

# WebMemo



Published by The Heritage Foundation

No. 2602  
September 2, 2009

## Defending Those Who Serve: Paying the Legal Costs of CIA Officers

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CIA Director Leon Panetta recently announced that he will use agency funds to pay for the legal defense of case officers targeted by President Obama and Attorney General Eric Holder's reinvestigation of interrogators the Department of Justice (DOJ) previously decided should not be prosecuted.

Panetta's decision is not only legal under the CIA's authorizing statute, but it is the correct position to take from a moral, public policy, and national security point of view. It is also the right thing to do for the individual agents, who would quickly exceed the limits of any federal employee professional liability insurance they have (if they have such policies).<sup>1</sup>

**Defending Federal Employees.** For agencies other than the CIA, a 1993 Comptroller General's opinion dictates that the payment of attorneys' fees related to a federal criminal investigation from appropriated funds requires the approval of the Attorney General.<sup>2</sup> Fortunately, this opinion is not the governing legal authority: Given the Attorney General's second-guessing of the DOJ's decision not to prosecute these agents, the likelihood that he would approve the use of such funds is of obvious concern.

The DOJ has its own funds that can be used to defend employees of federal agencies or to pay for private counsel if the employee is the target of

civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity...when the actions for which representation is requested reason-

ably appear to have been performed within the scope of the employee's employment and the Attorney General...determines that providing representation would otherwise be in the interest of the United States.<sup>3</sup>

Paying the defense costs of other agency employees may often be appropriate, but it is surely warranted in this belated (and seemingly political) "re-investigation," where there is a strong presumption that the earlier DOJ determination not to prosecute was correct and will stand, especially with regard to any individual CIA employee. However, any request by CIA employees for defense costs to be paid would undoubtedly be met by strong lobbying resistance from organizations friendly to this Administration—organizations that have been prominent in defending terrorist detainees and have seen prominent members rise to high levels inside the Administration.

Furthermore, if the Attorney General approved such a disbursement and agents were successful in procuring funds, DOJ policy states that payment for private counsel will cease if the department "[d]ecides to seek an indictment of, or to file an information against, that employee on a federal criminal charge."<sup>4</sup>

This paper, in its entirety, can be found at:  
[www.heritage.org/Research/LegalIssues/wm2602.cfm](http://www.heritage.org/Research/LegalIssues/wm2602.cfm)

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation  
214 Massachusetts Avenue, NE  
Washington, DC 20002-4999  
(202) 546-4400 • [heritage.org](http://heritage.org)

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Even if the DOJ paid the costs of private attorneys for CIA employees during the investigative part of the case out of its own funds, such payment would cease the moment the department decided to criminally prosecute the employees.

**Unique Authority.** Fortunately, Panetta has the unique authority to use appropriated CIA funds to pay for the defense of his employees during both the investigative and prosecutorial phase of a case. Under the Central Intelligence Agency Act of 1949,<sup>5</sup> the director is given special authority for expenditures and congressional appropriations:

The sums made available to the Agency may be expended *without regard to the provisions of law and regulations* relating to the expenditure of Government funds; and for objects of a confidential, extraordinary, or emergency nature, such expenditures to be accounted for solely on the certificate of the Director and every such certificate shall be deemed a sufficient voucher for the amount herein certified.<sup>6</sup>

In other words, the CIA has special needs, and, as provided by Congress, is not bound by all the restrictive laws applicable to other agencies. In short, the CIA Director himself has the legal authority to pay for his employees legal defense costs when he alone deems it is in the public interest to do so.

In *United States v. Richardson*, the Supreme Court held that a taxpayer who sued claiming that this provision was unconstitutional did not have standing.<sup>7</sup> The plaintiff argued that it violated Article I, Section 9, Clause 7 of the U.S. Constitution, which requires a regular statement and accounting of public funds. Under the holding of this case, it would be

difficult for liberal groups or individuals seeking to block Panetta's actions to establish standing to sue in federal court.

Thus, Panetta could defend his decision in court, and he does not need to seek the approval of the same individual, Attorney General Holder, who authorized the intrusive and dangerous investigations of CIA employees. Although President Obama has the legal authority to order Panetta to reverse his decision based upon his constitutional authority, it would be peculiar at best if the President claimed that the decision to reinvestigate the interrogators was appropriately a subordinate's—Eric Holder's—alone, while the more modest decision to pay attorneys' fees—as provided in statute—for agents who have already been investigated by two agencies is somehow not appropriate for the director of the CIA.

**Pro Bono Patriots.** Hopefully, experienced law firms in Washington and elsewhere will offer their services to these CIA employees in order to help defend individuals who were doing their duty and are essential to the security of this nation and the safety of its citizens. Many prominent bluestocking firms have eagerly provided thousands of pro bono hours to defend terrorists who stand accused of trying (sometimes successfully) to kill and murder American civilians and military personnel. With any luck, they will show the same willingness to help patriotic Americans who have worked hard over the past eight years to protect America.

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1. One such policy for federal employees has a \$200,000 limit for defense costs in an administrative investigation but a limit of only \$100,000 for criminal legal defense. See Federal Employee Defense Services, at <http://www.fedsprotection.com> (September 2, 2009).
2. Matter of Dept. of Health and Human Services, FDA—Reimbursement of Employees for Private Attorney Fees Incurred in Federal Criminal Investigation, 1993 WL 812014 (May 3, 1993).
3. 28 Code of Federal Regulations § 50.15(a).
4. 28 Code of Federal Regulations § 50.16(c)(2)(i).
5. The Central Intelligence Agency Act of 1949, Pub. L. 81-110, 63 Stat. 208 (June 20, 1949).
6. 50 U.S. Code § 403j(b). Emphasis added.
7. *United States v. Richardson*, 418 U.S. 166 (1974).