We do not act rightly because we have virtue and excellence, but we rather have those because we have acted rightly.

—Aristotle (384–322 BC)

Note: The views expressed herein are personal ones and do not necessarily reflect the official policy or position of the Department of Defense or any U.S. government agency.

A Structural Approach to Ethos

The Director of National Intelligence (DNI) Human Capital Strategic Plan, June 22, 2006, outlines Objective 3.1: “Foster an Ethos of Service, Integrity, and Accountability.”1 Objective 3.1 then defines that ethos as the “code” of shared values that guides the way an individual (and an organization) behaves, and it defines an institution’s culture. In fact, the DNI Ethos is a critical document for intelligence practitioners involved in work with unique professional requirements; namely, that practitioners are involved in work that sometimes involves violation of foreign laws, as well as moral standards, that others share and consider important.2 Clearly, such practitioners must have a professional ethos that guides duty performance in ambiguous, stressful conditions, with all work performed responsive to American law and values.3 This raises two important questions: Does the DNI Ethos of Service, Integrity, and Accountability fully and accurately reflect who we “should” be as federal employees working in the intelligence community (IC)? Does the IC need further codes of ethics, either by mission practice area or by agency, which could more effectively guide our work? In any case, intelligence practitioners face complex ethical and legal problems in their daily work. Some problems raise critical conflicts in duty
involving national security and democratic values. The resolution of such conflicts is neither straightforward nor easy.

This paper adopts a structural—as opposed to a philosophical—approach to the ethos issue: The IC is established by federal statute, with specified missions and well-defined operating parameters, and often with close oversight from inside and outside government. In that respect, federal law delineates the core missions, functions, and primary tasks for the overall IC, as well as for the member organizations that constitute that community. In many cases, federal law further delineates restrictions on intelligence practices. Federal law, arising from constitutional, statutory, decisional, and executive sources, embodies values and norms that guide and constrain duty performance.

Nonetheless, moral philosophy offers important theories and concepts that support and justify, as well as inhibit and restrain, intelligence practices. Some philosophical approaches, such as just war theory, provide an analytical framework with which to assess the moral propriety of intelligence operations. For example, when is it morally justifiable for the U.S. government to target a foreign sovereign nation or a nonstate actor as part of an intelligence operation (with either collection activities or covert action)? Or, why is it morally justifiable for the U.S. government to target an enemy intelligence officer but not an allied intelligence officer? Or, why is it morally appropriate to target an enemy intelligence officer but not one of his family members? Hence, the basic principles of just war theory involving just cause, right intentions, probability of success, last resort, and proportionality help inform a sense of who we are and why certain actions are morally justifiable in a given context. In any case, the DNI Ethos results from both legal and moral sources that help define who IC employees “should” be and what we should/should not do.

This paper also recognizes a close and reciprocal relationship between the law and morality. In other words, while moral theories and concepts typically inform the development of the law, the law also provides an informed understanding of what is and is not appropriate behavior. For example, even though something is legal, it may not be morally acceptable: A practice may be considered morally unacceptable by many, but nonetheless be recognized as legally permissible; conversely, a practice may be considered morally appropriate, but still not be recognized as legally permissible. Sometimes changing moral concepts leads to changes in the law,
while sometimes changes in the law bring about changes in what people believe to be morally appropriate. In that sense, the interesting issues are ones that involve conflicting moral and legal duties. For the intelligence practitioner, this often leads to challenging questions about shared values and appropriate ways of resolving conflicts between two "right" actions. In short, who we "should" be is also subject to change in response to changing understandings of morality and the law.

**Sources for the IC Ethos**

The DNI Ethos must be grounded in values and norms that are supported by the American people. Here, the legal and moral foundations for an intelligence practitioner’s work operate at both the institutional and individual levels. This paper offers a conceptual model (figure 1) for understanding an intelligence practitioner’s professional ethos, as well as providing an appreciation for competing professional obligations. The first two (upper) quadrants identify some of the legal and moral obligations operating at the institutional level, while the second two (lower) quadrants identify some of the legal and moral obligations operating at the personal level. Some documents (e.g., the U.S. Constitution or IC Mission documents) have both legal and moral foundations, providing some blurring between quadrants. In effect, the values and norms of behavior arising from these sources guide a practitioner’s performance, both on a conscious and an unconscious level. Moreover, this model should be useful in understanding conflicting obligations in a given context. What is the practitioner’s higher duty in a given situation?

Quadrant 1 raises issues involving primary duties under federal law. Here, intelligence practitioners have an overall mission to perform, whether it involves collection, analysis, counterintelligence, or special activities. As a practical matter, practitioners face three important issues when given a specific tasking: Does the tasking involve an authorized intelligence mission? Has the tasking (mission) received approval at the appropriate level of command/supervision? Does the tasking (mission) comply with appropriate rules and regulations issued by the Department of Justice?

International law plays an important role in limiting U.S. foreign intelligence operations. The United States is party to multiple international treaties, all duly ratified following "advice and consent" of the U.S. Senate, making each part of the "supreme Law of the
### Figure 1. The Legal and Moral Sources of the Intelligence Ethos

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<thead>
<tr>
<th>Legal Foundations (Quad 1)</th>
<th>Moral Foundations (Quad 2)</th>
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<tbody>
<tr>
<td>U.S. Constitution (oriented on Article II powers &amp; federal supremacy)</td>
<td>Declaration of Independence &amp; Constitution</td>
</tr>
<tr>
<td>Title 50 U.S. Code (advise &amp; support lawmaker &amp; protect sources &amp; methods)</td>
<td>Agency Ethics Program &amp; Officials</td>
</tr>
<tr>
<td>Ratified treaty (e.g., UN Charter, the Geneva &amp; Genocide Conventions, &amp; the Convention against Torture)</td>
<td>Trust Relationships: President &amp; Congress</td>
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<td>Federal regulations</td>
<td>IC/Agency Mission, Vision, &amp; Values Docs</td>
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<tr>
<td>EO 12,674, 12,333, &amp; 13,526; NSDDs; POTUS orders; &amp; NSC directives</td>
<td>IC Organizational Culture, to include subcultures by agency, discipline, &amp; practice area:</td>
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<tr>
<td>DoJ Memorandums, OLC Opinions</td>
<td>• Mission</td>
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<td>IC Directives; DoD Directive 5240.1-R &amp; 2311.01E</td>
<td>• Ideology</td>
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<td>• History</td>
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<td>• Dissent Channel (State Dept.)</td>
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<td></td>
<td>Just War Tradition (basic principles)</td>
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<td>Office Climate</td>
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### INSTITUTIONAL VALUES & NORMS

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<th>PERSONAL VALUES &amp; NORMS</th>
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<tr>
<td>Legal Foundations (Quad 3)</td>
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<tr>
<td>Title 18 U.S. Code (criminal statutes)</td>
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<tr>
<td>Financial &amp; conflict of interest disclosures</td>
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<td>State professional licensing, with disciplinary standards and liability issues</td>
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<td>Charge card use, Hatch &amp; Privacy Acts</td>
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<td>Nondisclosure Agreements &amp; Prepublication Review</td>
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<tr>
<td>Security Clearances (contacts &amp; travel)</td>
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<tr>
<td>EO, IG, Whistleblower Statutes</td>
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Land" as important as any statute passed by the Congress and signed into law by the president. The UN Charter, Article 2 (4) prohibits "the threat or use of force against the territorial integrity or political independence of any state," meaning that the United States is proscribed from conducting intelligence operations involving either large-scale covert actions or political assassination. The United States is also party to numerous international treaties, each of which further restrains intelligence operations. In the case of law of war violations (e.g., violations of international humanitarian law binding upon the United States), employees of the U.S. Department of Defense (DoD) have a regulatory obligation to report "possible, suspected, or alleged violation of the law of war, for which there is credible information." The DoD regulation sweeps broadly, including "all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law." Apparently, there is no similar reporting obligation imposed upon employees of the Central Intelligence Agency (CIA).

In many cases, the practitioner supports the policy process by providing timely foreign intelligence, as well as making sound recommendations about proposed programs and activities, but, in the end, the practitioner supports the policymaker with "advice." Where there are conflicting legal views, the Attorney General, acting through the Office of Legal Counsel (OLC), has a special role in rendering opinions and legal advice to the various executive agencies, and the OLC assists the Attorney General in his role as legal adviser to the president. However, the president decides whether and how to act upon intelligence products and processes, as well whether to execute certain programs (e.g., on a covert action through a finding and notification to the Congress). In that sense, once a policy decision has been made, a practitioner has a legal obligation to support the superiors appointed over him. Finally, every practitioner has a legal duty to protect intelligence sources and methods, sometimes using a conflict between the need for secrecy and efficacy in mission accomplishment.

Quadrant 2 focuses on the moral obligations of the government as an institution, both as it relates to values and norms derived from national source documents as well as from just war theory. For example, the U.S. Declaration of Independence calls for certain inalienable rights, to include "Life, Liberty, and the Pursuit of Hap-
piness,” along with the “Right of the People to alter or abolish [their own government].” This implies that government should be based upon the rule of law, with a right of the people to abolish a government (or eliminate government activities) that undermine deeply held values and norms.

Moreover, this vision was expanded in the Preamble to the Constitution: “to establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.” Indeed, Justice Potter Stewart, in commenting on First Amendment issues, remarked on the need for “an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.” There is then an inherent tension between the need for secrecy to advance the “common defence” and democratic values. In short, both the Declaration of Independence and the Constitution envision a government that balances civil liberties and national security, neither sacrificing one for the other.

Federal law mandates that each agency appoint a Designated Agency Ethics Official who is “to coordinate and manage the agency’s ethics program and to provide liaison to the Office of Government Ethics with regard to all aspects of such ethics program.” Moreover, Executive Order (EO) 12,674 outlines the principles of ethical conduct by government employees, the roles and responsibilities of the Office of Government Ethics, and agency responsibilities. However, it is noteworthy that both the Ethics in Government Act and EO 12,674 are focused primarily on conflict of interest and financial issues. While the financial disclosures requirements are, to an extent, an invasion of an employee’s privacy, such requirements provide a reasonable means of preventing ethical conflicts that would otherwise impair the integrity and legitimacy of senior-level actions.

Generally, Quadrant 2 raises issues involving the moral (and public) justification for certain programs and activities. On the one hand, the fact that a foreign nation or nonstate actor poses an existential threat to the United States can provide justification for certain intelligence operations and activities to collect information, providing policymakers with a decisional advantage. Moreover, intelligence practitioners can undertake special activities to preempt a looming problem before it becomes worse. If, however, practitioners and policymakers propose an activity under a claim of justification, it is imperative that the activity be supported by a clear-headed analysis of national interests and values, especially if that activity is inconsistent
with international law. In any case, just war theory, using the basic principles involving just cause, right intentions, probability of success, last resort, and proportionality, provides a useful analytic model in assessing and acting against foreign adversaries.

On the other hand, the public disclosure that the United States sometimes acts contrary to its stated values and norms can also undermine public (international and domestic) support. Thus, the United States faces especially difficult problems when it undertakes actions, such as the assassination of foreign leaders, inconsistent with international treaty obligations. This also highlights the tensions between secrecy and the need for public support, illustrating how excessive secrecy can have a catastrophic effect on the administration's credibility when it turns out that documents have been classified to cover up illegal or embarrassing activities.

Quadrant 3 focuses on prohibitions imposed by federal and state law, creating criminal liability for acts contrary to U.S. law. Generally, Quadrant 3 involves limitations on intelligence activities either within the United States or involving U.S. citizens and property overseas. Here, federal law prohibits the CIA from operating within the United States, while the Federal Bureau of Investigation (FBI) is severely constrained in its domestic collection activities. However, the fact that certain intelligence operations may also violate foreign law is not a relevant consideration.

In effect, federal law creates "red lines" or limitations on what federal employees cannot do. For example, an intelligence practitioner has a fiduciary obligation to protect classified information from unauthorized disclosure, and an employee who breaches that obligation can be prosecuted under federal law—without regard to how he or she personally assessed the national interest with regard to that disclosure. In 1983, President Ronald Reagan issued National Security Decision Directive 84 (NSDD 84) that required that all federal agencies handling classified information have employees sign nondisclosure agreements and, as appropriate, prepublication agreements. Such agreements create a contractual obligation, as a condition of employment and access, on the part of the employee to protect classified information from unauthorized disclosure. Moreover, federal statute places limitations on military intelligence liaison relationships with foreign powers, especially where foreign officers are suspected of involvement in human rights abuses. Finally, federal law imposes criminal liability on persons who reveal the protected identities of certain intelligence officers.
Generally, executive branch employees are barred by law from participating in partisan political activities, and some IC employees, such as CIA personnel or members of the senior executive service, are subject to more extensive restrictions on their political activities. As a matter of legal policy, federal employees are prohibited from making personal use of a government travel charge card. Moreover, there is a special problem involving legal and medical practitioners who hold licenses under state law. Here, physicians tasked to support the interrogation of prisoners may face conflicting views from a state licensing body interested in pursuing disciplinary action against them for their role in such activities. Finally, Quadrant 3 offers the employee several venues to resolve moral/legal dilemmas by reporting through Equal Opportunity (EO) channels, the agency Inspector General (IG), or the Whistleblower Protection statutes. As a practical matter, the IG performs an investigative function, ensuring that employees comply with legal standards, sometimes concluding that something is awful but still lawful; in that sense, the IG serves as a regulatory body for the "profession."

Quadrant 4 raises aspirational issues (idealized values and norms). Here, individual practitioners draw inspiration from a wide range of sources, with some inspiration coming from the employee's own background and other inspiration coming from institutional sources either while in training or through the work environment. On the one hand, human intelligence (HUMINT) collectors often develop personal relationships with clandestine sources; in fact, many believe that the most effective source relationships are rooted in trust and loyalty. On the other hand, analysts often develop support relationships with collectors, interagency colleagues, and customers. At more senior levels, managers must establish access and rapport with executive branch and congressional officials. Hence, an intelligence officer's ability to establish trust relationships is a critical aspect of his overall effectiveness.

Some sources, such as virtue ethics, are deeply rooted in the Western philosophical tradition and broadly address the character of a moral agent (here, the intelligence practitioner) as a driving force for ethical behavior. Other sources, drawing inspiration from personal moral/religious beliefs, are deeply held and sometimes quite specific in what an individual can and cannot do. Our oath as federal employees to support the Constitution helps us prioritize the allegiances we owe, to our fellow citizens, to our home agency, and to our co-workers. In any case, IC values and norms are reinforced at an individual level through
IC core qualification standards and annual performance reporting. In short, the employee can be faced with a hortative blend of values and norms, some conflicting and some reinforcing.

The ethical conflicts faced by intelligence practitioners cover a range of issues, based upon frequency of occurrence and impact. Some issues involve low occurrence but high impact, such as the use of torture to support interrogations. As a practical matter, torture can be classified based upon the duration and severity of the technique, raising a scale of legal and ethical concerns. One writer describes a torture pyramid, with Psychologically Coercive Interrogative Practices at the first level; Cruel, Inhuman, and Degrading Treatment at the second level; and Classic Torture at the third level. Clearly, some lesser practices might be unethical but not illegal under either international or domestic law, while more robust practices would be considered unethical and illegal from multiple perspectives. In truth, the U.S. government has sanctioned the torture of a very small class of persons, each with unique circumstances involving citizenship, location of capture, level of culpability in terrorist activities, and the anticipated intelligence that could be gleaned from that interrogation. Notably, these interrogations have been “high impact,” spawning a great deal of public interest.

The torture problem illustrates the legal and ethical issues faced by practitioners. In Quadrant 1, the practitioner may be under a legal obligation to execute a muscular program that has been the subject of a presidential finding, even though that program has suspect status under domestic and international law. In Quadrant 2, practitioners may justify the program under just war theory (need to act in a timely, proportionate manner to forestall coming threats) or under a utilitarian analysis (the possible payoff for many innocents outweighs the temporary imposition on the guilty few). In Quadrant 3, a medical professional supporting the program may have conflicting legal/ethical obligations under state professional licensing law. In Quadrant 4, practitioners may have conflicting personal religious/moral beliefs. In some cases, the issues surrounding the propriety of the program can be further complicated by conflicts within a single quadrant and with conflicting interpretations of international and domestic law. How should an individual decide whether to participate in a program? What is the appropriate resolution of this underlying conflict? In any case, the fact that a program or activity raises so many issues should serve as an indicator of a looming moral/legal storm.
Many apparent conflicts can be resolved through an analysis of various factors such as the nature and specificity of the legal/moral obligation, the weight of the authority, and the relevance of the source document. In some cases, a practitioner can also resolve a conflict through a clarification of the facts and issues, an alternatives analysis, or the time sensitivity of the problem. In other words, what is the source of the obligation? What other, less troubling but equally effective, methods of resolving the issue are there? Why is the problem so time sensitive that the practitioner cannot obtain clarification from superiors, the IG, or agency General Counsel? In the end, each practitioner must make his own moral decisions about the nature and extent of his participation in a program or activity. One can rely on the counsel of others only to a certain extent when it comes to activities that may be viewed as illegal or immoral.

While it is important to discuss the high-impact issues that stress our national values, I think it is much more important to discuss the high occurrence but low-impact issues that confront intelligence practitioners on a daily basis—in other words, the issues that don’t reach the front pages of the Washington Post. Ethics must be integrated into the personal lives and actions of public employees, helping to prevent errors of commission, as well as errors of omission where there is a duty to act. A well-grounded professional ethos, supported by relevant codes of ethics for practice areas, can sharpen professional judgment in time-sensitive, ambiguous circumstances.

The DNI Ethos: The Concept Explored

The DNI Ethos involves three interrelated concepts: service, integrity, and accountability, offering a succinct statement of who we—as intelligence practitioners—should be as federal employees. The DNI Ethos serves as a reminder that intelligence practitioners serve the American people, providing the expertise to accomplish assigned missions within specified operating parameters. Moreover, each concept has different application within different practice (mission) areas such as collections, analysis, counterintelligence, and special activities. In turn, this leads to the issue of whether the community should adopt a code of ethics, much like lawyers or physicians have a code of professional ethics, for different practice areas. Indeed, such codes should help orient individual practitioners on the more detailed responsibilities of their practice.
The concept of service involves two important aspects: the client served by the practitioner and our national security mission. Most importantly, our ultimate client is the American people, per the Constitution. The IC is responsible to the president through the DNI, with intelligence practitioners using unique expertise (cognitive, interpersonal, and technical) to serve the administration’s foreign policy objectives. Simply put, the practitioner takes his assigned missions from superiors through processes and procedures set by law. Moreover, the practitioner has a unique national security mission, one that often involves time-sensitive assignments in an ambiguous context. The practitioner must make judgment calls, often based upon incomplete and conflicting information, to accomplish that mission in a timely manner.

The concept of integrity concerns a practitioner’s obligation to tell the truth, without regard to preferred policy or political outcomes. The concept, however, has varying applications in different areas of professional practice. In fact, each IC mission area has unique legal and moral implications for the practitioner. There could be great utility in codes of ethics by mission or professional practice area; in fact, codes serve two important, contextual functions: they provide guides to appropriate behavior and they tend to deter inappropriate behavior.

For a HUMINT collector (e.g., a case officer or a National Clandestine Service operations officer), integrity often involves the use of discretionary judgment in building and maintaining a relationship with an asset (a human source). Honest, accurate, and timely reporting of all facts and opinions must follow. Clearly, there are integrity issues here: To what extent can (or should) a HUMINT collector mislead, deceive, or lie to an asset to achieve his assigned task? Is the asset merely a means to an end? Here, utilitarian moral theory, the belief that the proper course of action is the one that maximizes the overall “happiness,” can conflict with broader American values regarding the dignity of the individual and the need to tell the truth. If a collector confronts an actual conflict, such conflict is probably best resolved by reference to the case officer’s fiduciary obligations (e.g., his legal duties) to his primary client, the American people. Nevertheless, the collector still has a responsibility to protect his source—there are moral overtones when dealing with another human being who has made sacrifices and taken risks to help the case officer.
Collectors and analysts have an important relationship, one that must be based on professional collaboration and a sense of integrity. On the one hand, superiors evaluate collectors in terms of the volume, quality, and utility of their reporting. Collectors seek to produce high-quality reports that will answer important intelligence requirements. Clearly, a collector must produce reports that reflect "ground truth," coupled with insights about source placement and access or other information that allows the analyst to see the report in context. On the other hand, analysts provide feedback to collectors indicating the utility of the proffered reporting and often refining collection requirements. Analysts must have a sense of integrity, advising collectors when source reporting is irrelevant or believed to be a fabrication. In some cases, an analyst can artificially inflate the value of the reporting, making either the source or the collector into an apparent hero.

For an analyst, integrity involves "speaking truth to power," with the analyst providing timely, accurate, and relevant assessments to customers (often making judgment calls about prospective events under conditions of uncertainty). This point is evident in Intelligence Community Directive (ICD) 203, "Analytic Standards." ICD 203 outlines the core principles of analytic tradecraft (namely, a skills-based approach to analysis) to include standards on objectivity, independence from political considerations, timeliness, the use of all sources, and the application of tradecraft standards.

Analysts face several important challenges to their professional integrity. First, to what extent should an analyst "caveat" a judgment? Certainly, the inclusion of qualifying statements, sometimes claimed to be a form of bureaucratic "waffling," can reduce the value of intelligence assessments and can be used to help protect an organization from "being wrong." Second, when should an analyst offer his best assessment, as opposed to a fuller discussion of the evidence and alternative theories of the "case"? Here, a scrupulous analysis of the evidence may help the policymaker understand the nuances of the situation and arrive at a better-informed judgment, even if it is not always wanted because of reader preferences for shorter or more "current" products. Third, an analyst should consider the advisability of taking a "dissent" to an assessment proffered by a colleague, rather reducing the product to the lowest common denominator in an effort to reach a consensus opinion. Finally, the additional problem of politicized intelligence is complex, involving different
perspectives based upon training, experience, and judgment. Thus, an analyst could inadvertently color his assessments based upon his own preferred outcomes, or a policymaker may tip the scales based upon his broader understanding of the problem set. In any case, the intelligence officer has a legal obligation to provide “advice” to the policymaker, the client, who may press the analyst for a more nuanced understanding of the situation.

A counterintelligence (CI) officer confronts unique legal and moral issues. For example, a counterintelligence officer may be required to investigate IC vulnerabilities and threats from U.S. persons who might be engaged in espionage on behalf of a foreign power. This work typically involves a domestic investigation and the application of federal laws, to include civil liberties and privacy issues, in close coordination with the Department of Justice and the Federal Bureau of Investigation. CI officers confront complex issues involving electronic surveillance and monitoring of persons suspected of involvement in criminal activities. In some cases, one can define a “U.S. person” with a high degree of certainty, but in other cases, the situs and legal status of the suspect is unclear, bringing about a legal/moral judgment call, especially if it involves an inchoate crime.

By contrast, an employee engaged in special activities (e.g., covert action) may handle issues involving armed action (e.g., acts of war) overseas against a foreign adversary. Here, the practitioner may be faced with the need to act quickly and without attribution back to the United States. Clearly, such employees handle sensitive activities that have major foreign policy implications for the United States; such activities typically raise issues involving the law of armed conflict or just war theory. An intelligence officer advising a policymaker about such activities should be held to a high standard of care to ensure that such activities are supported by complete and truthful assessments.

The concept of accountability means that practitioners are personally responsible to supervisors, policymakers, and, ultimately, to the American people for operational successes and failures. Significantly, government employees are required to perform all duties in compliance with federal law. Accountability occurs in many ways, with oversight provided by the executive, legislative, and judicial branches of government. Some IC documents, such as the Intelligence Community Standards (the 610 series) that outline core qualification standards and annual performance reporting, serve as mechanisms for setting norms and for reinforcing values-based imperatives.
Ultimately, employees guilty of unprofessional behavior can be reprimanded, held accountable in annual performance evaluations, lose their security clearances or jobs, or be sent to prison.

Accountability is also a two-way street in that employees have ways of shining light on the excesses of their seniors. On the one hand, practitioners have numerous legitimate venues for calling their superiors to account to the American people, largely through the whistleblower statutes, complaints to the agency IG, or even confidential reporting to the congressional oversight committees. If an intelligence practitioner reports a suspected problem through such venues, he or she should be able to have the problem addressed without violating the obligation to protect classified information from unauthorized disclosure. On the other hand, practitioners who choose to call seniors to account through leaks to the media typically violate legal and moral obligations in pursuit of a self-defined “higher good.”

Leak cases stand on shifting legal and moral ground; some leaks have been about private pecuniary gain and other leaks have been about disagreement with public policies and programs. Samuel L. Morison was an analyst for the Office of Naval Intelligence when he provided imagery to Jane’s Defence Weekly, likely in an effort to advance his own postretirement career with the publisher. Lawrence Franklin was an expert on Iran for the Defense Intelligence Agency when he leaked information to the American Israel Public Affairs Committee (AIPAC), the foremost pro-Israel lobbying organization in the United States. He claims this was an attempt to get the information to the National Security Council, which he was not able to do through regular Pentagon channels. Last, someone leaked the National Security Agency’s Terrorist Surveillance Program (TSP), likely to bring about an end to a program that was believed to be illegal. While Morison and Franklin have been rightly held accountable, the person who leaked the TSP probably has the strongest moral arguments in his favor.

Finally, the IC is held accountable to the American people through Congress and the judiciary. The Congress has enhanced its own capabilities over the past decades through the work of the intelligence committees, the creation of agency IGs, and investigative commissions (e.g., the 1995 to 1996 Aspin-Brown Commission). While one can argue the effectiveness (or sometime ineffectiveness) of such efforts, there is probably no feasible alternative if the country is to maintain an effective intelligence capability. One important develop-
ment involves an extension of the jurisdiction of the Government Accountability Office (GAO) over the IC. Here, the GAO could provide enhanced accountability over critical issues such as facilities management, the use of contractors, and classified procurement.

The federal judiciary can hold federal employees accountable for criminal transgressions, with standards for transparency, impartiality, and fundamental fairness. An accused employee has constitutional and statutory due process protections, all in a credible system that balances accountability with the need to protect sources and methods through mechanisms such as the Classified Information Procedures Act (CIPA). Thus, while a federal employee such as Lawrence Franklin may claim good-faith motivations, the courts will hold culpable employees liable for criminal malfeasance.

Conclusion

Intelligence practitioners face complex moral and ethical problems: not the garden-variety questions about whether one may lie, cheat, or steal, but rather sophisticated problems arising from conflicting legal and moral duties—and with a focus on important national security interests. Moreover, intelligence practitioners are often called upon to make decisions in a time-sensitive uncertain environment, with varying context depending upon mission (practice) areas. In that sense, there could be great utility in codes of ethics that assist practitioners in addressing unique problems.

Does the DNI Ethos of Service, Integrity, and Accountability reflect who we “should” be as intelligence professionals? I think the answer is “yes.” How does IC culture currently reflect the DNI Ethos? In other words, how are we living up to what we should be? Here, I think we have gaps, both in terms of how well the DNI Ethos is understood in the community, as well as in how well we live up to it on a daily basis.

Notes


involving intelligence collection, although “increasing recourse to intelligence in multilateral forums is beginning to impose procedural constraints on the purposes for which that intelligence may be employed”). However, prehostility covert actions would be a violation of the Charter of the United Nations. See Charter of the United Nations, Article 2 (4) (prohibiting the use of force against the territorial integrity or political independence of another state).


7. U.S. Constitution, Article VI.

8. Charter of the United Nations, Article 2 (4). In any case, covert actions range in terms of scale and complexity. On the one hand, some large undertakings, such the aborted 1961 invasion of Cuba at the Bay of Pigs, would likely be considered an illegal use of force, placing the United States in violation of UN Charter. On the other hand, some lesser activities, such as cyberattacks or rendition activities, might be considered only a “frontier incident,” raising concerns only under foreign domestic law. See *Nicaragua v. United States of America* (International Court of Justice, 1986) I.C.J. 14. Finally, spying has not been held to be a violation of international law. See A. John Radsan, “The Unresolved Equation of Espionage and International Law,” *Michigan Journal of International Law* 28, no. 597 (2007).

9. The Geneva Conventions make important distinctions based upon a person’s status during hostilities (e.g., combatant or noncombatant) and the character of the international conflict (Common Article 2 or Common Article 3). In turn, this informs whether a person is an appropriate target of U.S. actions during wartime. In any case, the Geneva Conventions impose limitations on U.S. targeting without making a distinction whether that targeting is conducted by military or civilian intelligence personnel. By contrast, the Convention against Torture limits U.S. intelligence operations in either peace or wartime. Moreover, the U.S. Congress has passed
enabling statutes, such as The Torture Act, 18 U.S.C. § 2340, and The War Crime Act, 18 U.S.C. § 2441 (2006), that further impose limitations on U.S. intelligence activities. The Convention on the Prevention and Punishment of the Crime of Genocide, ratified by the United States, raises interesting ethical and legal issues for intelligence practitioners. Under Article 1, the parties agreed that genocide "is a crime under international law which they undertake to prevent and to punish." Seemingly, if the intelligence community assesses the existence of genocide in a foreign country, this could obligate the U.S. government to act. This means that intelligence analysts could properly conclude that genocide is ongoing, even though policymakers might not agree with that characterization.


11. Ibid., paragraph 3.1.


14. Executive orders, as well as other presidential law such as findings, National Security Decision Directives, and military orders, are binding upon members of the executive branch. See William C. Banks and Peter Raven-Hansen, "Targeted Killing and Assassination: The U.S. Legal Framework," University of Richmond Law Review 37, no. 667 (2003). Moreover, if an executive order or regulation is made under delegated authority from the U.S. Congress, such order or regulation usually carries the same legal force and effect as a statute. See also Peter Raven-Hansen, "Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12291," Duke Law Journal 1983, no. 2 (1983): 297–301.

15. The Congress has imposed a statutory obligation upon the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1 (i).


17. U.S. Constitution, Preamble.


21. Covert actions require presidential approval through a written finding with timely notification to the congressional intelligence committees, as well as certain other members. The DNI is obligated to ensure that the intelligence committees are kept “fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or carried out for or on behalf of” the U.S. government. 50 U.S.C. §413b.

22. The Department of State has a formal mechanism that permits employees to raise issues of substantive concern to the department’s senior leadership. This Dissent Channel is used by “the Policy Planning Director to bring constructive, dissenting or alternative views on substantive foreign policy issues to the Secretary of State and Senior Department Officials.” U.S. Department of State, Policy Planning Staff, http://www.state.gov/s/p/.


24. Article VI, U.S. Constitution, provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land.” Thus, if the U.S. Senate has given “advice and consent” to a treaty and that treaty has been duly ratified, then that treaty has the full force and effect of any other law enacted by the U.S. Congress. Lawrence H. Tribe, *American Constitutional Law*, 2nd edition (Mineola, NY: Foundation Press, 1988), 225–30. Moreover, the Charter of the United Nations, Article 2 (4), provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Article 51 further provides that nothing “shall impair the inherent right of . . . self-defense if an armed attack occurs.” In that respect, the prehostilities assassination of a foreign political leader would be a violation of international law, notwithstanding any contrary U.S. laws, regulations, or directives.

25. Secrecy also imposes societal costs by limiting avenues of redress by citizens and noncitizens alike against public officials for malfeasance in the course and scope of employment. See generally Laura K. Donohue, “The


29. There are actually two “Leahy laws” that apply to the funding and training of foreign personnel. For example: “None of the funds made available by this Act may be provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless the Secretary determines and reports to the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.” 2001 Foreign Operations Appropriations Act (Section 563 of Pub.L. 106-429).


33. 28 U.S.C. § 530 (“an attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State”). See District of Columbia Bar Opinion 323, “Misrepresentation by an Attorney Employed by the Government as Part of Official Duties,” published March 30, 2004 (attorneys acting in official capacity do not violate misconduct rules if they make representations that are reasonably intended to further the conduct of their official duties). *Accord* State Bar of Virginia Legal Ethics Opinion 1765, February 6, 2004 (an attorney can perform work for intelligence agency in an undercover capacity, to include the use of false identities, without violating the state bar rules proscribing conduct involving “dishonesty, fraud, deceit or misrepresentation”); Utah State Bar Advisory Opinion No. 02-05, March 18, 2002 (“A governmental lawyer who participates in a lawful covert governmental operation that entails conduct...
employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct.


38. While the torture issue is not representative of the broader ethical concerns that face intelligence practitioners, the debate over torture does provide a useful case study for the conceptual model offered in this paper. See Office of Legal Counsel, Memorandum on the Legality of Interrogation Methods Used in War on Terrorism, August 1, 2002; Office of Legal Counsel, Memorandum on Application of Treaties and Laws to al Qaeda and Taliban Detainees, January 22, 2002; and CIA Inspector General, “Counterterrorism Detention and Interrogation Activities (September 2001–October 2003),” Special Review, 2003-7123-IG, May 7, 2004 (redacted) (this report indicates that CIA officers had significant moral and legal concerns about their participation in the detention and interrogation program). Bell, “One Thousand Shades of Gray” (arguing that “in addition to moral and legal problems, the use of torture carries with it a host of practical problems that seriously blunt its effectiveness”).

39. Torture is considered illegal under both U.S. law and international treaty. See 18 U.S.C. §§ 113(c), 2340; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punish-


42. In an analogous context, some have questioned the identity of the client for the government lawyer: Does the lawyer represent the agency director, the agency, the president as head of the executive branch, the American people, or some formulation of a larger public interest? See Kathleen Clark, "Government Lawyers and Confidentiality Norms," *Washington University Law Review* 85 no. 5 (2007): 1033–98.

43. The DNI has a statutory obligation to act as an "advisor" to the president and the National Security Council. See 50 U.S.C. §403 (b) (2). In a sense, the DNI’s relationship to the president is analogous to an attorney-client relationship in which the attorney advises the client, but the client makes ultimate decisions about strategic issues such as whether to settle a case or proceed to trial. Moreover, even if the attorney disagrees about the client’s objectives, the attorney has an obligation to argue the client’s case, especially if it involves a good-faith argument involving “an extension, modification or reversal” of existing law. Nonetheless, it is unethical (and usually illegal) for an attorney to assist a client pursuing illegal activities.

44. See for example, Snow and Brooks, "Privacy and Security" (arguing for an unclassified, aspirational code that provides guidelines for practitioners); John Lunstroth, "A Proposed Analysts' Code of Ethics," *Defense Intelligence Journal* 16, no. 1 (2007): 157–63. The FBI produces a useful pocket guide, *The FBI Ethics Pocket Guide*, published by the FBI Office of Integrity and Compliance, which includes core values, a code of conduct, and compliance principles, as well as information on the laws and standards for different areas.

45. The National Clandestine Service has three core values: service, integrity, and excellence. CIA Website, “Clandestine Service,” https://www.cia.gov/offices-of-cia/clandestine-service/index.html. However, signals intelligence (SIGINT) collectors working at the National Security Agency (NSA) have moral and legal issues that differ from HUMINT collectors. The 2010
The Intelligence Community Ethos: A Closely Regulated Profession 75

NSA Strategy includes a goal of “Manifesting Principled Performance” that includes four objectives: demonstrate stewardship, exercise integrity, ensure accountability, and advance transparency. The integrity objective includes ensuring “our people strive to exercise sound judgment, place honor above expediency, and avoid even the appearance of impropriety.” The transparency objective includes a focus on “honesty and visibility with our overseers and stakeholders” and compliance with applicable laws and regulations.

46. The term politicized intelligence typically refers to analysis distorted to fit a desired policy/political outcome. Nolte, “Ethics and Intelligence,” 25.


48. Covert action is defined by statute as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States will not be apparent or acknowledged publicly.” 50 U.S.c. § 413b.

49. See, for example, ICS 610-1, “Core Qualification Standard for Senior Civilian Officers in the Intelligence Community,” February 22, 2010, which includes a commitment to “values-centered leadership.”


54. The role of contractors in the intelligence community raises separate and difficult problems for legal and ethical analysis. However, in that contractors are precluded from performing “inherently governmental functions” and are obligated to work under the supervision of government employees (military or civilian), the DNI Ethos and any supporting codes of ethics should have the same general applicability to contractors as it does for other IC employees. See Federal Activities Inventory Reform (FAIR) Act of 1998, 31 U.S.C. § 501 note. See also Project on Government Oversight, Testimony of Scott Amey, before the Senate Committee on Homeland Security and Governmental Affairs, “Intelligence Community Contractors: Are We Striking the Right Balance?,” September 20, 2011 (according to the
DNI, for Fiscal Year 2010, “core contractors” accounted for 23 percent of the total IC Human Capital Workforce).

55. 18 U.S.C. App. III. §§ 1-16.

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