leopold, *DHS Emails Question Federal Law Enforcement's Role in Violence at Occupy Wall Street and Oakland Rallies*, TRUTHOUT (Mar. 28 2013), http://www.truth-out.org/news/item/15389-newly-released-dhs-emails-questions-federal-law-enforcements-role-in-violence-at-ows-rallies-in-oakland-and-new-york (citing DHS FOIA Request, http://www.documentcloud.org/documents/625736-ows-nppd-region-1-final.html (last visited Aug. 13, 2013)).

[47] *See, e.g.*, E-mail from DHS spokesman Chris Ortman to DHS Secretary's Office staff, Nov. 1, 2011, *in* 5/3/2012 DHS FOIA DOCUMENT RESPONSE, *supra* note 45, at 45 (statement on the record describing FPS role in Portland Schrunk Plaza arrests).

[48] S. SELECT COMM. STUDY GOV'T OPERATIONS, 2 INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. DOC. NO. 94-755, at 221 (2d Sess. 1976).

[49] *See* Jason Leopold, *DHS Turns Over Occupy Wall Street Documents to Truthout*, TRUTHOUT (Mar. 20, 2012), http://truth-out.org/news/item/8012-dhs-turns-over-occupy-wall-street-documents-to-truthout#files.

[50] E-mail from [redacted] to [redacted], *in* 5/3/2012 DHS FOIA DOCUMENT RESPONSE, *supra* note 45, at 95.

[51] The report remains available at http://www1.rollingstone.com/extras/13637_DHS%20IP%20Special.pdf. The back and forth on pulling it down is discussed in email traffic FOIA'd and posted by Truthout. *See* Jason Leopold, *Top DHS Officials Went Ballistic Over Rolling Stone Contributor Michael Hasting's OWS Report, Internal Emails*

Even situational awareness activities received some criticism from the civil liberties left—an article in *Salon*, for example, described them as a "policy of daily spying on activists"[52]; this was then described on the *New York Times* website by a civil liberties advocate as "inappropriate surveillance of protesters associated with Occupy Wall Street."[53] But such criticism fails to engage the reasonable needs of law enforcement agencies with responsibilities for federal buildings. It's not obviously unreasonable for Federal Protective Service personnel to notice who is planning large events near the buildings they protect; in fact, it might be irresponsible for police *not* to notice such events.

Units of DHS designated to help "fuse" information for many law enforcement agencies—the DHS National Operations Center and also DHS intelligence analysts assigned to the fusion centers—did not have such situational awareness needs. Accordingly, the challenge for them was a little bit less challenging; because their mission is more limited (covering homeland security matters, only) a cleaner solution is possible. For example, when Chicago's police department asked the National Operations Center to circulate to law enforcement in seven other cities an "RFI" (Request for Information) on Occupy encampments and arrests,[54] that request was first distributed but then quickly recalled by top management, who explained: "DHS I&A [Office of Intelligence & Analysis] personnel—both at Headquarters and in the field—may NOT be engaged in any efforts to gather information on First Amendment-protected activities that have no direct nexus to violence or that are otherwise outside the scope of DHS I&A authorities. Such inquiries should be strictly limited to law enforcement channels."[55]

So far I've quoted various DHS actors' nods towards First Amendment values. But what about CRCL? CRCL's involvement had several related strands, described below. CRCL's training role may have raised awareness of First Amendment red flags, and also ratified CRCL's role and expertise. In addition, CRCL used that role and expertise to explain and underscore the importance of avoiding First Amendment infringements. And finally, in some limited situations, CRCL had clearance authority, so that CRCL approval was more or less required for promulgation of a document.

Training. In the Implementing Recommendations of the 9/11 Commission Act of 2007, Congress required that each DHS officer or intelligence analyst assigned to a fusion center undergo civil liberties training "developed, supported, or sponsored" by CRCL.[56] The same law

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Show, TRUTHOUT (July 31, 2012), http://truth-out.org/news/item/10634-dhs-on-rolling-stone-reporter-michael-hastingss-ows-report-he-can-be-provocative-help-him-understand-our-mission. The emails themselves are posted at https://s3.amazonaws.com/s3.documentcloud.org/documents/405431/ows-final-release-package-part2.pdf, at 78, 94.

[52] Natasha Lennard, *DHS Had Policy of Daily Spying on Activists*, SALON (Apr. 3, 2013), http://www.salon.com/2013/04/03/dhs_had_policy_of_daily_spying_on_activists.

[53] Jameel Jaffer, *Privacy is Worth Protecting*, N.Y. TIMES (June 9, 2013, 10:00:00 AM), http://www.nytimes.com/roomfordebate/2013/06/09/is-the-nsa-surveillance-threat-real-or-imagined.

[54] *See* E-mails from Chicago Police Department Officials to Other Police Department Officials, *in* 5/3/2012 DHS FOIA DOCUMENT RESPONSE, *supra* note 45, at 245-57.

[55] E-mails from [redacted] to [redacted], *in id.* at 251, 266, 270.

[56] 6 U.S.C. § 124h(c)(4)(A)(ii).

likewise required that each fusion center provide "appropriate privacy and civil liberties training" for all personnel, "in coordination with" both the DHS Privacy Office and CRCL.[57] The training provided is limited: CRCL gives the DHS intelligence analysts just a few hours' overview of civil rights and civil liberties background, and trains trainers (and provides materials) for the fusion center personnel. Critics have suggested this is inadequate[58]—although perhaps it is sufficient for raising awareness, if not for creating experts. In any event, the training requirement does introduce each of the intelligence analysts to the existence and role of CRCL. The results are evident in the Occupy FOIA document in one email from an employee at the Office of Intelligence & Analysis to a National Operations Center intelligence analyst, who had received a law enforcement request for information about Occupy protests. The email warned:

> [P]lease be very cautious in responding to requests related to constitutionally protected activities. Feel free to reach out to our CR/CL office if you have any doubt when asked to support requirement[s] you feel are questionable prior to taking any action."[59]

Similarly, after Pittsburgh's municipal Office of Emergency Management and Homeland Security (not part of DHS) distributed a "Threat Assessment" about Occupy Pittsburgh,[60] two DHS employees who saw this document became concerned that it "might be advocating surveillance and other countermeasures to be employed against activities protected under the 1st Amendment," and contacted CRCL to seek some kind of responsive training document "so that in the future they [the local authors of the Threat Assessment] have a greater awareness of how to develop intelligence assessments that don't undermine Constitutionally protected speech and assembly rights."[61]

Technical assistance. More directly within DHS's own walls, staff from DHS's Office of Intelligence & Analysis explained in an October 17 email that they were receiving numerous "questions and requests for information regarding Occupy Wall Street from a number of component partners and intelligence officers." The email explained their first answer: "Recognizing that this is a first amendment-protected activity, we have recommended (on an ad hoc basis when we received requests) that our Intelligence Officers refer inquiries to Fusion Centers and avoid the topic altogether." But the email requested more formal guidance from CRCL and the DHS Privacy Office.[62]

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[57] 6 U.S.C. § 511(a).

[58] *See, e.g.*, S. PERM. SUBCOMM. INVESTIGATIONS, COMM. HOMELAND SEC. AND GOV'T AFFAIRS, FEDERAL SUPPORT FOR AND INVOLVEMENT IN STATE AND LOCAL FUSION CENTERS 49 (Oct. 3, 2012), *available at* http://www.hsgac.senate.gov/download/report_federal-support-for-and-involvement-in-state-and-local-fusions-centers.

[59] E-mail from [redacted] to [redacted], *in* 5/3/2012 DHS FOIA DOCUMENT RESPONSE, *supra* note 45, at 188.

[60] Pittsburgh Office of Emergency Management and Homeland Security FOIA Response, http://nigelparry.com/enginefiles/uploads/occupyassessment.pdf (last visited on Aug. 13, 2013).

[61] E-mail from [redacted] to [redacted], *in* DHS FOIA DOCUMENT RESPONSE (PART 1) 2, http://truth-out.org/files/12-0048-First-Interim-Release_OWS_Part1.pdf (last visited on Aug. 13, 2013).

[62] *See* E-mail from Shala Byers to [redacted], *in id*. at 5.

Privacy Office and CRCL staff explained to the Office of Intelligence & Analysis manager who requested the guidance that simply referring the inquiries to Fusion Centers might "give the appearance that DHS is attempting to circumvent existing restrictions, policies, and laws." The right approach, they argued, was that "DHS should not report on activities when the basis for reporting is political speech," and should "also be loath to pass DHS requests for more information on the protests along to the appropriate fusion centers without strong guidance that the vast majority of activities occurring as part of these protests is protected." Not that there was a ban on reporting: "Persons demonstrating illegal or suspicious behavior and attempting to use the protests to obscure their activity could be reported, as long as there is no attempt to link the suspicious/illegal behavior to first amendment protected activity."[63]

The FOIA'd emails include resulting guidance promulgated by Office of Intelligence & Analysis leadership to DHS intelligence analysts. It stated:

> Activities such as speech and assembly (both of which are implicated in the planned "occupy" protests) are protected by the First Amendment and generally DHS would not collect information or report on these types of activities unless we had a compelling interest to do so. Below is some general guidance that we hope you find helpful.
>
> - The government may never collect or disseminate information based solely on First Amendment protected activities, or conduct investigations on that basis.
> - Generally, reporting should be about the violence or criminality of a particular individual or group. Reporting on activities without a nexus to violence or criminality often raises First Amendment concerns.
> - To justify research into and creation of a product containing First Amendment-protected activity, personnel should consider whether they have a lawful predicate (e.g. a lawful purpose to perform their authorized law enforcement functions or other activities, that is not based on the protected activity itself).
> - Once a lawful predicate has been established, personnel should ensure the scope of the research and reporting on First Amendment-protected activity is limited to the threat posed. This is often referred to as congruence.
> - The treatment of groups that may be involved in the First Amendment protected activity or related events should be even-handed and free of bias (e.g., not reporting more extensively or negatively on one group based on their viewpoint alone).

The email closed with an expression of collegiality: "Please let us know if you have any other questions, or if you require CRCL support in any other way. The CRCL office has been extremely helpful and responsive on this issue and they stand ready to assist."[64]

The emails include other evidence of more particularized advice seeking and giving. One episode involved a DHS intelligence analyst who asked about an incident in which an SUV was

[63] E-mail from Privacy office staff to [redacted], *id.* at 85.

[64] *Id.*

set on fire. He explained: "I ran across this today and was interested in a possible write up of the event for the state and locals. Before I spent the time writing on this, however, I'd like to know what objections CRCL might pose to such a product concerning the Occupy movement—which has thus far been nonviolent."[65] The email chain includes debate among CRCL staff members about whether any reporting on the incident, at all, would be appropriate in light of the DHS mission. What was sent back to the intelligence analyst notes that CRCL was:

> particularly concerned about attribution of the incident. The article notes that the police say they don't know who set the fire or why they did it, and while some of the graffiti contains slogans consistent with some of the Occupy movement's protests, the police say it would be 'unfair to blame any one group' for the incident, and the spokesperson for Occupy Eugene denounced the event and said it was not part of their tactics. Unless there is other intelligence that indicates that the vandalism can be attributed to the group, the product would have to be very careful not to attribute the incident to the movement." Accordingly, "If I&A believes the incident in Eugene merits nationwide reporting, it would be preferable for I&A to write up the incident in a manner that takes care not to attribute the action to Occupy (absent further information), rather than to write a general product about Occupy and add to that product a write-up of the incident (as the context of the product would make it difficult to convey that we have no information that the incident may be fairly attributed to Occupy, rather than someone merely sympathetic to their ideology). Generally, it would be difficult for DHS to justify a product on the Occupy movement at this time. As you note, the movement has been largely non-violent, and what criminal activity has taken place has mostly been of the civil disobedience variety (failure to secure/overstaying permits, non-violent resistance to arrest), with occasional violent resistance to being removed from a location/arrested, etc., and it is unclear what is appropriately attributable to the Occupy movement versus individuals who may later enter into a conflict with policy. Other concerns appear to be health and safety related (use of heating equipment, disposal of trash, etc). As these concerns generally are localized and not related to domestic terrorism, to our knowledge, it would be difficult for DHS to justify a product on what is largely First Amendment protected activity that doesn't appear to have a nexus to a DHS mission.

The intelligence analyst decided not to write the report.

Clearance authority. CRCL had not always played this influential a role in intelligence reporting at DHS. In fact, in April 2009, an Office of Intelligence & Analysis report on "Right-Wing Extremism"[66] was issued over CRCL's objection.[67] The report was marked "For Official

[65] E-mail from [redacted] to [redacted], *id.* at 13.

[66] *See* DEPT. HOMELAND SEC., OFFICE INTELLIGENCE AND ANALYSIS, RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (Apr. 7, 2009), *available at* http://www.fas.org/irp/eprint/rightwing.pdf.

[67] *See* Tom Brune, *Analysts Ignored Objections on Extremism Report, Official Confirms*, NEWSDAY (Apr. 17, 2009); Daryl Johnson, RIGHT-WING RESURGENCE: HOW A DOMESTIC TERRORIST THREAT IS BEING IGNORED (2012).

Use Only"[68] but was widely distributed to law enforcement agencies, and promptly leaked and posted online.[69] Defining right-wing extremism to include groups "that are mainly antigovernment, rejecting federal authority in favor of state or local authority, or rejecting government authority entirely," as well as "groups and individuals that are dedicated to a single issue, such as opposition to abortion or immigration," it warned that gun control opponents and veterans were plausible recruits to violent extremism, and cast aspersions on Republicans more generally by stating that opposition to the Obama administration's policy positions was "galvaniz[ing]" extremists.[70] The resulting furor from conservative constituencies,[71] and then from both Democrats and Republicans in Congress,[72] considerably enhanced CRCL's authority; the Secretary apologized to veterans for the report[73] and an internal directive was issued requiring clearance of all non-classified intelligence analysis by CRCL personnel, as well as by Privacy and the Office of the General Counsel. The clearance authority was not absolute, but to issue a document over the leadership-level objection of one of those offices, Intelligence & Analysis was required to appeal to the Deputy Secretary—a significant augmentation of the reviewing offices' influence.[74]

Returning to the Occupy issue, what's notable in the Occupy FOIA releases is that there is no evidence of an actual DHS intelligence report about Occupy. This kind of product would

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[68] The FOUO designation was supposed to bar distribution outside of the government. See Department of Homeland Security, Management Directive 11042.1, Safeguarding Sensitive But Unclassified (For Official Use Only) Information, Jan. 6, 2005, available at https://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_110421_safeguarding_sensitive_but_unclassified_information.pdf. It has since been officially supplanted by the designation "Controlled Unclassified Information." *See* Controlled Unclassified Information, Executive Order 13556 (Nov. 4, 2010).

[69] The leak was to Rodger Hedgecock. The story is told in DARYL JOHNSON, RIGHT-WING RESURGENCE: HOW A DOMESTIC TERROR THREAT IS BEING IGNORED (2012), written by the intelligence analyst who drafted the Right-Wing Extremism paper.

[70] *Id.* at 2-3.

[71] *See, e.g.*, Michelle Malkin, *Confirmed: The Obama DHS Hit Job on Conservatives is Real*, MICHELLE MALKIN (Apr. 14, 2009), http://michellemalkin.com/2009/04/14/confirme-the-obama-dhs-hit-job-on-conservatives-is-real, ("the piece of crap report issued on April 7 is a sweeping indictment of conservatives"). Numerous organizations responded by calling for the removal of Secretary Napolitano. She responded with an apology and a promise to revamp the intelligence product clearance process, including by augmenting the authority of CRCL. Jackie Kucinich, *Napolitano Atones for DHS Report*, ROLL CALL (May 7, 2009, 12:00 AM), http://www.rollcall.com/issues/54_127/-34696-1.html.

[72] *See, e.g.*, Letter from Congressman Bennie Thompson to Secretary Janet Napolitano (April 14, 2009), http://www.yallpolitics.com/images/ThompsonLetter041609.pdf (last visited on Aug. 13, 2013).

[73] *See* Ginger Thompson, *Extremist Report Draws Criticism; Prompts Apology*, N.Y. TIMES (Apr. 16, 2009, 3:03 PM), http://thecaucus.blogs.nytimes.com/2009/04/16/extremist-report-draws-criticism-prompts-apology/?_r=0.

[74] *See Hearing on FY2010 Budget for the Office of Intelligence and Analysis of the Department of Homeland Security Before the H. Homeland Security Subcomm. Intelligence, Information Sharing and Terrorism Risk Assessment*, 111th Cong. (2009) (statement of Bart Johnson, Acting Under Secretary) ("To strengthen our existing processes, an interim clearance process was put in place shortly after the release of the April 7, 2009 assessment. That process established mandatory review and concurrence by four offices - Civil Rights and Civil Liberties, the Privacy Office, Office of the General Counsel, and I&A's Intelligence Oversight Section. Any non-concurrence that could not be resolved was elevated to the Deputy Secretary for review, ensuring a much more coordinated review of I&A's products than had previously been in place.").

have been subject to CRCL's clearance authority. Perhaps that's because I&A leadership lacked interest in such a product. Or perhaps it's because clearance would have been implausible. As one of the email chains between two CRCL employees notes:

> W/r/t a larger report on the Occupy movement, do you mean that you don't think CRCL could clear on any product on OWS [Occupy Wall Street], generally? I tend to agree that it would be difficult to clear on that, given that any concerns out of the movement thus far are local matters: reasonable time, place, and manner restrictions on protests, health and safety issues, etc, all seem to be situational awareness issues (not domestic terrorism-related) that apply only to locals dealing with particular protests, and therefore, lack a DHS nexus for reporting. Given that their only foray into illegal activity, as a movement, seems to be violating permit rules and clashes with the police over removals (mostly, but not exclusively, through civil disobedience tactics), a product would tend to appear as merely reporting on First Amendment activity.

All in all, the emails and documents paint a portrait of a large agency with many people thinking hard—and, I think, appropriately—about the First Amendment issues. There are no smoking guns of repressive action or inappropriate monitoring.[75] CRCL seems, from this evidence, to have played an important out-of-view part, mostly in educating agency personnel about the suggested non-interventionist approach, with that education reinforced by the somewhat authoritative role in intelligence product review the office had accreted after a prior public contretemps.

B. Laptop Searches

In February 2008, a *Washington Post* story profiled a number of American citizens who claimed their cell-phones and laptops had been searched, copied, and even confiscated by U.S. Customs and Border Protection (CBP) when they were questioned at the border on their return to the United States from travel abroad.[76] The article's news hook was a Freedom of Information Act lawsuit filed the same day by the Electronic Frontier Foundation and the Asian Law Caucus, seeking CBP policy documents relating to such border searches.[77] While the issue had already

[75] Truthout acknowledges this with some regret, noting: "[T]he public still does not have a complete picture of what role, if any, the federal government played in dismantling the nationwide encampments. . . . Unfortunately, about 250 pages of redacted documents released last week by the Department of Homeland Security's (DHS) National Protection and Programs Directorate (NPPD), in response to Truthout's 17-month-old Freedom of Information Act (FOIA) request, does not contain any smoking guns that would put to rest that lingering question." Jason Leopold, *DHS Emails Question Federal Law Enforcement's Role in Violence at Occupy Wall Street and Oakland Rallies*, TRUTHOUT (Mar. 28 2013), http://www.truth-out.org/news/item/15389-newly-released-dhs-emails-questions-federal-law-enforcements-role-in-violence-at-ows-rallies-in-oakland-and-new-york.

[76] Ellen Nakashima, *Clarity Sought on Electronics Searches Travelers' Devices Seized at Border*, WASH. POST, Feb. 7, 2008.

[77] After the case was filed, CBP provided most of the documents sought; the plaintiffs continued their challenge seeking additional information, but lost. *Asian Law Caucus v. U.S. Department of Homeland Security*, 4:08-cv-00842, 2008 WL 5047839 (N.D. Cal. Nov. 24, 2008) (granting the government summary judgment).

made an appearance in several federal court opinions in criminal cases,[78] the *Post* story made a real splash; laptop searches became newly salient for both civil rights groups and Congress. The matter was pressed, for example, at a Senate Judiciary subcommittee hearing titled "Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel."[79] Bills were introduced,[80] reports written,[81] FOIA requests submitted,[82] objections elaborated,[83] and affirmative lawsuits filed.[84]

In the middle of the controversy, DHS released materials on the extant policy and the prevalence of electronic device border searches. The released information showed that CBP policy allowed border officials to search (and copy) the contents of laptops and cell-phones of any traveler—U.S. citizen or foreign national—undergoing border inspection, with or without suspicion. CBP also released information on the prevalence of laptop and cell-phone searches: such searches occurred at a rate of 250 per month in the months of 2008-2009 covered by the disclosure[85]: miniscule as a percentage of travelers but still large as a number. Advocates and Congress were not satisfied by this information and kept the issue alive into the new administration, asking the new Secretary to review and revise the policy. On August 27, 2009,

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[78] *See, e.g.*, United States v. Roberts, 274 F.3d 1007, 1010-11 (5th Cir. 2001); United States v. Ickes, 393 F.3d 501, 502-03 (4th Cir. 2005); United States v. Romm, 455 F.3d 990, 994-95 (9th Cir. 2006); United States v. Arnold, 454 F.Supp.2d 999 (C.D. Cal. 2006), *rev'd* 533 F.3d 1003, 1005 (9th Cir. 2008).

[79] *Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel: Hearing Before the S. Comm. on the Judiciary Const. Subcomm.*, 110th Cong. (2008) (statement of Jayson P. Ahern, Deputy Commissioner, U.S. Customs and Border Protection).

[80] *See* Electronic Device Privacy Act of 2008, H.R. 6588, 110th Cong. (2008); Securing Our Borders and Our Data Act of 2008, H.R. 6702, 110th Cong. (2008); Securing our Borders and our Data Act of 2009, H.R. 239, 111th Cong.) (2009); Border Security Search Accountability Act of 2008, H.R. 6869, 110th Cong. (2008); Border Security Search Accountability Act of 2009, H.R. 1726, 111th Cong. (2009); Comprehensive Immigration Reform ASAP Act of 2009, H.R. 4321, 111th Cong. (2009); Travelers' Device Privacy Protection Act of 2008, S. 3612, 110th Cong. (2008); Travelers' Device Privacy Protection Act of 2008, H.R. 7118, 110th Cong. (2008).

[81] ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP (April 2009), available at http://www.advancingjustice-alc.org/sites/asian-law-caucus/files/Returning%20Home.pdf/; MUSLIM ADVOCATES: UNREASONABLE INTRUSIONS: AMERICANS RETURNING HOME SEARCHED AND INTERROGATED ABOUT POLITICS, FAITH & FINANCES (April 2009), available at http://www.muslimadvocates.org/americans_returning_home_searched_interrogated_about_politics_faith_finances; YULE KIM, BORDER SEARCHES OF LAPTOP COMPUTERS AND OTHER ELECTRONIC STORAGE DEVICES 3 (Cong. Research Serv., RL34404, 2009). Later advocacy reports included CONSTITUTION PROJECT, SUSPICIONLESS BORDER SEARCHES OF ELECTRONIC DEVICES: LEGAL AND PRIVACY CONCERNS WITH THE DEPARTMENT OF HOMELAND SECURITY'S POLICY (May 18, 2011), available at http://www.constitutionproject.org/pdf/Border_Search_of_Electronic_Devices_0518_2011.pdf;

[82] *See* Letter from Catherine Crump, ACLU Staff Attorney, to Mark Hanson, FOIA Director, U.S. Customs and Border Protection (June 10, 2009), *available at* http://www.aclu.org/files/pdfs/freespeech/laptopfoia.pdf.

[83] *See, e.g.*, *ACLU Seeks Records About Laptop Searches at the Border*, ACLU (June 10, 2009), http://www.aclu.org/free-speech/aclu-seeks-records-about-laptop-searches-border.

[84] *See* Abidor v. Napolitano, 1:10-cv-04059 (E.D.N.Y. filed Sept. 7, 2010); House v. Napolitano, 1:11-cv-10852 (D. Mass. filed May 13, 2011), 2012 WL 1038816 (D. Mass. 2012).

[85] *See Laptop Search Analysis*, AM. CIVIL LIBERTIES UNION (Jan. 14, 2010), http://www.aclu.org/national-security/laptop-search-analysis. I used this table to compute the average: http://www.aclu.org/files/pdfs/natsec/laptopsearch/Tab_24_Chart_with_formulas_08182010.xls.

DHS announced new policies for both CBP and U.S. Immigration and Customs Enforcement (ICE).[86] Unlike the old policies, which had only been made public after substantial dispute, the new policies were immediately posted on the Department's website. They were a bit more constraining than the versions they replaced. In particular, they included timeframes, banned detention of devices after searches were complete, required device owners be provided information on appeal rights, and added supervisory review. They did not, however, add a suspicion prerequisite for searches. In addition, the Secretary instructed CRCL to conduct a "Civil Liberties Impact Assessment" within 120 days, a deadline of December 2009.

Program Review. A "Civil Liberties Impact Assessment" is a report. The phrase calls to mind the Environmental Impact Assessments required by the National Environment Policy Act of 1969,[87] and the Privacy Impact Assessments required by the E-Government Act,[88] but whereas EIAs and PIAs have become institutionalized, analogues in other arenas have not.[89] As of August 2009, CRCL had completed just four earlier Civil Liberties Impact Assessments.[90] The concept of an impact assessment is to systematically examine both the risks posed by a planned or ongoing process, and costs and benefits of potential strategies for amelioration of those risks.[91] This new electronic device searching impact assessment, the first started in the new administration, was not quickly forthcoming. In fact, it was not completed until December 2011, twenty months later than the Secretary had directed. And it was not immediately made public; although its completion was noted in a quarterly report to Congress,[92] even a bare

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[86] DEP'T OF HOMELAND SEC., BORDER SEARCH OF ELECTRONIC DEVICES CONTAINING INFORMATION, CBP Directive No. 3340-049 (Aug. 20, 2009), http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf; DEPT. OF HOMELAND SEC., BORDER SEARCHES OF ELECTRONIC DEVICES, ICE Directive No. 7-6.1 (Aug. 18, 2009), http://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf.

[87] National Environment Policy Act of 1969, Pub. L. 91-190 § 102(2)(C), 83 Stat. 852, 853 (1970), codified as amended as 42 U.S.C. § 432(c).

[88] *See* OFFICE MGMT. & BUDGET, M-03-22, GUIDANCE FOR IMPLEMENTING THE PRIVACY PROVISIONS OF THE E-GOVERNMENT ACT OF 2002 (2003) *available at* http://www.whitehouse.gov/omb/memoranda_m03-22 ("Privacy Impact Assessment (PIA) is an analysis of how information is handled: (i) to ensure handling conforms to applicable legal, regulatory, and policy requirements regarding privacy, (ii) to determine the risks and effects of collecting, maintaining and disseminating information in identifiable form in an electronic information system, and (iii) to examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks.").

[89] The idea of a civil liberties impact assessment seems to have made its first appearance in CTR. FOR AM. PROGRESS, SECURING AMERICA, PROTECTING OUR FREEDOMS AFTER SEPTEMBER 11, 14-15 (2005) *available at* http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=474133. *See also* Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559, 609-24 (2006). As Marks points out, a proposal for a Human Rights Impact Assessment process in public health policy formulation was made over a decade earlier. Lawrence Gostin & Jonathan Mann, *Toward the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Public Health Policies*, 1 HEALTH & HUM. RTS. 58 (1994), *available at* http:// www.hsph.harvard.edu/fxbcenter/V1N1gostin.htm.

[90] *See Civil Rights & Civil Liberties Impact Assessments*, DEPT. HOMELAND SEC. http://www.dhs.gov/civil-rights-civil-liberties-impact-assessments (last visited on Aug. 13, 2013).

[91] Gostin, *supra* note 89, at 61.

[92] *See* DEP'T OF HOMELAND SEC. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES Q. REP. FY2012, Q3 (Oct. 3, 2012), *available at* http://www.dhs.gov/sites/default/files/publications/crcl-quarterly-report-fy-2012-q3_0.pdf. The

executive summary was not posted until over a year later, in January 2013.[93] The to-be-expected FOIA request quickly followed,[94] and in June 2013 DHS released a full version, albeit with legal analysis redacted.[95]

The Impact Assessment—by this time titled a "Civil Rights and Civil Liberties Impact Assessment"—took the position that suspicionless laptop searches by border agents did not violate the Fourth Amendment. In this it lined up with all the Court of Appeals precedent extant at the time the document was completed.[96] (Between completion and release, the Ninth Circuit held, en banc, that forensic laptop searches, but not non-forensic searches, had to be justified by reasonable suspicion.[97] More on that decision below.) Even though CRCL found no constitutional violations, the Impact Assessment nonetheless made five recommendations:

- *Record a reason for each search.* "CBP officers who decide to conduct a device search generally should record the reason for the search in a TECS [computer system] field. To be clear, we are not recommending that officers demonstrate reasonable suspicion for the device search; rather we recommend that officers simply record the actual reason they are conducting the search, whatever that reason is. This recommendation exceeds constitutional requirements, but should facilitate CBP's operational supervision and oversight."
- *Explicitly ban race, religion, and ethnicity discrimination in searches, subject to narrowly tailored exceptions.* CRCL recommended that CBP and ICE should supplement the Department's overarching antidiscrimination policy by "stat[ing] explicitly in policy that it is generally impermissible for officers to discriminate against travelers—including by singling them out for specially rigorous searching—because of their actual or perceived race, religion, or ethnicity, and that officers may use race, religion, or ethnicity as a factor in conducting discretionary device searches only when (a) the search is based on information (such as a suspect description) specific to an incident, suspect, or ongoing criminal activity, or (b) limited to situations in which Component leadership has found such consideration temporarily necessary based on their assessment of intelligence information and risk, because alternatives do not meet security needs."
- *Collect data and conduct analysis of racial/ethnic disparate impact.* "CBP should improve monitoring of the distribution of electronic device searching by race and

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report states that the Impact Assessment was completed in August 2012, *id.* at 8, but the report, when released, was dated December 2011.

[93] *See* DEP'T OF HOMELAND SEC. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES, BORDER SEARCHES OF ELECTRONIC DEVICES (2013), http://www.dhs.gov/sites/default/files/publications/crcl-border-search-impact-assessment_01-29-13_1.pdf.

[94] *See* FOIA Request Letter from Catherine Crump, ACLU, to Fernando Pineiro, DHS FOIA Officer (Feb. 8, 2013), *available at* https://www.aclu.org/files/assets/dhs_border_search_report_foia.pdf.

[95] *See* DHS FOIA Response (2013), http://www.dhs.gov/sites/default/files/publications/crcl-border-search-impact-assessment_06-03-13_1.pdf (last visited Aug. 13, 2013).

[96] *See* sources cited *supra* note 78.

[97] United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013) (en banc).

ethnicity, by conducting routine analysis to "assess whether travelers of any particular ethnicity . . . at any port of entry are being chosen for electronic device searches in substantial disproportion to that ethnicity's portion of all travelers through the port. . . . Data and results should be shared with CRCL."

- *Remedy any detected disparate impact.* If analysis suggests "that electronic device searching in any port has a substantial unexplained skew towards travelers of one or more ethnicity, CBP should work with CRCL on developing appropriate oversight mechanisms. Subsequent steps generally should include a requirement of supervisory approval for searches (absent exigent circumstances) or enhanced training, and may include other responses."
- *Improve notice of redress avenues.* "CBP should improve the notice given to travelers subjected to electronic device searches by updating tear sheets to refer travelers to DHS TRIP [Travelers Redress Inquiry Program] if they seek redress." The assessment noted that TRIP's intake categories were correspondingly expanded, to allow complainants to reference not just discrimination but also abusive or coercive screening and free speech/free press violations.

CBP, the posted summary noted, had agreed to carry out each recommendation.

Civil liberties advocates were far from happy with the Impact Assessment. The ACLU, for example, described it as "disappointing" and its logic as "faulty."[98] Arguing in favor of a reasonable suspicion standard for border searches in terms that were not limited to electronic devices,[99] it summarized: "Even at the border, the Fourth Amendment requires more than just hunches. It is disappointing that the DHS watchdog dedicated to protecting our privacy and other civil liberties does not recognize that." The blogosphere ridiculed the project of an internally-conducted impact assessment as illegitimate ("What else would you expect them to say?"[100]), and commenters questioned the bona fides of CRCL, describing it as an "Orwellian"[101] office that "probably functions more like an entity tasked with creating and promoting the legal justification for programs that violate laws or civil liberties."[102]

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[98] Brian Hauss, *DHS Releases Disappointing Civil Liberties Report on Border Searches of Laptops and Other Electronics*, ACLU (June 5, 2013), http://www.aclu.org/blog/technology-and-liberty-immigrants-rights-national-security/dhs-releases-disappointing-civil.

[99] The ACLU's blog post on the topic noted, for example, "To be sure, rummaging around through people's personal papers may well turn up the occasional bad guy, but that is not the only consideration." *Id.* Of course, the government's authority to "rummage[e] around through people's personal papers" without any suspicion at all, if that rummaging is during a border inspection, is established. *See, e.g.*, United States v. Seljan, 547 F.3d 993, 1003-04 (9th Cir. 2008) (summarizing cases upholding suspicionless searches of personal papers and effects during border inspections).

[100] Mike Masnick, *Homeland Security: Not Searching Your Laptop Doesn't Benefit Your Civil Liberties, So We Can Do It*, TECHDIRT (Feb. 11, 2013, 8:51 AM), https://www.techdirt.com/articles/20130208/17415621927/homeland-security-not-searching-your-laptop-doesnt-benefit-your-civil-liberties-so-we-can-do-it.shtml.

[101] *Id.*

[102] Kevin Gosztola, *DHS Finds Suspicionless Border Searches Do Not Violate Americans' Civil Liberties*, THE DISSENTER (Feb. 8, 2013, 4:14 PM), http://dissenter.firedoglake.com/2013/02/08/dhs-finds-suspicionless-border-searches-do-not-violate-americans-civil-liberties/.

Lending credibility to the critics' complaints was the *Cotterman* decision by the U.S. Court of Appeals for the 9th Circuit, en banc. In a decision rendered during the writing of the impact assessment, a 9th Circuit panel had agreed with the United States in a child pornography prosecution that no individualized suspicion was necessary to justify a border inspection laptop search.[103] A few months after completion of the assessment, however, though long before its release, the Court of Appeals granted rehearing en banc,[104] and in March 2013, reversed on this point.[105] Forensic searches, the en banc court held, were far more intrusive than non-forensic examinations of electronic devices or of, say, luggage: "It is as if a search of a person's suitcase could reveal not only what the bag contained on the current trip, but everything it had ever carried."[106] Accordingly, such searches were lawful under the Fourth Amendment only if supported by individualized "reasonable suspicion."

CRCL released the very short executive summary without fanfare—indeed, without any notice or background at all. The same is true for the FOIA-prompted release of the entire report, months later. Any announcement would no doubt have emphasized the five recommendations in the impact assessment, and that each had been adopted by DHS. In any event, there was essentially no public discussion of those recommendations; coverage of the release in blogs and the press was entirely dominated by the civil rights and civil liberties community's displeasure with the reasonable suspicion conclusion. This is true even though those recommendations gave the advocacy groups a great deal that they had previously sought, which might have been advantageously celebrated and even built upon in additional areas. The rule that CBP officers "record the reason" for any electronic device search went some distance, though not all the way, to a requirement that there be reasonable suspicion—yet this aspect of the report got no attention. The recommendation that the DHS Traveler Redress Inquiry Program complaint form—thousands of which are filed each year—led to modification of the options travelers can check to include complaints about allegedly abusive searches and interviews, allowing previously impossible monitoring of those issues.[107] Even more striking, the CRCL-recommended articulation of a clear departmental rule against racial, ethnic, and religious discrimination in searching was something that civil rights and civil liberties groups had sought for years.[108] And they had similarly long proposed data collection and analysis to monitor the possibility of bias in

[103] United States v. Cotterman, 637 F.3d 1068 (9th Cir. 2011).

[104] United States v. Cotterman, 673 F.3d 1206 (9th Cir., Mar. 19, 2012) (granting reh'g en banc).

[105] United States v. Cotterman, 709 F.3d 952 (9th Cir. 2013) (en banc). The en banc court held, however, that the facts available to the searching border agents were sufficient to give rise to reasonable suspicion, and therefore upheld the search.

[106] *Id*. at 959.

[107] *See* DEP'T HOMELAND SEC. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES FY 2011 ANN. REP. 26 (2012) (reporting that 10% of DHS TRIP complaints used those new checkoff boxes).

[108] *See, e.g.*, ASIAN LAW CAUCUS, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP 29 (April 2009), available at http://www.advancingjustice-alc.org/sites/asian-law-caucus/files/Returning%20Home.pdf ("DHS ought to adopt a rule prohibiting law enforcement decisions based on race, ethnicity, religion, and national origin while eliminating the blanket exemption for national security and border investigations.").

traveler screening.[109] All this was in the impact assessment's accepted recommendations, but either nobody noticed, or advocates decided that they gained more from decrying the reasonable suspicion conclusion and did not want to muddy their message by praising these other policy changes.

C. Border Patrol and Interpretation

On May 14, 2011, Benjamin Roldan Salinas and his girlfriend, M.N., were harvesting salal in the Olympic National Forest. (Salal is an attractive groundcover plant; people get permits to pick it in forest service lands, and then resell it to florists.[110]) A Forest Service officer saw the couple from his car and immediately called the Border Patrol; based on his experience with salal harvesters and their limited English, he asked Border Patrol for assistance with Spanish-language interpretation. He then stopped the car in which the two were driving and began to ask them questions (in English). When the Border Patrol car pulled up, both fled on foot. Salinas jumped into the Sol Duc River and was swept away.[111] Ms. N. was arrested and charged with an immigration violation; news reports say that she was released after 10 days.[112] Salinas was found three weeks later, dead, his body tangled in brush four miles down river.[113]

The tragedy of a death increased considerably the focus by advocacy organizations on the topic—but the issue was far from new. Advocacy groups had for some time been concerned about Border Patrol enforcement at the northern border, arguing that it was unduly aggressive and often discriminatory. They pointed to the fact that the number of northern Border Patrol agents has skyrocketed, under congressional pressure, since 9/11[114]; notwithstanding the small number of attempted illegal border crossings to engage those so assigned, the number of northern border agents in 2012 was over 2000, compared to about 300 a decade before.[115] These agents

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[109] *See, e.g., id.* ("To allow Congress and the public to monitor compliance with this rule, DHS should require CBP officers to log the gender, race, ethnicity, religion, national origin, and nationality, as known or perceived, of each individual subjected to secondary inspections, searches of electronic devices, or other special security measures at each port of entry, and to report this information on an annual basis."). *Cf.* RIGHTS WORKING GROUP, RACIAL PROFILING AND THE NEED FOR DATA COLLECTION: WHAT DHS SHOULD COLLECT AND MONITOR (Nov. 2011), *available at* http://rightsworkinggroup.org/sites/default/files/Data%20Collection%20Recommendations%20for%20DHS.PDF (urging racial data collection in the different context of immigration enforcement, as well.

[110] *See Salal Permit Sales to Begin at Olympic National Forest*, USDA FOREST SERVICE (Aug. 25, 2011), http://www.fs.usda.gov/detail/olympic/news-events/?cid=STELPRDB5327177.

[111] The facts in this paragraph are taken from [Redacted] USDA Complaint Final Agency Decision, FS-11-5171, 28 (Apr. 28, 2012), *available at* http://nwirp.org/Documents/PressReleases/DecisionOfOASCRUSDAreCivilRightsComplaintREDACTEDforRelease.pdf (last visited Aug. 17, 2013).

[112] *See* Lornet Turnbull & Roberto Daza, *Climate of Fear Grips Forks Illegal Immigrants*, SEATTLE TIMES, June 26, 2011, at 1; William Yardley, *In Far Northwest, A New Border Focus on Latinos*, N.Y. TIMES, May 28, 2012, at A1.

[113] Turnbull, *supra* note 112.

[114] *See* CHAD HADDAL, CONG. RES. SERV., RL32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL, 22 (Aug. 11, 2010), *available at* http://www.fas.org/sgp/crs/homesec/RL32562.pdf.

[115] Just six weeks after 9/11, the USA PATRIOT Act authorized a tripling of Border Patrol personnel assigned to the northern border, from its 2001 allotment of 340. By 2005, the number assigned had reached over 1000. Then in

spend a good deal of their time collaborating with local law enforcement, and advocacy organizations reported that much of this collaboration was initiated as calls by local law enforcement for language assistance. (All Border Patrol agents are required to speak functional Spanish.[116]) Once Border Patrol was on the scene, enforcement interviews and often immigration arrests frequently followed.

Advocacy and community organizations complained that the practice violated the civil rights of their clients and participants. For agencies that receive federal financial assistance—which is to say, nearly every law enforcement agency[117]—the argument was founded on Title VI of the Civil Rights Act of 1964. Among other things, Title VI forbids national origin discrimination by federally supported organizations; in the 1974 case of *Lau v. Nichols*, the Supreme Court held that this ban covers language discrimination as well. (Indeed, the Court said in *Lau*, the challenged implementing regulation's requirement that recipients take "affirmative steps to rectify . . . language deficiency" was permissible under Title VI. Across the government, Title VI regulations have similar provisions.) So the argument is a simple one: the use of Border Patrol agents as interpreters by federally supported police departments is inappropriate, because it subjects Spanish-speakers to law enforcement inquiry and potential immigration consequences not faced by others, constituting language discrimination and a failure to provide appropriate language access.

Outreach and its uses. Just days after Mr. Salinas's body was found, a leading advocacy organization highlighted the issue in an email to CRCL staff, setting out allegations related to two different incidents—Mr. Salinas was referred to only obliquely. The complaints led to a meeting between CRCL and Border Patrol in June 2011, "on the topic of provision of interpretive services and how to avoid having it chill immigrant calls to police, etc." Documented in the response to a FOIA request, the email and an accompanying memo summarizing the meeting's resolution state that CBP and CRCL agreed to explore CBP use of "musters [in-service training statements] or other relatively low-key guidance." CBP was to coordinate with CRCL on "a draft guidance or muster on the topic of avoiding harm to community policing/victims/witnesses when providing assistance with language interpretation."[118] The pressure from advocates and community groups was noted: "This is

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2006, the Intelligence Reform and Terrorism Prevention Act required that 20% of the Border Patrol's annual increases in manpower be assigned to the northern border. P.L. 108-458. In FY 2010 and subsequent years, the number of Border Patrol agents was over 2,200. *See* UNITED STATES BORDER PATROL, BORDER PATROL AGENT STAFFING BY FISCAL YEAR (OCT. 1ST THROUGH SEPT. 30TH), http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/staffing_1993_2012.ctt/staffing_1993_2012.pdf (last visited Aug. 17, 2013).

[116] *See FAQs – Working for Border Patrol*, U.S. CUSTOMS AND BORDER PROTECTION (Mar. 11, 2013), http://www.cbp.gov/xp/cgov/careers/customs_careers/border_careers/bp_agent/faqs_working_for_the_usbp.xml#JobRequirements (last visited Aug. 17, 2013).

[117] For an index to all the recipients of federal financial assistance from the Department of Justice alone, see *OJP Grant Awards*, DEP'T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, http://grants.ojp.usdoj.gov:85/selector/main (last visited Aug. 18, 2013).

[118] *See* Memorandum from [redacted], Immigration Section Policy Advisor, for Meeting Participants (July 29, 2011), *in* 8/22/2012 DHS OCRCL FOIA RESPONSE 90-91, http://www.legalactioncenter.org/sites/default/files/docs/lac/911_FOIA_Response.pdf.

becoming a hotter topic by the day, and we really need to figure out an appropriately robust response.[119]

It is worth noting that under the Title VI theory, the civil rights violator is not the Border Patrol but rather the agency that *calls* Border Patrol. It is the agency that places that phone call that is allegedly breaching its language access obligations, discriminating against Spanish speakers; Border Patrol may be facilitating this breach, but it is not itself discriminating. The result is that CRCL's jurisdiction over the Border Patrol interpretation issue was far from exclusive. The Department of Justice provides financial support for a high percentage of the nation's law enforcement agencies, and therefore has Title VI authority. And the Department of Justice's civil rights offices (both the Office of Justice Programs' Office of Civil Rights, and the Civil Rights Division's Federal Coordination and Compliance Section) face a very different environment than does CRCL with respect to CBP operational activities. The political and relational realities that make it difficult for an internal agency office to find another agency office's conduct problematic are bound to be lessened in a situation in which the complained-about conduct is mostly conducted by another agency. I analyze in Part II the ways in which the potential involvement of a sister agency value-based ally, such as the Department of Justice, affects the hand of an office such as CRCL. Here, I will simply note that the FOIA'd documents demonstrate that the potential for Justice Department involvement was clearly in the minds of the actors.[120]

Complaint investigation. Immigrant rights advocates took advantage of the overlapping jurisdictional issue just a few days later; in July 2011, Ms. N (Mr. Salinas's girlfriend) filed a complaint, not with DHS, but with the U.S. Department of Agriculture (USDA), of which the Forest Service is a component. Because Mr. Salinas's death was after an encounter with a federal—"federally conducted," in the language of federal civil rights offices, not "federally supported"—law enforcement agency, Title VI does not apply. But, represented by the Northwest Immigrant Rights Project, Ms. N.'s complaint argued that the Forest Service officer's actions constituted race and national origin discrimination, in violation of USDA's antidiscrimination regulation[121] and Executive Order 13166, which has since 2000 forbidden federal agencies to discriminate against people with limited English proficiency. NWIRP's argument was twofold. First, just as under Title VI, NWIRP argued that use of Border Patrol as interpreters was inappropriate, because it subjected Spanish-speakers to law enforcement inquiry and potential immigration consequences not faced by others stopped by Forest Service officers.

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[119] *See* E-mail from Margo Schlanger, then DHS Officer for Civil Rights and Civil Liberties, to Ronald D. Vitiello, Deputy Chief, Border Patrol (July 28, 2011, 7:57 AM), *in* 8/22/2012 DHS OCRCL FOIA RESPONSE, *supra* note 118, at 86-87.

[120] *See* Memorandum from [redacted], Immigration Section Policy Advisor, for Meeting Participants (July 29, 2011), *supra* note 118, at 91 ("She and Officer Schlanger also discussed the role of the Department of Justice (DOJ) in enforcing these laws, and the recently-circulated draft DOJ Frequently Asked Questions . . .").

[121] 7 C.F.R. § 15(d) ("No agency, officer, or employee of the United States Department of Agriculture shall, on the ground of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, or disability, or because all of part of an individual's income is derived from any public assistance program, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the United States Department of Agriculture.").

Second, NWIRP claimed, that use was pretextual, a cover for hostility towards Hispanics or perhaps for the arresting Forest Service Officer's interest in immigration enforcement, which should not have been his concern. The complaint included strong evidence on both theories, including an email sent on June 8, 2011, by the Forest Service Officer who was the subject of the complaint to several individuals complaining that in the aftermath of the incident, a community member was watching his house. A Border Patrol Officer on the email chain responded, "The great thing would be to request translation assistance so that we are able to sack this guy up." As the USDA Office of the Assistant Secretary for Civil Rights later noted, "The implication of this email was that the practice of requesting interpretation assistance is a guise for initiating an immigration enforcement action. . . . The tone of this email clearly implied that this was a standing practice between FSO [the Forest Service Officer] and BP [Border Patrol]."[122]

Complaining to USDA was a savvy piece of advocacy by NWIRP. USDA's civil rights office is not just an Office of Goodness—it is uniquely empowered, among federal civil rights offices. Its operative regulation was promulgated by the Clinton Administration in 1999[123] just after the Department settled a mammoth fair-lending case to remedy generations of discrimination against African-American farmers.[124] That regulation granted the USDA Office of the Assistant Secretary not just the authority to adjudicate complaints, but also to make "final determinations . . . as to the corrective actions required to resolve program complain[ts]."[125] So unlike CRCL, which is authorized only to make recommendations to the Secretary and DHS offices, and required then to report to Congress those recommendations and the agency response,[126] USDA's civil rights office, led by a Senate-confirmed Assistant Secretary for Civil Rights, has the regulatory authority to direct other USDA offices what to do.[127] That authority

[122] [Redacted] USDA Complaint Final Agency Decision, FS-11-5171, 28 (Apr. 28, 2012), *available at* http://nwirp.org/Documents/PressReleases/DecisionOfOASCRUSDAreCivilRightsComplaintREDACTEDforRelease.pdf (last visited Aug. 17, 2013).

[123] *See* Nondiscrimination in USDA Conducted Programs and Activities, 64 Fed. Ref. 66,709 (Nov. 30, 1999) (amending 7 C.F.R. § 15d (1999)); Nondiscrimination in USDA Conducted Programs and Activities, 63 Fed. Reg. 62,962 (Nov. 10, 1998) (amending 7 C.F.R. § 15d (1998)); Nondiscrimination in USDA Conducted Programs and Activities, 61 Fed. Reg. 17,851 (Apr. 23, 1996) (amending 15 C.F.R. § 15d (1996)).

[124] *See* Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999). *See also* TADLOCK COWAN & JODY FEDER, CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS (2012), *available at* http://www.nationalaglawcenter.org/assets/crs/RS20430.pdf.

[125] The regulation has what looks like two corresponding scriveners errors. It reads: "The Director of the Office of Civil Rights will make final determinations as to the merits of complaints under this part and as to the corrective actions required to resolve program **complainants**. The **complaint** will be notified of the final determination on his or her complaint." 7 C.F.R. § 15d.4(b) (emphasis added). It seems clear the two emphasized words should have been switched. *See also* 7 C.F.R. 288(a)(13) (authorizing the Assistant Secretary for Civil Rights to "make final determinations on both the merits and required corrective action" for program complaints).

[126] *See* 6 U.S.C. § 345; 42 U.S.C. § 2000ee-1.

[127] I do not mean to take a position on the essentially hypothetical issue whether the Secretary would be empowered to instruct the Assistant Secretary how to use this regulatory authority. This is the analogue of the longstanding administrative law argument about the extent of presidential authority over decisions by executive branch officials. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250-51 & nn. 8 & 9 (2001) (citing scholarship on both sides of the question, and taking a position "accept[ing] Congress's broad power to insulate administrative activity from the President, but argu[ing] that Congress has left more power in presidential hands than generally is recognized").

seems not to be very often asserted (and was not utilized at all in the Bush administration), but it continues to exist.[128]

Over the next months, as the USDA investigation moved along, the advocacy community worked to bolster its point of view by preparing two in-depth reports, each combining sympathetic facts, a rights-based frame, and policy argumentation.[129] The issue remained a live one at DHS, but the guidance mentioned in the memo summarizing the June 2011 meeting did not issue. Indeed, in April 2012, there is evidence that CRCL at least considered seeking formal legal advice from the DHS Office of the General Counsel on the issue.[130] In May, nine months after filing its USDA complaint, NWIRP took another step to increase inter-agency pressure on DHS, filing another complaint, this time with the Department of Justice and the Department of Homeland Security, on behalf of five new complainants as well as (again) M.N. Each of the complainants had been stopped by non-immigration law enforcement, who called Border Patrol to help with interpretation. In each case, the Border Patrol agent who responded then questioned the complainant about his or her immigration status; several of them were put into immigration proceedings as a result. The theory of this complaint was the same as for the Forest Service complaint, except with a Title VI jurisdictional hook:

> We therefore believe that the interpretation/translation assistance justification is being used to cover a pattern of discriminatory enforcement activity that the agents themselves appear to realize is problematic. Hence, they report that their involvement was as a result of a request for interpretation assistance. The inescapable conclusion is that the actual or pretextual use of Border Patrol agents for interpretation assistance by law enforcement agencies is resulting in outright discrimination in one of two ways: 1) to the extent that it is really about language access, it constitutes impermissible discrimination because the price of such access for a segment of the LEP population is enduring questioning about citizenship and immigration status (and detention and deportation for some); or 2) to the extent that it is simply a pretext in cases where law enforcement agencies are calling in Border Patrol without justification, it is of course a different, but no less pernicious, form of discrimination. In either case, the practice violates civil rights protections.[131]

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[128] *See* USDA, *Civil Rights at USDA: A Backgrounder on Efforts by the Obama Administration*, http://www.usda.gov/documents/USDA%20Civil%20Rights%20Background.pdf (last visited Aug. 17, 2013). *See also* Reports of Civil Rights Complaints, Resolutions, and Actions, USDA, http://www.ascr.usda.gov/reports.html (last visited Aug. 17, 2013).

[129] *See* SARAH CURRY ET AL., One America and the Univ. of Washington Center for Human Rights, THE GROWING HUMAN RIGHTS CRISIS ALONG WASHINGTON'S NORTHERN BORDER (Apr. 17, 2012), *available at* https://www.weareoneamerica.org/sites/weareoneamerica.org/files/REPORT_northernborder-FINAL.pdf; LISA GRAYBILL, Am. Immigration Council, BORDER PATROL AGENTS AS INTERPRETERS ALONG THE NORTHERN BORDER: UNWISE POLICY, ILLEGAL PRACTICE (Sept. 12, 2012), *available at* http://www.ilw.com/articles/2012,0927-graybill.pdf.

[130] *See* Draft Memorandum from Tamara Kessler for Audrey Anderson, *in* 8/22/2012 DHS OCRCL FOIA RESPONSE, *supra* note 118, at 10.

[131] Letter from Jorge Barón, Executive Director, Northwestern Immigrant Rights Project, Elizabeth Hawkins, Attorney, Bean Porter Hawkins PLLC, and Wendy Hernandez, Attorney, Hernandez Immigration Law, to Eric Holder, Attorney General, and Janet Napolitano, DHS Secretary 8 (May 1, 2012), *available at*

The May 1 complaint sought intervention by the Department of Justice, whose Civil Rights Division coordinates Title VI and Executive Order 13166 enforcement across the government, and whose Office of Justice Programs has the lead role in Title VI enforcement involving law enforcement agencies that have received funding from the Department of Justice. The complaint requested two DOJ statements: the first, to local law enforcement and the second to federal law enforcement, that use of Border Patrol agents as interpreters violates Title VI and Executive Order 13166 obligations, respectively. In addition, NWIRP asked DHS to terminate removal proceedings for anyone facing immigration consequences as a result of a request for interpretation by Border Patrol agents.

The USDA Office of the Assistant Secretary for Civil Rights issued a formal finding against the U.S. Forest Service on May 31, 2012, declaring, after comprehensive analysis, that Forest Service use of Border Patrol agents to provide interpretation services constituted national origin discrimination and also that the language access issue was being used was a pretext for discrimination against Latinos. Over the evident opposition of the Forest Service, the Final Agency Decision closed with an "Order of Relief," which included an instruction to the Forest Service to develop a language access plan that relied on neutral interpreters, not Border Patrol agents.[132] This order went much further than the hypothetical Border Patrol guidance discussed within DHS nearly a year before; that was described in the FOIA'd email as guidance about "avoiding harm to community policing/victims/witnesses when providing assistance with language interpretation" whereas the USDA order simply banned, altogether, language assistance coordination with Border Patrol.

This episode highlights, in particular, the cross-agency dynamics involved in the work of an Office of Goodness. The USDA's finding of discrimination was an important victory for the advocacy groups, ratifying their legal approach to the Border Patrol interpretation issue. But they still did not have what they really wanted, because the USDA decision covered only the Forest Service. To cover state and local law enforcement calls to Border Patrol would require either an authoritative ruling by the Department of Justice (governing the obligations of these federally supported agencies) or a policy change by the Border Patrol. It took another six months, but on November 21, 2012, CBP promulgated "Guidance on Providing Language Assistance to Other Law Enforcement Organizations," which instructed Border Patrol offices not to agree to requests from non-DHS law enforcement agencies seeking "CBP assistance based solely on a need for language translation." Instead, "absent any other circumstances, those

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http://nwirp.org/Documents/PressReleases/ComplaintToUSDOJandDHSreInterpretationAssistanceFinalRedacted05-01-2012.pdf. *See also id.* at 2:

> "As the Border Patrol agents are preparing to depart, the WSP trooper thanks them and has the following exchange with the agents:
>
> • WSP Trooper: 'Well, I appreciate you coming out.'
> • BP Agent: 'No problem, give us a call anytime.'
> • WSP Trooper: 'Oh yeah, well, we like to, we just have to do it in a roundabout sort of way.'
> • BP Agent: 'That's fine, that's great, we have no problem with that. We appreciate the calls.'"

[132] [Redacted] USDA Complaint Final Agency Decision, *supra* note 122, at 35.

requests should be referred" to interpreters.[133] The policy was distributed to relevant groups—including NWIRP—about two weeks later.[134]

Training. Finally, once the policy was announced, CRCL did outreach to affected local law enforcement agencies, offering them materials[135] and training about alternatives to their prior reliance on Border Patrol for language assistance.[136] I surmise that these activities assisted Border Patrol in its need to preserve good relations with local law enforcement, in part by improving local capacity but in part by suggesting that the denial of language assistance was attributable not to Border Patrol's own preferences but because of civil rights imperatives.

D. The NCTC AG Guidelines

On March 22, 2012, the Office of the Director of National Intelligence announced a major change to federal information sharing policy. New guidelines replaced rules announced in 2008, and now permit the National Counterterrorism Center (NCTC) to obtain and retain large federal governmental datasets that contain mostly non-terrorism information about U.S. citizens for up to five years, in order to facilitate repeated "pattern-based" computer queries and analysis designed to identify terrorism information. It is up to each federal agency from which NCTC requests databases to negotiate terms—including whether a shorter time frame is appropriate. Previously NCTC was allowed to hold onto these kinds of datasets only for 180 days—enough time to process the data, but not to simply put it into storage on the chance that it might later prove useful. In addition, the prior permitted uses of pattern analysis were narrower.[137]

This all sounds technical but is actually not. As far as public information indicated, the new guidelines constituted a sea change in federal governmental surveillance of U.S. residents and citizens. Just about everything any part of the federal government knows about anyone is now potentially available for five years of big-data-mining by federal counterterrorism authorities. (We know now that similar data-ingestion and data-mining techniques were being used by other agencies, too,[138] but that information became public much later, and is beyond this

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[133] Memorandum from David V. Aguilar, CBP Deputy Commissioner for CBP Officers (Nov. 21, 2012) (available at http://foiarr.cbp.gov/streamingWord.asp?i=1233 (last visited Aug. 17, 2013)).

[134] Press Release, Northwest Immigrants Rights Project, Breaking News: Border Patrol Policy Change Important Victory for Border Communities (Dec. 13, 2013) (available at http://www.nwirp.org/news/viewmediarelease/49 (last visited Aug. 17, 2013)).

[135] *See* LEP Resource Guide for Law Enforcement, DHS OCRCL, *available at* http://www.dhs.gov/sites/default/files/publications/lep-resouce-guide-law-enforcement_0.pdf (last visited Aug. 17, 2013).

[136] *See CRCL Provides Language Access Technical Assistance to Law Enforcement*, DHS (Feb. 2013), http://www.dhs.gov/crcl-provides-language-access-technical-assistance-law-enforcement.

[137] For a defense of the new rules in civil liberties terms, see OFFICE DIR. NAT'L INTELLIGENCE, CIVIL LIBERTIES AND PRIVACY OFFICE, INFORMATION PAPER: DESCRIPTION OF CIVIL LIBERTIES AND PRIVACY PROTECTIONS INCORPORATED IN THE UPDATED NCTC GUIDELINES (Jan. 2013), *available at* http://nctc.gov/docs/CLPO_Information_Paper_on_NCTC_AG_Guidelines_-_1-22-13.pdf (last visited Aug. 17, 2013).

[138] *See* Barton Gellman, *U.S. Surveillance Architecture Includes Collection of Revealing Internet, Phone Metadata*, WASH. POST, June 15, 2013, at A1; Ellen Nakashima et al., *New Documents Reveal Parameters of NSA's*

Article's purview.) Yet although privacy advocates and bloggers tried to fan the flames, public response to the NCTC AG guidelines change was short lived. The *New York Times* ran a front page story, devoting some space to the "civil-liberties concerns among privacy advocates." But those concerns somehow didn't catch on. Blog posts like "The National Counterterrorism Center Just Declared All of Us Domestic Terrorists"[139] got little traction. Civil liberties have a limited constituency,[140] and with so little to gain, politically, perhaps Democrats in Congress were reluctant to make this an issue on which they would fight the Administration.[141] (Subsequent NSA revelations seem to be changing this political calculus.)

Working groups. Nine months after the NCTC guidelines were issued, a story in the *Wall Street Journal* by investigative reporter Julia Angwin revealed a much more sustained record of dissent *within* the government. Based on both reporting and FOIA'd documents, which she posted, Angwin's story revealed that CRCL and the DHS Privacy Office had opposed the eventually adopted changes over the course of a full year. The documents include staff emails starting February 2011 discussing recommended language, talking points, and briefing memos. The discussions and work was conducted via a working group, denominated the "Internal Records Working Group,"[142] or occasionally "DHS/NCTC Records Working Group."[143] It evidently including staff from numerous DHS offices—the Office of Intelligence & Analysis, Privacy, CRCL, the Office of the General Counsel, the Office of Policy, and relevant operational components.[144] It seems that the working group was able to develop one shared DHS set of suggestions about the NCTC guidelines.[145] But these met with substantial resistance outside the

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Secret Surveillance Programs, WASH. POST, June 20, 2013, at A1; Charlie Savage, *N.S.A. Said to Search Content of Messages to and From U.S.*, N.Y. TIMES, Aug. 8, 2013, at A1; Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, June 6, 2013, at A1; Charlie Savage, *Senate Panel Presses N.S.A. on Phone Logs*, N.Y. TIMES, July 31, 2013, at A1; In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act (U.S. Foreign Intelligence Surveillance Court, Docket 105B(g) 07-01 (2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/105b-g-07-01-rbw-signed-order-130715.pdf (last visited Aug. 17, 2013).

[139] Marcy Wheeler, *The National Counterterrorism Center Just Declared All of Us Domestic Terrorists*, EMPTYWHEEL (Mar. 23, 2012), http://www.emptywheel.net/2012/03/23/the-national-counterterrorism-center-just-declared-all-of-us-domestic-terrorists/.

[140] *See, e.g.*, AMY B. ZEGART, EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY 72-82 (2011) (discussing the low level of "voter attention to the bureaucratic details of intelligence agencies", and finding that "intelligence has fewer and weaker interest groups than almost any other policy area").

[141] *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

[142] *See, e.g.*, Email from an Intelligence Operations Specialist at the Office of Intelligence & Analysis to Rebecca Richards and Others (Feb. 29, 2012), *in* DHS INTERIM RESPONSE 43, http://www.documentcloud.org/documents/526365-dhs-interim-responsecontent.html#document/p347/a83505 (last visited Aug. 17, 2013).

[143] E-mail from [redacted] to [redacted] (May 12, 2011, 12:52 PM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 148.

[144] *See* E-mail from [redacted] to [redacted] (Feb. 29, 2012, 11:40 AM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 55.

[145] *Id. See also* E-mail from [redacted] to [redacted] (Dec. 9, 2011, 11:08 AM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 439 (proposing "harmonizing CRCL and OGC's language to something both offices can get behind").

Department; one email to a senior DHS lawyer from counsel's office at the Office of the Director of National Intelligence (ODNI) states: "We certainly value the input. However, from our review, several of the comments tend to suggest a potential lack of understanding as to the overarching intent of the Guidelines. Furthermore, some of the edits you have proposed would eviscerate the authorities of the DNI and NCTC."[146] Staff discussions were then held between staff from DHS, ODNI, and the Department of Justice,[147] but the results are not disclosed in the released materials.

Advice. By late spring 2011, the issues were being discussed, repeatedly, at the agency leadership level rather than only by staff. A (redacted) May 12, 2011 memo to the Secretary from me, as CRCL's head, and from DHS Chief Privacy Officer Mary Ellen Callahan, is titled (clunkily) "How Best to Express the Department's Privacy and Civil Liberties-Related Concerns over Draft Guidelines Proposed by the Office of The Director of National Intelligence and the National Counterterrorism Center."[148] Disagreement continued in subsequent weeks and months. For example, emails between a member of the Secretary's staff and Callahan note that Callahan "non concurred on operational examples" evidently included in some document, because "they were complete non sequiturs, non-responsive, and did not demonstrate the underlying issues."[149] The Secretary's involvement in the discussion is confirmed at several other points, as well.[150]

By this time, the dispute was solidly multi-agency (or, as they say in the federal intelligence world, "in the interagency"). And although there is no public documentation confirming the point, Angwin reported that Nancy Libin, the political appointee head of the Justice Department Office of Privacy and Civil Liberties—the DOJ's analogous Office of Goodness—was likewise counseling against expansion of NCTC big-data authority.[151] Angwin explained that that the proposed change was prompted by the Northwest Flight 253 "underwear bomber," Umar Abdul Mutallab, who tried but failed to bring down a Detroit-bound airplane on Christmas day 2009. She summarized that at both DOJ and at DHS, privacy and civil liberties officials "argued that the failure to catch Mr. Abdulmutallab wasn't caused by the lack of a suspect—he had already been flagged—but by a failure to investigate him fully. So amassing

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[146] *See, e.g.*, E-mail from Matthew Kronisch to Mary Ellen Callahan & Margo Schlanger (Mar. 11, 2011, 2:44 PM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 47.

[147] *Id.*

[148] Memo from Margo Schlanger, CRCL Officer, and Mary Ellen Callahan, Chief Privacy Officer, for Secretary Janet Napolitano (May 12, 2011), *in* DHS INTERIM RESPONSE, *supra* note 142, at 347.

[149] E-mail from Mary Ellen Callahan to John Cohen (June 17, 2011, 9:52 AM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 252.

[150] *See* E-mail from [redacted] to [redacted] (June 1, 2011, 2:22 PM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 212 (referencing an "'information sharing' S1 meeting" ("S1" means Secretary)); E-mail from [redacted] to Ken Hunt (July 28, 2011, 9:40 AM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 283 (referencing "another S1 meeting coming up"). Additional information on the meeting can be found on pp. 255-265.

[151] *See* Julia Angwin, *U.S. Terrorism Agency to Tap a Vast Database of Citizens*, WALL. ST. J., Dec. 13, 2012 ("At the Department of Justice, Chief Privacy Officer Nancy Libin raised concerns about whether the guidelines could unfairly target innocent people").

more data about innocent people wasn't necessarily the right solution."[152] And the argument did not die: after months of negotiations between DHS and NCTC, in November 2011 the civil liberties/privacy issues were revived within DHS by the CRCL and the Privacy Office with a new memo deemed likely to set off a "firestorm."[153] The two offices prepared talking points for the DHS Deputy Secretary for a March 2012 Deputies Committee[154] meeting at the White House. The Wall Street Journal reports that Callahan was told to make her case at that meeting,[155] but to no avail. The new rules were signed a few days later.

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The four vignettes above provide the foundation for some more general thinking about Offices of Goodness. In Part II, I canvass the tools available to them and how each one works.

III. Tools Available to Offices of Goodness.

Tools available to Offices of Goodness range along several dimensions: from the less to more coercive; from the less to more systemic; from the preventive to responsive; and from the internal to external. While I'm sure other tools could be added by participants or observers with other backgrounds, I here explore a starter list, informed by the four controversies just described.

A. Preventive tools

Offices of Goodness have a variety of processes they can use to try to prevent or ameliorate agency operations that conflict with Goodness. Here I analyze four of those methods—inclusion in policy formulation working groups; clearance; advice; and training and technical assistance. Each of these tools can be used in a reactive context as well, to attempt to reduce or respond to a demonstrated problem.

(1) *Inclusion in working groups.* Like any bureaucratic organizations, federal agencies bring people together to work on projects. One important way that an Office of Goodness can represent Goodness is by participating in such a working group.[156] There are both risks and benefits to this approach. The risk is erosion of value commitment as the Office of Goodness staff is carried along by the imperatives of whatever the working group's project is—a

[152] *Id.*

[153] *See* E-mail from Margo Schlanger to Mary Ellen Callahan (Nov. 9, 2011, 9:01 PM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 447 ("I'm not sure I'm prepared [for] the firestorm we're about to create'); E-mail from Mary Ellen Callahan to Margo Schlanger (Nov. 16, 2011, 4:22 PM), *in* DHS INTERIM RESPONSE, *supra* note 142, at 446 ("I don't know that we are ever going to get consensus on this from the other signatories, but we have the dep sec instructions").

[154] The Deputies Committee is the most senior sub-cabinet meeting in the Executive Branch, bringing together the Deputy Secretaries of the national security agencies. *See* NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 1 ("NSPD-1"), ORGANIZATION OF THE NATIONAL SECURITY COUNCIL SYSTEM, Feb. 13, 2001, *available at* http://www.fas.org/irp/offdocs/nspd/nspd-1.htm (last visited Aug. 17, 2013).

[155] *See* Angwin, *supra* note 151.

[156] For in-depth analysis of working groups in another agency and another context, see, for example, Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROB. 57, 72-88 (1991).

risk that is particularly strong if a conflict between the project and Goodness cannot be reconciled with technocratic adjustment or minor tweaks but rather requires some degree of sacrifice of project efficacy. The benefit is inclusion of Goodness in group discussions as the project develops, which can lead to various types of accommodations and changes.[157] Even if the group discussions end in impasse, full inclusion of the Office of Goodness staff can (though it need not) mean that the conflict is highlighted and explained to bureaucratic higher-ups, enabling those more senior officials to either fight it out or resolve it some other way. The NCTC AG Guidelines incident described above provides an example; the working group negotiations described in the disclosed documents leading to, first, principals-level discussion at DHS and, eventually a Deputies Committee resolution, albeit one rejecting the position of DHS's CRCL and Privacy Office.

(2) *Clearance authority.* Bureaucracies produce documents, and a common control device is a requirement of "coordination" prior to finalization of those documents.[158] But as Pressman and Wildavsky observed in their classic study of government policy implementation, "Telling another person to co-ordinate . . . does not tell him what to do. He does not know whether to coerce or bargain, to exert power or secure consent."[159] A clearance requirement is one specific environment for this issue; clearance requirements can be more or less coercive. On the most coercive end, an Office of Goodness could have the ability simply to bar promulgation of a document. Such authority is usually, however, a hallmark of chain-of-command superiority—not something that Offices of Goodness typically possess. While the agency-head can, of course, decline to issue (or deny permission to issue) a document, one government office ordinarily cannot authoritatively stop the issuance of a document by its sibling office. Still, it is possible to give an office assigned a clearance role something very close to that power, by structuring the conflict resolution procedure so that it is the operational office that needs to "appeal" a clearance denial. This is what is described in the account above about DHS and Occupy. If the DHS Office of Intelligence & Analysis disagreed with the considered refusal of CRCL, Privacy, or the DHS Office of the General Counsel to clear an intelligence product, the burden was on Intelligence & Analysis to persuade the Deputy Secretary that it should be able to issue the product. This description suggests what is, analytically, one step lower in terms of coercion: a clearance process can allow the objecting office a chance to appeal. Least coercive is a simple coordination requirement, in which the Office of Goodness is merely offered a chance to attempt to persuade, but no other authority. Regardless of the impact on the document subjected to clearance, even the softest of clearance requirements ensures that each office asked

[157] *See, e.g.*, Dickinson, *Military Lawyers*, *supra* note 26, at 18-21 (describing lawyers' "integration with officers and troops on the battlefield as essential to their ability to inject legal norms and values into the decision-making process").

[158] *See, e.g.*, HERBERT KAUFMAN, RED TAPE: ITS ORIGINS, USES, AND ABUSES 49 (1977) ("Increased participation in governmental decisions by external groups is matched by procedures to make sure that every administrative unit *inside* the government also contributes its special knowledge, point of view, and sympathy for its clientele to the final product. One method is compulsory clearance of pending decisions with every relevant organizational unit whose jurisdiction touches on the matters under consideration.").

[159] JEFFREY L. PRESSMAN & AARON B. WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND; OR, WHY IT'S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL, THIS BEING A SAGA OF THE ECONOMIC DEVELOPMENT ADMINISTRATION AS TOLD BY TWO SYMPATHETIC OBSERVERS WHO SEEK TO BUILD MORALS ON A FOUNDATION OF RUINED HOPES 134 (1973).

to clear is kept informed of what is going on at other government offices, which has its own benefits.

(3) *Advice.* Both working groups and clearance arrangements are ways of structuring advice given by staff to agency decisionmakers. An important tool for any Office of Goodness is the opportunity to give advice even in the absence of such structures. Advice-giving, both in writing and at meetings, is a key part of the NCTC account above. And CRCL's advice to Border Patrol about interpretation issues is part of that story, too. Advice-giving can operate in several ways. Office of Goodness advisors can spot or highlight issues that might otherwise be insufficiently noticed or valued. They can advocate and perhaps persuade decisionmakers about a particular position. If their advice is known or discoverable, they can increase the political cost of taking a contrary position, because the decisionmaker's choice to overrule their objection may become public. On the other hand, if Office of Goodness advice ratifies rather than challenges agency policy, then it can both reassure decisionmakers and reduce the potential political cost of that policy, by providing a ready answer to objectors ("We ran this by the Office of Goodness, and it signed off."[160]) .

(4) *Training and technical assistance.* Training is often the first response of an organization faced with a compliance problem. Work about equal employment opportunity training suggests that several reasons for its preferred status. Implementation of a training program allows an organization to signal its Goodness. In addition, because training looks at inputs, not outcomes, it is easy to measure and success is very attainable. Moreover, a training remedy for a Goodness problem supports a cognitively attractive story of ignorance rather than malicious non-compliance. None of these rationales turn much on efficacy, and indeed, diversity and anti-harassment training, for example, are very widespread even though they do not generally seem to promote race or gender integration in the workplace or reduce the prevalence of workplace harassment.[161] But the account of the Occupy issue, above, demonstrates that training works in other ways as well. While moderate amounts of workplace training are unlikely to produce experts in any complicated field, training by Office of Goodness staff can alert the trainees about "warning flags," so that they know to seek assistance when such an issue arises. In-house training also exposes the trainees to the office performing the training, ratifying that office as expert and respected, and placing it in the personal networks of those trained. Finally, training and technical assistance allow an Office of Goodness to offer a service to another office in its agency, keeping the relationship from being uniformly conflictual.

[160] *Cf.* Jacob Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193 (2012) (analyzing reasons to delegate a decision to a party that does not share the delegator's views).

[161] *See, e.g.*, Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOCIOLOGY 1203 (2007); Alexandra Kalev, Frank Dobbin, & Erin Kelly, *Best Practices or Best Guesses? Diversity Management and the Remediation of Inequality*, 71 AM. SOCIOLOGICAL REV. 589 (2006).

B. Responsive tools

Additional tools respond to practices already underway that may conflict with Goodness. Here I treat two of those methods— program or operational review, and investigation of individual or systemic problems:

(1) Program or operational review. The laptop search impact assessment described above is a species of program review.[162] So too is the demographic data analysis adopted as a result of that review. Program review is a broad genus, covering examination of all types of policy, policy implementation, and practices. A few observations follow:

First, it seems likely that the dynamics of these sorts of reviews will often depend on whether they are deemed special or routine. A review that is special usually begins with some kind of trigger, which frames the expectations about the review by suggesting that a problem may well exist, and therefore makes it less aggressive for the Office of Goodness to, in the event, find a problem. In addition, special reviews are more likely to receive a great deal of time, effort, and attention, where such resources are harder to muster for routine reviews.[163]

Second, the public or non-public nature of a review is important, but the effects of the choice are complicated. If a review is public, it functions as "a threat and a means for inviting external oversight."[164] That means that the Office of Goodness is bound to receive much more pressure from other agency offices to make it relatively gentle—but the office whose program is under review is also under much more pressure to accede to recommendations. As Mark Moore and Jane Gates wrote about Inspectors General, "it . . . seems clear that the effectiveness of IGs is greatest when they can operate with the implicit threat of publicity and congressional attention rather than its reality. When an issue escalates, there is a real risk that program managers will dig in their heels, frustrating implementation of proposed changes."[165] Inspectors General have final authority over their reports, which allows this threat to be a realistic one. A crucial question arises whether the Office of Goodness has the authority to override suggestions as to the content of a report that is public, or whether, instead, the report itself is subject to some kind of fairly coercive clearance process.[166] If there *is* a coercive clearance process for a public report, one can expect that process to exert potentially irresistible pressure to soften its content. As for a non-public report, unless (like the USDA civil rights office) an Office of Goodness has final or near-

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[162] On impact assessments in particular, see, e.g., SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (1984); KAUFMAN, RED TAPE, *supra* note 158, at 49; Bamberger & Mulligan, *Privacy Decisionmaking*, *supra* note 5.

[163] *Cf.* RICHARD E. MORGAN, DOMESTIC INTELLIGENCE: MONITORING DISSENT IN AMERICA 152 (1980) ("In the immediate aftermath of the intelligence scandals, anyone in the Justice Department assigned the task of reviewing an FBI domestic intelligence investigation will naturally take it seriously. But inevitably, if the task is an additional duty for those who must undertake it, it may become devalued to a quick look and a routine 'sign off.').

[164] Bamberger & Mulligan, *Privacy Decisionmaking*, *supra* note 5.

[165] Moore & Gates, *supra* note 5, at 73.

[166] *See, e.g.*, Bamberger & Mulligan, *Privacy Decisionmaking*, *supra* note 5 ("[D]uring her tenure Kelly successfully prevented DHS or the White House from exercising editorial control over reports issued by her office or privacy impact assessments, although her annual report did go through a review.").

final authority not just to make recommendations but to insist that they be carried out, a non-public report may be plainer spoken but is likely to be at least somewhat less influential. Without anticipated public exposure of at least some summary of findings and recommendations, there is less reason for disagreeing operational offices to accede to a program review's recommendations. At that point, the Office of Goodness's goal has to be to persuade an authoritative decisionmaker, such as the agency's Secretary, to resolve an intraorganizational dispute in its favor—a unattractive position to put the Secretary in, and in any event, one that requires the Office of Goodness to make a large expenditure of organizational capital.

Third, unless an Office of Goodness possesses sufficient influence that it need not care about maintaining collegial relations within its agency, a program review is likely to be perceived as much more legitimate if it is undertaken at the request of some important stakeholder or principal (Congress or the Secretary, for example), or based on some objective feature of the situation (say, a death). Of course an Office of Goodness can affirmatively seek an assignment by an agency principal to conduct a review, if its leaders believe such a review would prove useful. But without that assignment—which is to say, without acknowledgement of a potential problem by an authority outside the Office—assertion of autonomy to review extant operational policies or practices is likely to be seen internally as at least power-grabbing and possibly illegitimate.

(2) *Complaint investigation.* What makes an investigation different from a program review is that investigations look (at least initially) at particular facts and results, examining the effects of some program, activity, or conduct on an individual or individuals. The description above of the Border Patrol interpretation issue illustrates the dynamics of an Office of Goodness investigation, performed by USDA's highly empowered civil rights office.

Many many offices within government agencies do internal investigations. To name just a few, Inspector Generals' offices explore the possibility of criminal charges being brought[167]; ethics offices and offices of professional responsibility consider the possibility of various types of professional discipline; security offices investigate security breaches. The purpose of an Office of Goodness complaint system is often more prospective. As Kaufman wrote about ombudsman's offices, "If the ombudsman finds merit in a complaint, the expectation is that the accused agency will normally accede to his finding and redress the grievance as he recommends. . . . The complainant, in short, would enjoy the services of a well-equipped champion whose resources would be comparable to those of other parts of the bureaucracy, a champion whose performance was measured by triumphs over bureaucratic adversaries."[168] At DHS, because CRCL lacks authority either to prosecute or to discipline, individual wrongdoing is largely left to those other offices that have such authority. (Other Offices of Goodness in other agencies may possess the authority to investigate and sanction.[169]) And because CRCL mostly lacks authority

[167] IGs offices do many other types of reviews as well. *See* sources cited *supra* note 27.

[168] KAUFMAN, RED TAPE, *supra* note 158, at 95-96.

[169] *See* Dickinson, *Military Lawyers*, *supra* note 26, at 24-25.

to provide individual remedies, that too, is left to different systems.[170] Instead, CRCL uses complaint investigations as a foundation for the same sorts of more systematic recommendations that might come out of a program review.[171] This is evidently similar to the approach taken by USDA's civil rights office to its Border Patrol interpretation investigation, described above.

Why have Offices of Goodness investigations, then? Several reasons seem important. Investigation authority means that an Office of Goodness can conduct a targeted program review without being accused of self-aggrandizement—the agenda is set by complaints, not by the Office itself. In addition, becoming a regular recipient of complaints opens a window for the Office into agency operations and their impacts. This is particularly true if the complaint process is constructed to facilitate tracking of large numbers of complaints. (Recall that one of the recommendations adopted as a result of CRCL's Electronic Device Searching Impact Assessment was modification of the check-off options for traveler complaints, to include complaints about allegedly abusive searches and interviews, allowing much easier monitoring of the issue over time.) And correspondingly, authority to conduct investigations premised on complaints allows an Office of Goodness to offer a service to the external advocacy and community groups whose support I argue in Part III it needs to maintain effectiveness.

C. Boundary-spanning tools

I have mentioned several times above the interaction between an Office of Goodness and those outside its agency who share a commitment to its assigned value, Goodness. The relationship between the office and those external constituencies requires care and feeding. The tools discussed here are outreach, document generation, and congressional reporting.

(1) *Outreach.* A crucial aspect of Office of Goodness operations is boundary spanning[172]—maintaining connections to external constituencies of Goodness. Each Office of Goodness offers an obvious organizational entry point to stakeholders that share its assigned value. As discussed in the next section, secure connections are also vital to maintaining the Office's commitment to its assigned value. But even apart from that, where these connections are secure and effective, they offer the Office of Goodness information about problems, ideas

[170] For example, administrative claims may be brought under the Federal Tort Claims Act. Note that CRCL's authority is broader for disability rights complaints brought under Section 504 of the Rehabilitation Act of 1970. *See* 6 C.F.R. pt. 15.

[171] *See* DEP'T OF HOMELAND SEC. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES ANN. REP., FY 2011, *supra* note 16; DEP'T OF HOMELAND SEC. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES ANN. REP., FY 2010 (2011), *available at* http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2010.pdf (last visited Aug. 17, 2013); DEP'T OF HOMELAND SEC. OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES ANN. REP., FY 2009 (2010), *available at* http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2009.pdf (last visited Aug. 17, 2013).

[172] On the role and stresses of boundary-spanners in complex organizations, see, for example, Howard Aldrich, *Organizational Boundaries and Interorganizational Relations*, 24 HUM. REL. 279 (1971); Howard Aldrich & Diane Herker, *Boundary Spanning Roles and Organization Structure*, 2 ACAD. MANAGE. REV. 217 (1977); W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS 203-13 (5th ed. 2002); Robert E. Spekman, *Influence and Information: An Exploratory Investigation of the Boundary Role Person's Basis of Power*, 22 ACAD. MANAGE. J. 104 (1979).

about solutions, political support in the Congress, and public back-up for contested positions taken inside the agency. The "groups," as non-profit advocacy organizations are sometimes called in Washington, can do many things not easily available to a government office, from talking to the press, to pressing an issue with a sympathetic congressional staffer, to an organized protest. It is obviously better for an Office of Goodness if such moves are supportive, rather than adverse to its own existence and its preferred outcomes. In addition, one of the Office's claims to influence within an agency is its ability to predict what steps will and will not provoke controversy from groups that share its value.

So all things point Offices of Goodness towards robust engagement with organizations dedicated to Goodness, by meeting and other methods. The Border Patrol interpretation section, above, demonstrates some of the dynamics, as the Northwest Immigrant Rights Project and others reached out to CRCL, and CRCL reported these groups' concerns to Border Patrol and named those concerns as one reason to issue new policy.

(2) *Document generation.* Each Office of Goodness strategy produces documents, which may set out a problem, finding, or solution. Those documents are a key part of Office output.[173] They may be disclosed automatically or on request by, say, Congress, or under FOIA.[174] Or, theoretically,[175] they could be leaked. However they get out, they are fodder for external organizations and constituencies—particularly when the documentation supports those organizations' views. For example, the documentation of CRCL's nonconcurrence with the release of the Right-Wing Extremism paper bolstered the views of external organizations and stakeholders that the paper was problematic. And it provided them with a talking point ("An office inside DHS agrees that . . .") Even if an Office's conclusions do not accord with the external users' views, if the Office does a competent job gathering and analyzing the situation, the resulting information can be highly useful to external actors, contributing to what Seth Kreimer names the "ecology of transparency."[176]

(3) *Congressional reporting.* As described in Part I's discussion of CRCL's statutory authorities, Congress typically requires Offices of Goodness to include in their annual or other congressional reports information that is either of interest to members of Congress or to their constituencies. Indeed, it would be odd for Congress to omit such a requirement, which allows Offices of Goodness to improve congressional oversight capacity. Placing a monitor inside the agency and instructing that monitor to report back in the event of a problem is a variant of the "fire-alarm" oversight strategy named (and analyzed most famously) by political scientists Mathew McCubbins and Thomas Schwartz.[177] The strategy has pros and cons, from Congress's

[173] *Cf.* Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129 (2013).

[174] For a discussion of the development of FOIA as an accountability tool after the 9/11 attacks, see Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PENN. J. CONST. LAW 1011 (2008); GOLDSMITH, *supra* note 19, at 112-121.

[175] I am not aware of any leaks from CRCL, but of course it's possible.

[176] *See* Kreimer, *supra* note 174.

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

perspective. An Office of Goodness has internal access, which improves the penetration of the fire alarm system beyond what can be expected of, say, an advocacy organization. On the other hand, an Office of Goodness is subject to much more pressure than one of the outside advocacy groups to minimize or fail to report its colleagues' problems.[178] In addition, congressional reporting depends on the Office maintaining at least sufficient influence to both find out about problems, and at least sufficient autonomy or authority to report about them. Still, Offices interested in having an impact are well advised to see congressional reporting not just as a chore but an opportunity for influence.[179]

The prior paragraph deals with the impact of congressional reporting after the fact. But congressional reporting requirements have dynamic effects, too. If it requires an Office of Goodness to publish both its recommendations and its agency's response to them, Congress simultaneously magnifies pressure on both the agency and on the Office, particularly if congressional committees or staff are believed to monitor the reports, and potentially follow up with letters, requests for briefings, or hearings. Public disclosure and the possibility the agency might be called to account increases the stature of the Office's recommendations and the likelihood of concurrence. But it also imposes pressure on the Office to soft pedal and thereby keep disagreements in the family. The point is that congressional reporting is double edged in just the same way described above with respect to program reviews.

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The tools just described can only affect what occurs within an Office of Goodness's agency if others in that agency care about the Office's views and if those views are sometimes different from those of other agency staff. These prerequisites for Office of Goodness effectiveness are the subject of Part III.

IV. What Do Offices of Goodness Need?

Offices of Goodness cannot increase the amount of Goodness in an agency without two capacities: (a) influence and (b) commitment. That is, Office staff must know about and be able to affect agency activity, and they must wield such influence as they have in furtherance of Goodness, their Office's assigned value. In this Part, I argue that both influence and commitment depend crucially on external reinforcement.[180]

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[178] Perhaps this is why some of the Intelligence Community's Civil Liberties Offices issue congressional reports so opaque as to be useless as fire alarms. *See, e.g.*, DEP'T OF DEF. PRIVACY AND CIVIL LIBERTIES REP. FY2013, Q1, at 2 (2013), *available at* http://dpclo.defense.gov/civil/Res_And_Pub/reports/FY13QTR1.pdf (last visited Aug. 17, 2013) (listing number of complaints by relevant constitutional amendment, and reporting only that some are pending, and some have been reviewed).

[179] See Bamberger & Mulligan, *Privacy Decisionmaking*, *supra* note 5 (describing the DHS privacy office: "Kelly framed her office's direct-congressional-reporting function as both a right and an obligation, and emphasized the function's importance as a signal of structural independence").

[180] The account I present is consonant with Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247 (2011) (describing how factors including the increasing influence of privacy advocates and the rise of privacy professionals have pushed corporate privacy regimes from the procedural to the substantive), and SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT

The argument begins with the observation that Offices of Goodness exist to bring into their agencies not just a value that is not primary, but one that constrains or even conflicts with the agency's raison d'etre. For reasons to do with culture, expertise, interest groups, and congressional oversight, agencies tend to develop a strong and univalent sense of mission. As James Q. Wilson wrote in his classic treatment of bureaucracy:

> A sense of mission becomes the basis, explicitly or implicitly, on which personnel are recruited, trained, rewarded, and managed. Philip Selznick, from whom my views on this matter are so obviously derived, has remarked that an organizational mission is not simply the formal goal of the organization but the distinctive and valued set of behaviors, selected from among a large number of behaviors, by which activity toward a goal and organizational maintenance are reconciled. Mission, in short, implies much more than the neutral, technical term, "means."[181]

Scholars of bureaucracy and administration have long explained that agencies have difficulty simultaneously internalizing a mission and its constraints, much less conflicting goals.[182] Since the entire point of an Office of Goodness is constraint or opposition, this means that every Office of Goodness faces continual pressure to slide into disempowered irrelevance or to be tamed by capture or assimilation.[183] These dangers are magnified by the fact that a powerless Office of Goodness is far from useless either to its agency or to Congress. Even if everyone inside the agency knows that the Office has little or no influence, both the agency and the Congress can continue to reap some of the benefits of its existence, by claiming, technically accurately, to have an Office dedicated to Goodness. Stakeholders, whether in or out of the agency, who are less interested in the value Goodness than in *seeming* to care about Goodness may be well served by

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STATEMENT STRATEGY OF ADMINISTRATIVE REFORM (1984) (highlighting as crucial factors for the success of an internal compliance unit the clarity of its goals, its staff's commitment to those goals, its autonomy, and its external support). Todd LaPorte's work on "high-reliability organizations" provides another useful analogy. See, e.g., Todd R. La Porte, *Challenges of Assuring High Reliability When Facing Suicidal Terrorism, in* SEEDS OF DISASTER, ROOTS OF RESPONSE: HOW PRIVATE ACTION CAN REDUCE PUBLIC VULNERABILITY 99 (Auerswald et al, eds., 2006) ("Highly reliable operations . . . are difficult to sustain in the absence of external enforcement. Continuous attention both to achieving organizational missions and to avoiding serious failures also requires repeated interactions with elements in the external environment, not only to ensure resources, but, as importantly, to buttress management resolve to maintain the internal relations outlined above and to nurture highly reliable organizations' culture of reliability.").

[181] JAMES Q. WILSON, THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS 14 (1978). Among Selznick's relevant work is, for example, PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION, ch. 3 (1957).

[182] *See, e.g.*, WILSON, BUREAUCRACY, *supra* note 5; Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009); JEANNE NIENABER CLARKE & DANIEL C. MCCOOL, STAKING OUT THE TERRAIN (2d ed. 1996); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, COLUM. L. REV. 2217 (2005).

[183] Offices of Goodness be unwelcome within agencies for other reasons as well. As Kaufman wrote, an ombudsman's office—a species of Office of Goodness—"creates anxieties among legislators and administrative agencies already on the scene. . . . Administrative agencies wonder what the impact of an ombudsman on their operations would be, particularly since he would introduce impediments to crisp decisive action, and perhaps encourage resistance where none would otherwise develop." KAUFMAN, RED TAPE, *supra* note 158, at 96.

a neutered Office, to which assignments can be made without fear of disruption.[184] And stakeholders who care more may not be able to detect the Office's fettered circumstances. On the other hand, if an Office truly lacks all influence, that fact is bound to get out to some extent, making it an unconvincing standard-bearer and therefore fairly useless. So one would expect Offices of Goodness to face efforts to limit but not quite eliminate their influence. I argue in this part that Offices will be hard pressed to resist such efforts without external reinforcement and support.

Even a powerless Office of Goodness poses some risk to its agency: without much influence itself, it may, for example, nonetheless produce records able to be used against the agency by more muscular Goodness advocates. This prospect can be eliminated by capture or assimilation,[185] which I mean to encompass not just personally self-interested behavior but any systematic inclination by Office of Goodness staff to undervalue Goodness compared to the agency's primary mission. (As discussed below, the mechanisms of capture may be quite different than in the ordinary usage in positive political theory.) Pressures towards capture or assimilation are likely to be even stronger than those towards impotence. After all, unlike a disempowered Office, a tame Office of Goodness can be given the trappings of influence without threat to the agency.[186] Again, this part's argument is that resistance to capture can be bolstered by a variety of boundary-spanning techniques, to ensure that Office staff maintain external Goodness advocates as an important reference group:

A. Influence

An Office of Goodness cannot be effective if its staff is frozen out of meetings, its advice can be disregarded without consequence, or its activities face resource constraints that prevent it from undertaking or participating in important projects. Offices of Goodness do not seek autonomy (like so many other federal offices), but they must seek influence. As in so many situations in federal agencies, "[t]he principal source of power is a constituency."[187] And of course Offices are not the passive recipients of constituency support; they can help build support,

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[184] *See, e.g.*, John W. Meyer & W. Richard Scott, Organizational Environments: Ritual and Rationality 31 (updated ed., 1991) ("By designing a formal structure that adheres to the prescriptions of myths in the institutional environment, an organization demonstrates that it is acting on collectively valued purposes in a proper and adequate manner").

[185] Ordinarily, the phrase "regulatory capture" denotes "a situation in which an industry which is regulated controls a regulatory agency's policies." Michael E. Levine, *Regulatory Capture*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 267, 267 (Peter Newman ed., 1998). In our setting, however, the agency itself is in a role like a regulated entity, and the Office of Goodness is akin to a regulator. For a summary of capture theory, see *id.*; Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990). For foundational treatments, see, for example, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MGMT. SCI. 3, 3 (1971); Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT SCI. 335 (1974); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. LAW & ECON. 211 (1976).

[186] On the analogous issue of "cosmetic compliance" in the corporate law context, see, e.g., Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

[187] WILSON, BUREAUCRACY, *supra* note 5, at 205.

as well as rely on it.[188] The potential supporters are Congress, non-governmental groups, other agencies, and the White House. Observations on many of the relevant dynamics follow:

Congress, the White House, and the budget. Without sufficient resources, the Office will, for example, lack staff. And the tools described above can be quite staff intensive.[189] Budgetary needs require support to satisfy. Like nearly all federal agencies, an Office of Goodness depends on the Congress for its budget. And Congress—or at least the members of Congress in the President's party—begin with the administration's budget, submitted by the Office of Management and Budget, within the White House. Thus the Office needs support from at least one of the key budgetary players—the agency's budget decisionmaker (who provides a proposed budget to OMB), the White House, or someone in the Congress. Others have explored the federal budgetary process in detail,[190] and I will not belabor the point, except to observe that an administration's budgetary requests for Offices of Goodness might well require particular scrutiny by the Office's supporters; various parts of the administration might want to starve particular Offices, if they can, given their watchdog function.[191]

Congress and the oversight function. Perhaps less obvious (though partially broached above) is Congress's *non*budgetary role in buttressing the influence of Offices of Goodness. As already explained, congressional reporting is one way Offices of Goodness carry out their fire alarm function, alerting Congress to issues members interested in Goodness might want to know about. Congressional reporting is simultaneously a key tool within the agency, because exposure of an Office's recommendations and the agency's responses pressures the agency to agree to the recommendations (while simultaneously pressuring the Office to tone those recommendations down, so that the agency's leaders don't mind saying yes). The additional point here is that

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[188] Many sources analyze the ways in which federal offices build their varied constituencies. *See, e.g.*, KAUFMAN, THE FOREST RANGER, *supra* note 14; JAMES Q. WILSON, THE INVESTIGATORS, *supra* note 181; Cuellar, *supra* note 14; DANIEL P. CARPENTER, BUREAUCRATIC AUTONOMY, *supra* note 14, CARPENTER, REPUTATION AND POWER, *supra* note 14.

[189] When DHS's CRCL took on the new task of intelligence product clearance, the Administration's FY 2011 proposed budget sought an additional six staff positions to do the work, at a cost of $1.2 million. *See* DEP'T OF HOMELAND SEC., CONG. BUDGET JUSTIFICATION, FY 2011, at OSEM-23, *available at* http://www.dhs.gov/xlibrary/assets/dhs_congressional_budget_justification_fy2011.pdf (last visited Aug. 17, 2013). This was about 5% of the office's total budget. The funds were not, however, forthcoming. *See* DEP'T OF HOMELAND SEC., CONG. BUDGET JUSTIFICATION, FY 2012, at OSEM-21, *available at* http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf (last visited Aug. 17, 2013).

[190] The current executive budget process is set out in very great detail in OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2013.pdf (last visited Aug. 17, 2013). For some discussion of the constraints inherent in this process, see Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 805-808 (2013). More generally, *see, e.g.*, AARON WILDAVSKY, THE NEW POLITICS OF THE BUDGETARY PROCESS (1988); ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS (1995); Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998).

[191] As Richard Pious writes of sub-agency operational bureaus seeking more autonomy, they work to ensure that "[d]etailed spending authorizations and specific itemized appropriations [are] granted directly to the bureaus in order to prevent the department (or White House) from determining the allocation of resources for bureau programs." RICHARD M. PIOUS, THE AMERICAN PRESIDENCY 232 (1979).

congressional reporting's influence is likely to fade if congressional committees, members, or staff do not follow up on at least some of what is revealed, whether the follow-up occurs by letter, requests for staff or member briefings, committee hearings, or any other of the myriad ways in which congressional actors make their views and interests known.[192]

White House. The White House has many non-budgetary levers that influence what goes on in the agencies. Of course this is true for the President and those very close to him. As then-professor Elena Kagan summarized in her analysis of "Presidential Administration," "a President has many resources at hand to influence the scope and content of administrative action. Agency officials may accede to his preferences because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power."[193] But, like every other institution in this Article (and with credit for the phrase to Ken Shepsle), the White House is a "they," not an it.[194] For any Office of Goodness, at least dozens of the many hundreds of staff in the Executive Office of the President[195] can either support or diminish the Office's influence. White House staff—assigned to the White House Counsel's office, Domestic Policy Council, the National Security Staff, the Office of Information and Regulatory Affairs, the Office of Public Engagement, etc.—can function very like congressional staff after a "fire alarm" is rung, reaching into the agency with particular vigor if something or someone directs their attention to a particular problem. White House staff can request or ignore Office views on the resulting issues, and can include or exclude Office staff and leadership from the resulting meetings. Even though agencies strive to present a united front to the White House, involvement in White House meetings and discussions is very empowering, validating the importance and "equities" (a word used in Washington to mean appropriate role) of the offices included and necessitating at least their grudging acquiescence in the agency position. If, on the other hand, White House staff excludes or gives short shrift to the views of Office staff or leadership, that diminishes Office influence within the agency.[196]

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[192] *See, e.g.*, McCubbins & Schwartz, *Police Patrols versus Fire Alarms*, *supra* note 177; JOEL D. AUERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990); DODD & SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE (1979).

[193] Kagan, *Presidential Administration*, *supra* note 127, at 2298.

[194] *Cf.* Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. OF LAW & ECON. 239 (1992). The point is frequently made (though also frequently ignored). *See, e.g.*, Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1854 (2013) ("Recall that while the President is ultimately in charge, the White House itself is emphatically a 'they,' not an 'it.'); Magill & Vermeule, *Allocating Power*, supra note 13, at 1036 ("Agencies Are a 'They,' Not an 'It.' Even casual observers of the administrative state recognize that agencies, like nearly all large organizations, are not unitary actors.").

[195] *See* Leadership Library, Executive Office of the President (subscription site, http://lo.bvdep.com/OrgDocument.asp?OrgId=-1&LDIBookId=19&LDIOrgId=151861&LDISecId=200&FromRecent=1&Save=0#O151861)

[196] A similar point about the intra-agency boost provided by White House access, though tied to the President rather than the White House more broadly, is made in Magill & Vermeule, *Allocating Power*, *supra* note 13, at 1058 ("Our hypothesis is that the President has more influence over [Executive-created] agencies because those who are closest to the President within these agencies are better equipped to overcome their intra-agency opponents. Their access to the superior authority of the President will operate as something of a trump card in intra-agency disputes.").

Other agencies. Offices of Goodness can be shored up or undermined by offices in other agencies. As DeShazo and Freeman have pointed out, "agencies can be prompted to take their secondary missions more seriously when Congress enhances interagency lobbying by increasing the power of other agencies, which derive relevant expertise and interests from their own statutory mandates, to lobby the implementing agency."[197] Offices of Goodness are, to use this language, assigned to a "secondary mission" within their agency. So the kinds of efforts DeShazo and Freeman describe, in which agencies influence each other by "providing useful information, threatening litigation, or threatening to go over the head of the agency to members of Congress or higher-ups in the White House" all interact with Offices of Goodness' efforts. This is obvious in two of the examples, above, dealing with the Border Patrol interpretation issue and the NCTC data ingestion and retention guidelines. In the first, the FOIA'd documents evidence substantial impact from what DeShazo and Freeman might call "lobbying" of DHS by DOJ and USDA. The result was to push DHS towards the more civil-rights-friendly policy of restricting Border Patrol's interpretive services offered to non-DHS law enforcement. On the other hand, the DHS position in the NCTC data-retention matter, which had evidently been agreed to within the Department (including by CRCL and the Privacy Office), prior to objections by ODNI, was overruled in the interagency process.

The point is not simply that another agency might agree or disagree with an Office of Goodness, although as just seen either is possible. It is that an Office of Goodness may be able either to call upon or to fend off a like-minded part of another agency, increasing its own fire-power in the former instance or bolstering its agency's (highly-valued) autonomy in the latter. Agreement is not a prerequisite for assistance. If, for example, an outside agency understood to be committed to Goodness takes a harder stance on some issue than an Office of Goodness, that might actually enhance the Office of Goodness's position, making its preferred approach the compromise. But less happily for the Office of Goodness, the other agency may undermine it in several ways. If the outside agency takes a *softer* stance than the Office of Goodness, that may defeat the Office's point of view in the specific instance and harm the Office's reputation more generally. Or the outside agency's harder stance, if it wins the day, may damage the Office's influence by rebutting its claim to its agency that following Office advice will assist in defending against attacks on the agency's autonomy.[198]

Advocacy Groups. As sociologists have explored, for decades American corporations have created offices to mirror their regulatory environment, putting in place environmental, EEO, and labor relations offices, for example.[199] Offices of Goodness constitute the equivalent strategy for government agencies, mirroring external stakeholder values and providing an obvious point of access for advocacy groups interested in constraining the agency's operations. So a key role for many Offices of Goodness is to manage the relationship between the agency

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[197] *See* J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005).

[198] *Cf.* WILSON, THE INVESTIGATORS, *supra* note 181, at 165 ("In my view, it is the desire for autonomy, and not for large budgets, new powers, or additional employees, that is the dominant motive of public executives.").

[199] *See* P.R. Lawrence & J.W. Lorsch, *Differentiation and Integration in Complex Organizations*, 12 ADMIN. SCI. Q. 1 (1967); J.D. THOMPSON, ORGANIZATIONS IN ACTION (1967); J. MEYER & W.R. SCOTT, ORGANIZATIONAL ENVIRONMENTS: RITUAL RATIONALITY (1992).

and the advocacy groups that are the agency's natural opponents, but the Office's natural constituents—to take their phone calls and meetings, answer at least some of their questions, and blunt their criticisms. For this to work, the Office has to provide the groups with something of value.[200] That is likely to be information and access, whether via informational meetings or by producing reports and documents that advocates can in turn use. Other possibilities include a complaint process, which might produce individual or policy remedies for problems, or at the least, serve process values. Advocacy groups hope for more, of course; what they really want is that that Offices informed by their concerns and analysis may be able to accomplish sought reforms.[201] And if the Office is influential, that sometimes happens.

As with each player discussed in this section, advocacy groups can augment or diminish the influence of an Office of Goodness. Offices of Goodness often owe their very existence to advocates,[202] and lean heavily on their support. In part this is because Offices of Goodness are sharply limited in how open they can be with their would-be-sponsors in Congress. For example, one administration rule governing the budgetary process is that in congressional briefings, public meetings, and the like, all executive branch officials must support the President's budget, once it exists. So if an Office of Goodness employee is asked in a congressional briefing whether the Office needs more money than the President's budget provides, at least the explicit public answer must be no. Both the agency and the White House use various methods to enforce that answer—for example, by sending a chaperone to such meetings. To state the same point more generally, Offices of Goodness are part of the very agency it is their job to constrain, which means they must walk a very fine line in discussing their needs, successes, and recommendations even with outsiders on whom they depend, whether Congress or the White House Accordingly, in both budgetary and policy processes, an Office of Goodness benefits greatly from having a surrogate or advocate who can speak more plainly. If advocacy groups find value in the Office of Goodness, they are likely to play that role.

Within the agency, it can actually be quite helpful to the Office if advocates somewhat outflank it in their zeal for Goodness. That frames the Office's own views as moderate, helping it to maintain its credibility within the agency. If, however, the divergence between the external Goodness position and that of the Office is too great—as it seems to have been in the laptop

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[200] Of course, leaders in Offices of Goodness may wish to assist advocacy organizations for simpler ideological reasons, as well, to increase the organizations' own stature in service of the shared value. Steve Teles explores this point in his account of "transformative bureaucracy," which he describes as activities by political appointees "consciously deploying agency resources to transform the terms of political competition in the future," in part by "assist[ing] the development of [chosen] political organizations by providing them direct subsidy, increasing their profile (for example, by giving highly-publicized speeches to their members), and by granting them preferred access to agency decision making." Steven Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. IN AM. POLITICAL DEVELOPMENT 61 (April 2009).

[201] *Cf.* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 648 (1998) ("Nongovernmental actors do not work alone. . . . [T]hey invariably seek governmental officials who will act as allies and sponsors for the norms they are promoting. Once engaged, these governmental norm sponsors work inside bureaucracies and governmental structures to promote the same changes inside organized government that nongovernmental norm entrepreneurs are urging from the outside.").

[202] For example, it was the groups who dreamed up CRCL as an entity within DHS, the first such inward-focused civil rights or civil liberties office. [CITE AN INTERVIEW]

border search case study—that may be quite harmful to the Office. An Office of Goodness may gain collegiality points, internally, when it takes public hits for its agency's position. But one of the reasons that the agency follows the Office's advice is in order to at least somewhat assuage criticism from the advocacy groups. If following Office advice does not accomplish that goal, the Office's internal influence will decline. So, in the laptop border search situation, we saw that CRCL made several recommendations made in its impact assessment, each accepted by CBP. But accepting those suggestions seems to have elicited no good will at all from the advocacy community. The result is likely to influence the CBP audience for the next set of recommendations, as agency officials question whether a CRCL-proposed reform really has any external constituency.

A final way in which advocacy groups can increase or maintain the influence of an Office of Goodness is by making its predictions come true. If an Office predicts a firestorm of public concern about a particular policy, should that policy be implemented and become known, it is advocates that create the firestorm, if they can. (Efforts to create a firestorm failed in the NCTC example, above.) And if the Office argues within its agency that a policy (perhaps after modifications) is fine, it is advocates that *don't* create a firestorm. The point is not that advocacy groups carry out their efforts in order to support the Office of Goodness, but rather that if the Office proves wrong in its predictions, it is likely to lose influence. This creates all the more incentive for Office staff to discuss issues with various groups in advance, where possible.

Law and Courts. For many reasons, advocates often prefer law talk to policy talk: legal rules govern more than one agency; can outlast a single administration; may be court-enforceable; and, perhaps most important, resonate with their rights-based politics/orientation.[203] But Office of Goodness reference to law is double-edged, for several reasons. On the one hand, reference to legal obligations is extremely powerful, perhaps even trumping of other concerns. On the other hand, for an Office of Goodness that is not in a General Counsel's office, framing an issue as a legal one can set up the losing side of an infra-agency conflict; it is lawyers in the General Counsel's office, not Office of Goodness staff—even if they are also lawyers—who play the institutional lead role with respect to legal questions. In addition, if a question is framed as legal and is likely to be litigated, that cedes authority to the courts, which may well decide against the views of the Office of Goodness. Agency dynamics and the state of the legal precedent will thus dictate whether Offices of Goodness are more likely to frame their commitments in *policy* rather than *legal* terms.

All that said, Offices of Goodness are likely to lean heavily on court decisions that agree with them, or even tilt their way; in the political economy of an agency, such decisions are valuable currency. Offices may also make legal arguments with respect to issues in which court authority is mixed or that have not yet been litigated in federal court. On the other hand, if many courts have come out against a particular position, that dampens the availability of that position for an Office of Goodness; it would be unlikely to take a legal position more protective than court decisions on an issue that has been repeatedly litigated. So for example, in the laptop border search case study, above, at the time CRCL's impact assessment was completed, two

[203] *See, e.g.*, STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS (1974); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

district courts had rendered opinions questioning the right of the government to conduct laptop searches absent reasonable suspicion,[204] but the federal courts of appeals had, as of the time of the impact assessment, reversed in both cases and uniformly upheld such searches. No internal office like CRCL is likely to opine publicly, and adversely to its agency's frequently asserted litigation position, that those courts are simply wrong.

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Offices of Goodness are inherently under siege; efforts to push them aside and render them irrelevant are part and parcel of their agency's mission focus. To resist certainly does not require that all the external sources of influence just discussed operate in their favor. But if none do, an Office of Goodness will be hard pressed to retain any influence. The next section examines how to improve the odds that what influence they have is used in service of their assigned value—how, that is, they can maintain their commitment, and avoid cooptation or capture.

B. Commitment

Offices of Goodness are likely to experience erosion in their staff's commitment to the assigned value, Goodness, as both collegial and careerist pressures take their toll. By collegial pressures, I mean the ordinary impact of working with mission-focused colleagues not in the Office of Goodness. As Herbert Simon said in his foundational work on administration, a person "does not live or months or years in a particular position in an organization, exposed to some streams of communication, shielded from others, without the most profound effects upon what he knows, believes, attends to, hopes, wishes, emphasizes, fears, and proposes."[205] By careerist pressures, I mean the impact of an anticipated career path within the agency, which will push Office of Goodness staff to develop reputations as "team players" whose approach meshes well and enhances the agency's primary mission. I suggest below that efforts to resist capture must counter both; those who want an Office of Goodness to avoid it must ensure that Office staff conceptualize Goodness advocates as part of their reference group, and that staff have available and attractive career paths involving Goodness advocacy.

Numerous scholars have written about professional identification in government agencies, and how professional commitments and professional reference groups, and the cultural distinctions they produce, can be outcome-determinative. Magill and Vermeule recast a good deal of administrative law in these terms:

> The ongoing contest over the roles of expertise, legalism, and politics in administrative law can thus be viewed in sociological terms as a contest among different types of professionals, with different types of training and priorities. Legal rules and institutional

[204] *See* United States v. Arnold, 454 F.Supp.2d 999 (C.D. Cal. 2006), *rev'd*, 523 F.3d 941 (9th Cir. 2008); United States v. Cotterman, 2009 WL 465028 (D. Ariz. 2009), *rev'd* 637 F.3d 1068 (Mar. 30, 2011), *vacated and aff'd en banc on other grounds*, 673 F.3d 1206 (Mar. 8, 2013).

[205] HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR xvi (3d ed., 1976).

> structures that empower scientists or engineers will conduce to a technocratic agency culture, while rules and structures that empower lawyers will carry in their wake the distinctive culture of lawyers.[206]

In study after study, the empowering of one or another professional group at a particular agency influences that agency's approach to its assignments and challenges.[207] Indeed, James Q. Wilson argues that the very essence of being a professional is to be "someone who receives important occupational rewards from a reference group whose membership is limited to people who have undergone specialized formal education and have accepted a group-defined code of proper conduct. The more the individual allows his or her behavior to be influenced by the desire to obtain rewards from this reference group, the more professional is his or her orientation." Accordingly, "the way such a person defines his or her task may reflect more the standards of the external reference group than the preferences of the internal management."[208] And "institutionalist" sociologists agree that professional networks exert real influence over their participants who work in scattered organizations.[209]

So for values closely associated with a particular profession, no doubt hiring a critical mass of such professionals can assist in safeguarding the value. Again, to quote Wilson, "Politicians and interest groups know that professionals can define tasks in ways that are hard for administrators to alter, and so one strategy for changing an organization is to induce it to recruit a professional cadre whose values are congenial to those desiring the change."[210] In one example of this strategy, we learn from recent work, lawyers within national security agencies are assigned to ensure a value I will summarize by the term "lawfulness."[211] Other examples abound.[212] But what if the profession in question does *not* homogenously embrace the relevant value, Goodness? Lawyers' professional commitments may include lawfulness as an overriding value (although the professional value of client-representation[213] no doubt competes). But taking the example of DHS's CRCL, and its more contested assigned values of civil rights and civil

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[206] Magill & Vermeule, *Allocating Power*, *supra* note 13, at 1077-78.

[207] *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990) (lawyers and economists vs. engineers); KATZMANN, *supra* note 15 (lawyers vs. economists).

[208] WILSON, BUREAUCRACY, *supra* note 5, at 60.

[209] *See, e.g.*, JOHN W. MEYER & W. RICHARD SCOTT, EDS., ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY (updated ed. 1992); WALTER W. POWELL & PAUL J. DIMAGGIO, EDS., THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (1991).

[210] *Id.* at 64.

[211] *See, e.g.*, sources cited *supra* note 25.

[212] *See, e.g.*, *supra* note 207; Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1498-1501 (2001) (public health professionals). [THINK ABOUT THIS]

[213] *See, e.g.*, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613.

liberties, the legal profession is certainly not uniformly committed to those values.[214] After all, in every civil rights case there are lawyers on both sides. Accordingly, simple professional ties are far from enough to keep Office staff committed to those values, even if they are all lawyers. What is needed is ties not to the legal profession as a whole, but to a much more specific professional community. In the case of a civil rights Office, for example, the key would seem to be sufficient staff connection to the civil rights community that its values remain salient and influential notwithstanding the contrary pressures inherent in the Office's position within its agency. The Office benefits greatly, that is, if its staff conceptualize themselves as, for example, "civil rights lawyers" rather than "lawyers in a civil rights office."

Connections to a corner of a profession depend on some combination of hiring, networking, and career paths. The first of these is the most obvious; Office of Goodness can hire experienced staff from organizations that share its assigned value.[215] In practice, this strategy may run into implementation problems because of constraints on federal hiring under the civil service human resources rules.[216] But assuming hiring managers can hire more or less who they choose, bringing in new employees directly from advocacy groups is a common strategy for Offices of Goodness that seek to ensure staff commitment. For example, Douglas NeJaime explains that during the first Obama Administration, many civil rights offices hired numerous "attorneys with significant cause lawyering experience," "signal[ing] the likelihood of increased action on issues important to the organizations from which these lawyers came."[217] And Kenneth Bamberger and Deirdre Mulligan's account of two federal privacy offices similarly stresses that hiring staff experienced in the "privacy field" was crucial to the greater success of the DHS office, compared to the Department of State office.[218]

But even if they were hired from a Goodness organization, as staff gain experience within the government, that affiliation is likely to fade and their reference group to shift to their more immediate peers. An Office of Goodness can push back against this shift by promoting opportunities for its staff to network with Goodness advocates, sending them to conferences, workshops, and the like. My guess would be that even more important is the staff's expectation about their own career paths. If Office of Goodness staff think of their own likely path as limited

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[214] My point is in some tension with Laura Dickinson's analysis of JAG Corps lawyers, whom she finds dedicated to human rights norms via their commitment to the idea of the rule of law. *See* Dickinson, *Military Lawyers*, *supra* note 26, at 21-22.

[215] While his topic was not an Office of Goodness, in his magisterial analysis of the Federal Drug Administration, Daniel Carpenter similarly attributes much of its success to its leaders' hiring strategy. *See* DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REPUTATION AT THE FDA (2010) (describing the FDA's pattern of hiring experts who shared its value commitments, and their willingness to join the agency because of its excellent reputation).

[216] Federal hiring managers for civil service jobs can hire only from a list of eligible applicants, called a "certificate list," which is assembled *not* by the hiring office but by the agency's human resources department. Particularly because an Office of Goodness is such a small part of its agency, HR personnel are likely to be quite uninformed about how to evaluate applications, leading, in my experience, to frequent misalignments between the composition of the list and the Office's own preferences. (Offices of General Counsel are less constrained, by statute.)

[217] Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2009).

[218] Bamberger & Mulligan, *Privacy Decisionmaking*, *supra* note 5.

to other agency offices, that is unhelpful for maintaining their commitment to Goodness. But what if they see more possibilities in which Goodness remains important? This could be the case if promotion within the Office is available and depends on demonstrated commitment, or if they contemplate going to work for a different agency's Office of Goodness that shares the same value commitment or for an advocacy organization. All these prospects would encourage staff to safeguard their own reputations for commitment to Goodness and, less calculated but no less important, to keep Goodness advocates as a key reference group.[219]

Conclusion

This Article has explored an important but understudied institutional device used to induce large bureaucratic governmental institutions to heed certain "precarious values," notwithstanding the tension between those values and the agencies' primary commitments. I began by showing how one important Office of Goodness exercised real but limited influence in four controversies. I then used those examples to inform detailed analysis of the tools Offices of Goodness may use, and the prerequisites for Office effectiveness.

In the Article's introduction, I mentioned that the Office of Goodness strategy has been proposed as a solution for two very high-profile controversies. In a recent press conference, the President endorsed a Privacy and Civil Liberties Officer for the National Security Agency, and also some kind of civil liberties advocate for the Foreign Intelligence Surveillance Court.[220] The details of any proposal are not yet available [UPDATE LATER], but some of the insights just developed may inform the institutional design choices of would-be reformers, so that reforms are more likely to actually serve the "Goodness" values of privacy and civil liberties. At the NSA, it is easy to see pitfalls. How could a complaint system be constructed when the subjects of surveillance do not know their own status? Would an NSA Privacy and Civil Liberties Officer be empowered to pursue those values broadly conceived, or limited to more narrow conceptions of lawfulness? If the latter, it would be difficult for the new Officer to avoid (or surmount) conflict with the General Counsel. Would NSA Privacy and Civil Liberties Office staff be able to discuss or report publically about any problems or recommendations? If not, what kind of external reinforcement can they rely upon to maintain their influence within the NSA? And so on.

The idea of harnessing adversarial process for the FISA court seems less fraught. American law has a long tradition of bringing outsider lawyers into litigation processes; the contours of the role of government-paid challenger—e.g., public defender—are solidly established in the legal profession. I surmise that this would make role commitment far easier to maintain. Moreover, external influence-reinforcement seems less crucial when there is a formally structured decisionmaking process with its own norms of reasoned elaboration.[221]

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[219] *Cf.* KATZMANN, *supra* note 15 (discussing the career paths of FTC economists and lawyers and their influence on staff values.

[220] *See supra* page 2.

[221] I don't mean to be naïve in making this point. Of course there is abundant reason in litigation settings to worry that "the haves come out ahead." *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on*

The overall point—and this is the Article's broadest lesson—is that Office of Goodness efficacy should not be taken for granted. Unless the goal is purely cosmetic, a new Office's tools must be carefully prepared, and its influence and commitment purposefully produced and maintained. This Article makes just a start on the needed research.

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the Limits of Legal Change, 9 LAW & SOC'Y REV. 95 (1974). But in litigation, the "have nots" can at least get a seat at the table and a chance to speak. Without external-reinforcement, an Office of Goodness may be denied even access.