ORGANIZATIONAL THEORY AND COUNTERTERRORISM PROSECUTIONS: A PRELIMINARY INQUIRY†

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INTRODUCTION

This Essay is a preliminary organizational theory inquiry into potential issues resulting from the creation of the National Security Division,[1] the first new division in the Department of Justice ("DOJ") in nearly fifty years.[2] My goal is to outline a preliminary research agenda, setting the stage for scholars who seek to analyze in greater detail the legal and theoretical issues identified in this Essay. I approach these issues in an interdisciplinary fashion, explicitly detailing different organizational theory methods of analysis and applying them to legal problems raised by the creation of this new DOJ entity. Accordingly, Part I describes the creation of the National Security Division and the reorganization associated with its creation. Part II introduces four theoretical approaches drawn from the organizational theory literature. After providing a basic explanation of each approach, I will demonstrate the utility of organizational theory by applying it to select aspects of the National Security Division. The Essay concludes by synthesizing the observations detailed in Part II and suggesting a research agenda that could expand upon those findings.

I. THE REORGANIZATION OF THE DOJ

On March 9, 2006, the President signed legislation that created the National Security Division—the first new division in the DOJ in nearly

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[1] USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, sec. 506(b)(1), 120 Stat. 192, 248–49 (codified at 28 U.S.C. § 509A (2006)).

[2] Kenneth L. Wainstein, *Message from the Assistant Attorney General* to U.S. DEP'T OF JUSTICE, NATIONAL SECURITY DIVISION PROGRESS REPORT (2008) [hereinafter NSD REPORT], *available at* http://www.usdoj.gov/nsd/docs/2008/nsd-progress-rpt-2008.pdf.

fifty years.[3] Some notable aspects of the National Security Division are its ability to: 1) control investigations regarding terrorist threats, 2) determine which terrorism-related cases U.S. attorneys will prosecute, 3) review and authorize national security surveillance techniques, and 4) exercise control over the sharing and disclosure of intelligence information.[4]

The Counterterrorism Section was one of three primary national security components within the DOJ that The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction ("WMD Commission") recommended be consolidated into a single national security division.[5] The WMD Commission noted that the Department's three primary security components "remained separated from one another, reported through different chains of command, and were located in separate parts of the Department."[6] The WMD Commission further concluded that the Department failed to take full organizational advantage of recent governmental reforms aimed at improved coordination.[7] The WMD Commission further argued, "One of the advantages of placing all three national security components under a single Assistant Attorney General is that they will see themselves as acting in concert to serve a common mission."[8] When President George W. Bush signed the legislation that acted upon these recommendations and created the National Security Division, he stated that the creation of the Division

> "allow[s] the Justice Department to bring together its national security, counterterrorism, counterintelligence and foreign intelligence surveillance operations under a single authority [and] . . . fulfills one of the critical recommendations of the WMD Commission: It will help our brave men and women in law enforcement connect the dots before the terrorists strike."[9]

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[3]   Patriot Improvement and Reauthorization Act of 2005 sec. 506, § 509A, 120 Stat. 192, 248–49 (codified at 28 U.S.C. § 509A); NSD REPORT, *supra* note 2, at 39.

[4]   *See* NSD REPORT, *supra* note 2, at 11–12, 18, 21.

[5]   *Id.* at 1–2; THE COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 471 (2005) [hereinafter WMD COMMISSION], *available at* http://www.gpoaccess.gov/wmd/pdf/full_wmd_report.pdf (recommending consolidation of the Office of Intelligence Policy and Review and the Counterterrorism and Counterespionage sections).

[6]   NSD REPORT, *supra* note 2, at 1–2; WMD COMMISSION, *supra* note 5, at 472.

[7]   NSD REPORT, *supra* note 2, at 2; WMD COMMISSION, *supra* note 5, at 472 ("Major changes were made at the CIA, FBI, and Department of Homeland Security. The core organization of the Justice Department, however, did not change at all.").

[8]   WMD COMMISSION, *supra* note 5, at 472.

[9]   Press Release, U.S. Dep't of Justice, Fact Sheet: Department of Justice to Create National Security Division (Mar. 13, 2006), http://www.usdoj.gov/opa/pr/2006/March/06_opa_136.html (quoting President George W. Bush).

While his statement may be true, the reorganization also fundamentally altered the organizational structure and culture of the Counterterrorism Section (the prosecutors responsible for counterterrorism prosecutions). Before the reorganization, the prosecutors of the Counterterrorism Section were part of the Criminal Division, supervised by an Assistant Attorney General with criminal law responsibilities.[10] After the creation of the National Security Division, the prosecutors of the Counterterrorism Section were moved out of the Criminal Division and placed under the supervision of an Assistant Attorney General with extensive ties to the intelligence community.[11]

According to the Senate Intelligence Committee report accompanying the legislation that created the National Security Division, the new division is a "full element of the Intelligence Community."[12] The Assistant Attorney General for National Security who leads the Division can only be appointed with the approval of the Director of National Intelligence ("DNI") and reports to the DNI and the Attorney General.[13] The DNI enjoys full supervisory authority over all aspects of the Assistant Attorney General's work functions except he may not "execute" any law enforcement powers.[14] In short, what may outwardly appear as a mere rearranging of boxes on an organizational chart is rather a fundamental change from a law enforcement mindset and culture to an intelligence mindset and associated intelligence culture surrounding the prosecutors of the Counterterrorism Section.

Through this consolidation, the reorganizers sought centralized management that situates a quasi-intelligence agent at the head of the National Security Division, one whose appointment is subjected to the approval of and supervision of the DNI. This is in stark contrast to the Counterterrorism Section's prior leadership structure, situated in the Criminal Division. Thus, there exists the potential for tension between the Counterterrorism Section's national security mission and criminal law mission, a point acknowledged by the DOJ, which has described the intelligence-law enforcement tension as a "careful balancing of important competing interests."[15]

The reorganization that took place in the DOJ was, on its face, premised upon a belief in structure and control. Such a belief presumes that all organizational players will perfectly balance their competing

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[10]   NSD REPORT, *supra* note 2, at 3, 5.

[11]   *Id.* at 3, 5–6.

[12]   SELECT COMM. ON INTELLIGENCE, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2006, S. REP. NO. 109-142, at 32 (2005).

[13]   *Id.* at 31.

[14]   *Id.* at 31–32.

[15]   NSD REPORT, *supra* note 2, at 12.

missions, without regard to external influences. As the following discussion will make clear, however, structure is but one factor in the potential success of an organization.

II. Four Organizational Theory Lenses and What They Reveal About the DOJ Reorganization

A. Classical Theory

1. Classical Theory Generally

Classical organizational theory is grounded in principles of engineering and economics developed during the industrial revolution of the 1700s;[16] it is rational and normative. While the classical school has evolved since its inception, its core theoretical assumptions have been largely unaltered. Those assumptions are:

1. Organizations exist to accomplish production-related and economic goals.
2. There is one best way to organize for production, and that way can be found through systematic, scientific inquiry.
3. Production is maximized through specialization and division of labor.
4. People and organizations act in accordance with rational economic principles.[17]

As these principles make clear, the primary focus of the classical organizational theory is the structure or "anatomy of formal organization."[18] W. Richard Scott refers to this orientation as the "rational perspective," which assumes highly formalized rational collectivities pursuing specific goals.[19] Frederick W. Taylor's seminal work, *The Principles of Scientific Management*, is representative of this orientation in its articulation of processes to structure, rationalize, and control organizations.[20] Similarly representative are the works of Max Weber, whose focus on bureaucracy centered on the importance of rules and hierarchy, and Henri Fayol, who advocated a series of principles to guide and coordinate specialized work activities.[21]

There are key distinctions amongst the various approaches taken by the classical era theorists I have described. Taylor, with a focus on rationalization, studied the worker or lower levels of organizations, and in so doing, sought to translate knowledge from these studies into

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[16]   Jay M. Shafritz et al., Classics of Organization Theory 28 (6th ed. 2005).

[17]   *Id.*

[18]   William G. Scott, *Organization Theory: An Overview and an Appraisal*, J. Acad. Management, Apr. 1961, at 7, 9.

[19]   Shafritz, *supra* note 16, at 6.

[20]   *Id.* at 31–32.

[21]   *Id.*

scientifically driven management practices.[22] In contrast, Fayol sought to rationalize the efforts of top management.[23] While their unit of focus differed, they both "proposed *one best way* to manage" and "they attempted to develop *rational* techniques that would help in building the structure and processes necessary to coordinate action in an organization."[24]

Taylor believed that identifying and eliminating wasteful steps in worker performance could enhance the efficiency of organizations.[25] To accomplish this end he "sought to simplify tasks so that workers could be easily trained to master their jobs."[26] Taylor, like Weber, focused on competence and believed workers were motivated by money; accordingly, an objective system that rewarded productivity would best accomplish organizational goals.[27]

Fayol, however, posited two management functions: *coordination* and *specialization*.[28] His principles of management were, in his words, "those to which I have most often had recourse."[29] Fayol's belief was that these were "universally applicable principles . . . that could be used to improve management practices."[30] Five of his six principles—technical, commercial, financial, security, and accounting—were deemed less important than his sixth and final principle: managerial.[31] This management principle concerned itself with "division of work, authority and responsibility, discipline, unity of command, unity of direction, subordination of individual interest to general interest, remuneration of personnel, centralization, scalar chains, order, equity, stability of personnel tenure, initiative, and esprit de corps."[32] Such a lengthy list of principles is beyond the scope of this Essay; however, some general themes can be derived from them. Coordination and control are achieved through four of Fayol's principles:

1. The Scalar Principle. The "scalar principle stated that coordination would be aided by a hierarchical distribution of authority in

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[22]   *Id.* at 31; B.J. HODGE ET AL., ORGANIZATION THEORY: A STRATEGIC APPROACH 19 (6th ed. 2003).

[23]   HODGE, *supra* note 22, at 19.

[24]   *Id.*

[25]   *Id.*

[26]   *Id.*

[27]   *Id.*

[28]   *Id.* at 20.

[29]   HENRI FAYOL, GENERAL AND INDUSTRIAL MANAGEMENT 41 (Constance Storrs trans., 1949), *as reprinted in* SHAFRITZ, *supra* note 16, at 48, 60.

[30]   HODGE, *supra* note 22, at 19.

[31]   SHAFRITZ, *supra* note 16, at 31.

[32]   *Id.*

organization," best achieved through a "pyramid-like structure" of "[a]uthority and control."[33]

2. Unity of Command. The "unity of command" principle posits "that workers should only have to respond to one superior," otherwise conflict may result.[34]

3. Span of Control. The "span of control" principle refers to "the optimal number of subordinates that a supervisor could efficiently and effectively supervise."[35]

4. The Exceptions Principle. The "exceptions principle" posits that top managers should handle unusual problems, and lower level employees should handle routine events and issues.[36]

Specialization, however, was achieved through organizational formation and grouping. The "departmentalization principle" posited that "similar tasks or functions should be grouped within the same department or unit."[37] Furthermore, line and staff functions should be distinguished and separated, with line functions being defined as "those that contribute directly to . . . organizational goals," while staff functions are "support activities" that "are peripheral to the organization's primary goals," and therefore "should be subordinated within the organization's scalar authority structure."[38]

The insights of Luther Gulick in his *Notes on the Theory of Organization* expanded upon the previously established principles.[39] Gulick developed a set of principles of administration that relied upon many of the assumptions found in Fayol's work.[40] In light of those assumptions, Gulick articulated what an executive must do to successfully organize his functional elements. The acronym developed by Gulick was known as "POSDCORB,"[41] which is comprised of the following activities:

- **Planning**: determining that which "need[s] to be done and the methods for doing them to accomplish" organizational goals;[42]

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[33]   HODGE, *supra* note 22, at 20.

[34]   *Id.*

[35]   *Id.*

[36]   *Id.*

[37]   *Id.*

[38]   *Id.*

[39]   Luther Gulick, *Notes on the Theory of Organization*, *in* PAPERS ON THE SCIENCE OF ADMINISTRATION (Luther Gulick & L. Urwick ed., 3d ed. 1954), *as reprinted in* SHAFRITZ, *supra* note 16, at 79; *see also* SHAFRITZ, *supra* note 16, at 33.

[40]   *See* SHAFRITZ, *supra* note 16, at 33.

[41]   *Id.*; Gulick, *supra* note 39, at 13, *as reprinted in* SHAFRITZ, *supra* note 16, at 86.

[42]   Gulick, *supra* note 39, at 13, *as reprinted in* SHAFRITZ, *supra* note 16, at 86.

- **Organizing:** establishing "formal structure of authority through which work . . . [is] arranged, defined and co-ordinated for the defined objective";[43]
- **Staffing:** handling the personnel functions of bringing in and training staff, and maintaining work conditions;[44]
- **Directing:** making decisions, crafting orders and instructions, and leading the enterprise;[45]
- **Coordinating:** interrelating various parts of organizational work;[46]
- **Reporting:** keeping executives' superiors informed, and as a consequence, informing self and subordinates using "records, research and inspection";[47] and
- **Budgeting:** providing "fiscal planning, accounting and control."[48]

These classical theories and the principles they espouse, when taken together, suggest a normative model of how organizations *should be*. This is evident from their reliance upon a "best way" to organize philosophy. Moreover, the classical theories assume a rational way to control organizational behavior through reliance upon structure. In such an orientation, the organizational chart and control mechanisms embedded within positions and authority are viewed as sufficient measures for achieving—or at least maximizing—organizational goals.

As a normative theory, the classical approach can be criticized for a failure to recognize the reality of how organizations actually behave. Furthermore, its reliance on control techniques and hierarchy as mechanisms of rational control lacks a humanistic dimension and fails to take account of environmental and sociological phenomenon. Moreover, the principles espoused in the classical approach, with their grounding in manufacturing industries and the factory system, may not be generalizable to organizations that produce knowledge or deliver services. These shortcomings will become evident through application of classical theory principles to the Counterterrorism Section of the National Security Division.

2. Classical Theory Insights Regarding the Counterterrorism Section

The rationale for moving the Counterterrorism Section into a new National Security Division is a clear example of classical theory

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[43]   *Id.*

[44]   *Id.*

[45]   *Id.*

[46]   *Id.*

[47]   *Id.*

[48]   *Id.*

thinking. The WMD Commission, the DOJ, and the President of the United States all accepted arguments that reflect the theories of Fayol, Taylor, and Gulick. The DOJ exhibited a belief that rationally developed techniques for structure and processes could lead to coordinated action, and that formal structures with deliberately prescribed lines of authority and a unified chain of command could further organizational objectives. Below I provide a more detailed explication of these operative principles.

The DOJ, by creating the National Security Division and moving the Counterterrorism Section under a new hierarchy, demonstrated its reliance upon principles of coordination and specialization. The scalar principle, or scalar chain as articulated by Fayol, posits that many activities require "speedy execution" for success.[49] Consequently, the chain of superiors from "the ultimate authority to the lowest ranks," especially in government, may suffer from too many links in the chain, which may cause needless delay or even subordinate action in the "general interest" without direction or authority from superiors.[50] Such a result runs contrary to the principle of unity of command, and may impact upon the principles of directing and coordinating as articulated by Fayol.[51] It appears the DOJ reorganization saw the solution to this challenge as a rationally derived hierarchy that unifies disparate components under a singular management structure and, where necessary, creates coordination of work effort.[52] To achieve this goal, recognition of the limits of human nature, articulated in Gulick's concept of "span of control,"[53] is necessary and was readily apparent in the reorganization approach followed by the DOJ.

In its reorganization efforts, the DOJ embraced these classical organizational theory concepts. In its National Security Division Progress Report, which explains the origins of the Division, the DOJ reaffirmed that its creation and the movement of the Counterterrorism Section into the new division was justified because the three national security components previously in place had "remained separated from one another, reported through different chains of command, and were located in separate parts of the Department."[54] The solution implemented by the DOJ was a pyramid-shaped hierarchical structure led by an Assistant Attorney General for National Security, thus

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[49]   FAYOL, *supra* note 29, at 34, *as reprinted in* SHAFRITZ, *supra* note 16, at 56.

[50]   *Id.* at 34–35, *as reprinted in* SHAFRITZ, *supra* note 16, at 56–57.

[51]   *See id.* at 25–26, *as reprinted in* SHAFRITZ, *supra* note 16, at 51–52.

[52]   *See supra* note 11 and accompanying text.

[53]   *See supra* note 35 and accompanying text.

[54]   NSD REPORT, *supra* note 2, at 1–2 (citing WMD COMMISSION, *supra* note 5, at 472).

unifying disparate components under one leader.[55] Moreover, to ameliorate concerns regarding span of control, three Deputy Assistant Attorney Generals oversee the daily work of the Division.[56]

Furthermore, in the eyes of reformers, the prior system had only one "point of common authority between the intelligence lawyers . . . and the criminal prosecutors."[57] In a clear acknowledgement of the classical theorists' reliance upon hierarchy and rational techniques of control, the DOJ noted, but ultimately dismissed, the utility of effective leadership and personalities. Its Progress Report states, "While each of these components was supervised by dedicated and effective managers, there was no single, clear line of authority and no direct management accountability beneath the Deputy Attorney General for all matters related to national security."[58]

Acting in accordance with its theoretical orientation, the DOJ implemented a leadership reorganization that minimized the perceived inefficiencies represented by a lengthy scalar chain designed to promote the exception principle by pushing decisions farther down the chain of command for resolution. The Department reinforced the hypothesis that it had adopted a classical theory orientation. In explaining the National Security Division's objective of "centralized management," its Progress Report states, "Prior to the creation of the [National Security Division], the Department's national security operations were conducted by several components that worked through different chains of command and varied reporting structures."[59]

The DOJ reorganization also demonstrates sensitivity to the departmentalization principle. The departmentalization principle posits that "similar tasks or functions should be grouped within the same department or unit."[60] This principle is more specifically detailed in the concept of "division of work," in which the workers always work on the same part, and the manager is always concerned with the same effort.[61] While the activity of the Counterterrorism Section does not involve the production of goods, its work effort can be analyzed in analogous fashion. Prior to reorganization, the Counterterrorism Section was led by a Deputy Assistant Attorney General in the Criminal Division, the official who also supervised the Fraud and Appellate sections,[62] which produced

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[55]   *Id.* at 2–3.

[56]   *Id.*

[57]   *Id.* at 5.

[58]   *Id.*

[59]   *Id.*

[60]   HODGE, *supra* note 22, at 20.

[61]   FAYOL, *supra* note 29, at 20, *as reprinted in* SHAFRITZ, *supra* note 16, at 48.

[62]   NSD REPORT, *supra* note 2, at 3.

an "output" in the form of investigations, research, and advocacy. These critical tasks, while similar to the work of the Counterterrorism Section, are governed by different goals, subject matter, expertise, and policy concerns. Through reorganization, the division of work that the supervisor of the Counterterrorism Section had been concerned with was necessarily reduced and became focused upon national security related functions. In a related sense, this departmentalization and division of work (or perhaps more accurately, this consolidation of specialized work) facilitated unity of direction by placing one head or manager over the organizational subdivisions and grouping activities under a manager who will facilitate a singular objective. This approach can be understood as the "one head one plan" method, which is a distinct but essential condition for achieving "unity of action, co-ordination of strength and focus[ed] . . . effort."[63] The DOJ's classical theory orientation is further instantiated by the mission statement of the National Security Division, which declares as its primary objectives: "[t]he centralization of the management of the Department's national security program"; "[t]he coordination of operations and policy across the national security spectrum"; "[t]he implementation of comprehensive national security oversight"; and "[t]he further development of national security training and expertise."[64]

3. Possible Conclusions Regarding Classical Theory and the National Security Division

A careful examination of the DOJ's creation of the National Security Division and its movement of the Counterterrorism Section into the new bureaucratic structure represents a heavy reliance upon classical theory. The reformers responsible for recommending and implementing the reorganization rely in many respects upon the principles articulated by Weber, Fayol, Taylor, and Gulick, among other classical theorists. This orientation is not without criticism, just as the classical school is not without critics. While I have identified some preliminary classical theory issues, there exists a substantial opportunity for further scholarly research and analysis of the reorganization. For example, while the Counterterrorism Section has a national security mission, it also has a criminal law mission. As such, its dual objectives are in tension with each other, a point acknowledged by the DOJ in its Progress Report, which described the tension as a "careful balancing of important competing interests."[65]

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[63] FAYOL, *supra* note 29, at 25, *as reprinted in* SHAFRITZ, *supra* note 16, at 51.

[64] NSD REPORT, *supra* note 2, at 5.

[65] NSD REPORT, *supra* note 2, at 12.

Furthermore, the classical theory principles of line and staff functions, as articulated by Fayol, are largely dependent upon the analytical approach adopted by researchers. For example, if one sees the institutional mission of the National Security Division as the incapacitation of terrorists through prosecutions, this mission mandate will subordinate intelligence and investigation components to staff or support status. If the mission mandate is to prevent attacks through prolonged investigations and surveillance, however, this mission mandate will subordinate prosecutions from a line function to a secondary function. These issues and the potential tension they create may pose legitimacy problems for the DOJ as it makes decisions regarding the importance of intelligence gathering versus prosecutions.[66] Moreover, because support activities such as legal review are necessary but insufficient conditions for organizational success, it is unclear where in this complex hierarchy the role of legal advice fits. These brief conclusions highlight the rich opportunities for further examination of this historic governmental reorganization.

B. Organizational Behavior

1. Organizational Behavior Theory Generally

The organizational behavior perspective is concerned with how personnel act within organizations. This analytical approach focuses "on people, groups, and the relationships among them and the organizational environment."[67] Organizational behavior theory seeks to determine how organizations can maximize growth and development amongst their personnel and assumes that from personnel growth and development, organizational creativity, flexibility, and prosperity will result.[68] Given organizational behavior theory's focus and assumptions, the relationship between the organization and its personnel is necessarily codependent and is premised upon providing individuals with maximum amounts of information openly, accurately, and honestly, enabling them to make decisions about their future.[69]

These assumptions were summarized by Lee G. Bolman and Terrence E. Deal in their work *Reframing Organizations: Artistry, Choice, and Leadership* as follows: 1) "Organizations exist to serve human needs rather than the reverse"; 2) "People and organizations need each other"; 3) "When the fit between individual and [organization]

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[66]   For a discussion of the tension between legitimacy and effectiveness see generally Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. (forthcoming 2009).

[67]   SHAFRITZ, *supra* note 16, at 145.

[68]   *See id.* at 149.

[69]   *Id.* at 145.

is poor, one or both suffer"; and 4) "A good fit benefits both."[70] Thus the organization is the context in which behavior occurs— the organization is not merely an independent or dependent variable, but is both shaped by and shapes personnel behavior. This is a logical and necessary consequence of the codependent and interactive nature of organizational behavior theory. Such a context-dependent interactive relationship suggests that "under the right circumstances, people and organizations will grow and prosper together."[71] Those circumstances require an optimal balance of values that impact human behavior— values that may be influenced by different leadership, team building, and motivational factors or changes in the work environment or interpersonal relationships.[72]

The first theorist to discover the importance of attention to personnel within an organization was Elton Mayo in his famous "Hawthorne Experiment."[73] Mayo's approach was initially premised upon classical organizational theory; however, when he began observing changes in a working environment (for example, lighting, temperature, and humidity) he found that nearly any change positively impacted worker performance.[74] The common variable was the attention paid to the worker and the importance of stable social relationships in the work place.[75] Management's ability to succeed depended in large part on its ability to motivate people, listen to their needs, and maintain open lines of communication.[76]

Douglas McGregor, another early theorist, suggests that motivation can in fact be largely impacted by how "managerial assumptions about employees . . . become self-fulfilling prophecies."[77] He termed these management assumptions "Theory X" and "Theory Y."[78] Theory X takes a classical approach. It sees workers as unmotivated, without ambition, needing to be led, resistant to change, and not a part of the organization.[79] As such, workers must be controlled through organization, money, and other motivating factors or persuasive or

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[70] LEE G. BOLMAN & TERRENCE E. DEAL, REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP 115 (3d ed. 2003).

[71] SHAFRITZ, *supra* note 16, at 149.

[72] *See id.* at 145–49.

[73] DEREK S. PUGH & DAVID J. HICKSON, WRITERS ON ORGANIZATIONS 131–32 (6th ed. 2007).

[74] *Id.* at 132.

[75] *Id.* at 132–34.

[76] *Id.*

[77] SHAFRITZ, *supra* note 16, at 148.

[78] *Id.*

[79] Douglas Murray McGregor, *The Human Side of Enterprise*, MANAGEMENT REVIEW (Nov. 1957), *as reprinted in* SHAFRITZ, *supra* note 16, at 179, 179.

punitive tools.[80] Theory Y, however, looks at human nature and human motivations.[81] It assumes that management organizes for success, but must do so with the recognition that people are responsible and can determine their own goals and direct their own efforts to help achieve organizational aims.[82] Under Theory Y, management must provide to employees the tools for success.[83] The implication of these theories is that management must not seek control (for example, reject Theory X), and instead must have confidence in human capacities (Theory Y).[84]

Abraham Maslow also studied motivation, developing a "hierarchy of needs" that was largely criticized for its simplicity and lack of empirical grounding.[85] The hierarchy of needs relates in its assumptions to McGregor's Theory Y. Maslow envisioned a set of goals, beginning with the most essential requirements of food and oxygen, and increasing hierarchically to the need for self-actualization.[86] Maslow's hierarchy is a component of his overall argument that goal achievement is a consequence of man's perpetual wanting, or need for growth, and threats to that growth will impact one's motivation and performance.[87]

Finally, Irving Janis's article *Groupthink* highlights a shadow side of organizational behavior theory—the possibility that interrelationships and "concurrence seeking" can rise to a level where those within a group become blind to alternative (non-group derived) courses of action.[88] Janis identifies eight "groupthink symptoms" and suggests that groupthink can be avoided by implementing management practices that stress the following: critical evaluation, impartiality, open inquiry, outside policy planning and evaluation groups, pre-consensus deliberations, outside expert critiques, a devil's advocate, altering subgroups, relations with rivals, and a residual doubts meeting.[89]

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[80]   *Id.*

[81]   *Id.* at 182–83.

[82]   *Id.* at 183.

[83]   *Id.*

[84]   *Id.* at 184.

[85]   SHAFRITZ, *supra* note 16, at 147–48.

[86]   A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOLOGICAL REV. 370, 372–83 (1943), *as reprinted in* SHAFRITZ, *supra* note 16, at 167, 168–72.

[87]   *Id.* at 395, *as reprinted in* SHAFRITZ, *supra* note 16, at 176.

[88]   SHAFRITZ, *supra* note 16, at 148–49; *see also* McNeal, *supra* note 66 (providing an example of groupthink present during the creation of the military commissions where officials within the Bush White House intentionally shielded themselves from the coercive isomorphic pressures of outside influence).

[89]   Irving L. Janis, *Groupthink: The Desperate Drive for Consensus at Any Cost That Suppresses Dissent Among the Mighty in the Corridors of Power*, PSYCHOLOGY TODAY, Nov. 1971, at 43, 44–46, 74–76, *as reprinted in* SHAFRITZ, *supra* note 16, at 185, 187–92.

2. Relationship of Organizational Behavior Theory to Classical Theory

Organizational behavior theory envisions organizations as systems in which people have a significant impact on organizational goal attainment. The main concern of organizational behavior theorists is not merely the formal system (its structure, organization, mission, methods, and resources), but instead, people. Those people are not viewed as resources who work for the organization; "they *are* the organization."[90] As such, a structurally oriented theoretical approach would not account for the variable impact that people have on the method and manner by which organizational goals are achieved or how personnel can affect organizational structure itself. This perspective challenges the "rational, efficiency-oriented scientific management" approaches and posits that social climate and group interactions affect goal attainment.[91] The classical theory—in rational and efficient machine-like systems subject to one best managerial approach—is undermined by the acceptance of the reality of human nature within organizations; reality recognizes that people have different roles and objectives, varied and complex interrelationships, diverse needs, and sometimes conflicting responsibilities and interests.

3. Lessons Learned from Applying Organizational Behavior Theory to the Counterterrorism Section

The reformers who moved the Counterterrorism Section from the Criminal Division to the National Security Division failed to appreciate many of the insights that organizational behavior theory can provide. By moving the Counterterrorism Section into a work group dominated and led by intelligence agents, they created the serious potential for groupthink. The orientation of the new workgroup creates an environment where dissenting opinions advocating criminal law solutions may not be considered or viewed as legitimate. Moreover, the self-assessments developed by the National Security Division reveal a clear rejection of the organizational behavior theory and reliance upon mandated structures to achieve cooperation.[92] By shifting the orientation of the Counterterrorism Section, the National Security Division may also have impacted the satisfaction that Counterterrorism Section prosecutors derived from their proactive role as criminal prosecutors. As a result, the Counterterrorism Section may witness resignations and additional unfavorable press.[93] The new control-oriented and regimented

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[90]   PUGH, *supra* note 73, at 130.

[91]   HODGE, *supra* note 22, at 20.

[92]   *See* NSD REPORT, *supra* note 2, at 5.

[93]   *See, e.g.,* Ari Shapiro, *As Domestic Spying Rises, Some Prosecutions Drop*, NPR, July 11, 2008, http://www.npr.org/templates/story/story.php?storyId=91968094.

structure may fail to recognize the potential for employees, when left to their own abilities, to develop the right outcomes based on the overall organizational mission of preventing terrorist attacks.

Despite these facts, the National Security Division has recognized some features reminiscent of an approach cognizant of organizational behavior theory. It created an external ethics review team to ensure that intelligence officials were not abusing their authority similar to the type of external review proposed by Janis to protect against groupthink.[94] But one could also view this remedy as a classical structure masquerading as an organizational behavior remedy. In other words, rather than being an audit team, it may be more accurately described as a Theory X control process.

C. Power Politics Theory

1. Power Politics Theory Generally

The "power and politics" school, or power in organizational theory perspective, can be contrasted with other rational "modern" structural, organizational economics and organizations or environment schools based on the differences in its assumptions. Other schools rely on certain assumptions—they assume rationality; assume that the institution's primary purpose is to accomplish established goals; assume that people in positions of formal authority set goals; assume that their primary questions involve how best to design and manage organizations to achieve declared purposes effectively and efficiently; and see "personal preferences of organization members [as] restrained by . . . rules, authority, and norms of rational behavior."[95] These assumptions can be firmly distinguished from power politics theory.

Power politics theory rejects the above stated assumptions as *naïve* and *unrealistic*.[96] Power politics theory views organizations as "complex systems of individuals and coalitions, each having its own interests, beliefs, values, preferences, perspectives, and perceptions."[97] Power politics theory predicts the development of coalitions that "continuously compete with each other for scarce organizational resources."[98] Given this assumption, conflict is "inevitable" and "[i]nfluence—as well as the power and political activities through which influence is acquired and maintained—is the primary 'weapon' for use in competition and conflicts."[99] In the power politics school, the competition for control,

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[94] NSD REPORT, *supra* note 2, at 9.

[95] SHAFRITZ, *supra* note 16, at 283.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

resources, and influence are "essential and permanent facts of organizational life."[100]

In their organization theory text, Shafritz, Ott, and Jang combine the definitions of power proposed by scholars Gerald Salancik, Jeffrey Pfeffer, Robert Allen, and Lyman Porter and define power as "the ability to get things done the way one wants them done; it is the latent ability to influence people."[101] This helpful, albeit non-universal definition emphasizes the relativity of power—power is context-specific and relational. Stated differently by Pfeffer, "A person is not 'powerful' or 'powerless' in general, but only with respect to other social actors in a specific social relationship."[102] The phrase "the way one wants them done" reminds us that "conflict and the use of power often are over the choice of methods, means, approaches, and . . . 'turf.'"[103] Importantly, power in this amalgam definition is made explicitly a structural phenomenon—a consequence of the division of labor and specialization. "[O]rganizational behavior and decisions frequently are not 'rational'" (in the modern structural/organizational economics/systems sense) and are not always "directed toward the accomplishment of established organizational goals."[104]

John R. P. French Jr. and Bertram Raven, in their work *The Bases of Social Power*,[105] theorize that in relations amongst individuals (or agents), "the reaction of the *recipient agent* is the more useful focus for explaining the phenomena of social influence and power."[106] In their work, they identify the following five bases of social power: "reward power, the perception of coercive power, legitimate power (organizational authority), referent power (through association with others who possess power), and expert power (power of knowledge or ability)."[107] The implications of this study are insightful in that they reveal that the efficacy of power is dependent upon the base of power from which it is exercised. The efficacy of power is reflected in "the recipient's sentiment toward the agent who uses power," also known as attraction, "and *resistance* to the use of power."[108]

James March, unsurprisingly (given his links to sociology), finds that the power of organizations is not limited to internal sources. He

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[100] *Id.*

[101] *Id.* at 284.

[102] *Id.* at 285.

[103] *Id.*

[104] *Id.*

[105] John R. P. French, Jr. & Bertram Raven, *The Bases of Social Power*, *in* STUDIES IN SOCIAL POWER 150–67 (Dorwin P. Cartwright ed., 1966).

[106] SHAFRITZ, *supra* note 16, at 285.

[107] *Id.* at 286; French & Raven, *supra* note 105, at 155–56.

[108] SHAFRITZ, *supra* note 16, at 286.

posits six models of social choice as a template for further empirical predictions about power.[109] His ultimate conclusion that influence and power are useful but have not provided much insight for social scientific research is to be expected when considered with his other research.[110] March is a proponent of bounded rationality and believes (much as power politics theorists do) that coalitions form, and those coalitions have their own preferences regarding what an organization should be like.[111] The coalition point is the area where, in March's view, power politics and its ties to rationality begin to conflict with organizational limits.[112] This is because various states of anarchy can exist at once and those anarchic states are not constrained by organizational structure and may be influenced by environmental factors.[113] Decision-making processes ultimately become a complex interplay between "problems, solutions, participants, and choices, all of which arrive relatively independently of one another."[114]

2. Application of Power Politics to the Counterterrorism Section

A power politics perspective would view the move of the Counterterrorism Section from the Criminal Division to the National Security Division as a control mechanism to guard against the possibility that the Criminal Division would subvert the administration's goal of shifting away from criminal enforcement and towards an intelligence and military-based approach to counterterrorism. In fact, the rationale for moving the Counterterrorism Section was that coordinated action could not come about without more clearly defined structures, lines of authority, and a unified chain of command.[115] These are structural responses to a growth in factions or difficult to control substructures (whether real or perceived), and structure is inherently bound up in the power politics theory.

By moving the Counterterrorism Section to the National Security Division, the DOJ sought to eliminate the potential for shifting organizational goals by minimizing the possibility that the balance of power amongst coalitions could take place. Stated differently, by consolidating personnel with counterterrorism responsibilities, the possibility that "many conflicting goals, and different sets of goals take

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[109] *Id.*

[110] *Id.*

[111] Pugh, *supra* note 73, at 119.

[112] *Id.*

[113] *Id.*

[114] *Id.* at 121.

[115] *See* NSD Report, *supra* note 2, at 5.

priority as the balance of power changes among coalitions" was largely counteracted.[116]

Another power politics way to analyze the reorganization is to recognize that counterterrorism missions within the DOJ involve diverse functional specialties amongst labor components. A counterterrorism case can be successfully prosecuted only with cooperation between prosecutors, criminal investigators, and intelligence operatives, as well as interagency collaboration. Such diverse and technical labor components hold equal degrees of importance for a successful prosecution, in the sense that they are all necessary. These units have different path dependencies, however, and may even have different goals. As such, they will necessarily seek to advance their own interests and create their own sub-goals, which may be in conflict with the criminal justice goal of successful prosecutions. The prosecutors, when situated in the Criminal Division, were, in Pfeffer's terms, "resource dependent" upon intelligence agents because they could not prosecute their cases without the support of the intelligence community, which holds information regarding potential defendants and enjoys a level of expertise that prevents outsiders from questioning its judgment.[117] Such protective coalitions, with their information advantage, have been termed "fiefdoms" by intelligence scholars, an appropriate term to describe their critical and walled-off nature.[118]

Much as Pfeffer predicts, "'[t]hose persons and those units that have the responsibility for performing the more critical tasks in the organization have a natural advantage in developing and exercising power in the organization. . . . Power is first and foremost a structural phenomenon, and should be understood as such.'"[119] The potential for such coalitions to develop was in the eyes of the DOJ's organizational designers—a phenomenon that could only be addressed through structural reform—and the Counterterrorism Section was accordingly moved to the new National Security Division.[120]

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[116] SHAFRITZ, *supra* note 16, at 284.

[117] *Id.*

[118] JOSEPH J. TRENTO, PRELUDE TO TERROR: THE ROGUE CIA AND THE LEGACY OF AMERICA'S PRIVATE INTELLIGENCE NETWORK, at xii (2005); Philip Davies, *Intelligence Culture and Intelligence Failure in Britain and the United States*, 17 CAMBRIDGE REV. OF INT'L AFF. 495, 507 (2004).

[119] SHAFRITZ, *supra* note 16, at 284 (citation omitted).

[120] The corrective structural measures employed may have created an entirely new set of organizational issues including, but not limited to: the creation of a new organizational culture, a shift in organizational goals, dissatisfaction amongst personnel, and, of course, new power relationships.

D. Organizational Culture Theory

1. Organizational Culture Theory Generally

Organizational culture theory places its focus on "the culture that exists in an organization, something akin to a societal culture."[121] It analyzes "intangible phenomena, such as values, beliefs, assumptions, perceptions, behavioral norms, artifacts, and patterns of behavior."[122] Organizational culture is seen as "a social energy that moves people to act."[123] "'Culture is to the organization what personality is to the individual—a hidden, yet unifying theme that provides meaning, direction, and mobilization.'"[124] The organizational culture perspective is an organizational theory with its own central assumptions, and given its unique assumptions, it is a counterculture within organizational theory that differs from the rational schools.[125]

Organizational culture theory challenges the rational perspectives about "how organizations make decisions and . . . why organizations— and people in [them]—act as they do."[126] Organizational culture theorists criticize the rational schools because while the rational schools have clearly stated assumptions, those assumptions are premised upon four organizational conditions that must exist for their theories to be valid, but those conditions in practice rarely exist.[127] Those assumptions are: "1. a self-correcting system of interdependent people; 2. [a] consensus on objectives and methods; 3. coordination achieved through sharing information; and 4. predictable organizational problems and solutions."[128]

Organizational culture theorists contend that in the absence of those four conditions, "organizational behaviors and decisions are [instead] predetermined by the patterns of basic assumptions held by members of an organization. These patterns of assumptions continue to exist and to influence behaviors in an organization because they repeatedly have led people to make decisions that 'worked in the past.'"[129] Accordingly, "[w]ith repeated use, the assumptions slowly drop out of people's consciousness but continue to influence organizational decisions and behaviors even when the environment changes and

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[121] SHAFRITZ, *supra* note 16, at 352.

[122] *Id.*

[123] *Id.* (citing RALPH H. KILMANN ET AL., GAINING CONTROL OF THE CORPORATE CULTURE, at ix (1985)).

[124] *Id.* (quoting KILMANN ET AL., *supra* note 123, at ix).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* (citation omitted).

[129] *Id.* at 352–53.

different decisions are needed."[130] Organizational culture explains the phenomenon of the phrase "that's the way things are done here"—the organizational culture becomes "so basic, so ingrained, and so completely accepted that no one thinks about or remembers [the assumptions driving behavior]."[131]

Organizational culture theorists believe that "[a] strong organizational culture can control organizational behavior."[132] Such a culture "can block an organization from making [needed] changes" to adapt to its environment.[133] Moreover, "rules, authority, and norms of rational behavior do not restrain the personal preferences of organizational members. Instead, [members] are controlled by cultural norms, values, beliefs, and assumptions."[134] Across organizations, basic assumptions may differ and organizational culture may be shaped by many factors, some of which may include: societal culture, technologies, markets, competition, personality of founders, and personality of leaders.[135] Furthermore, the effect of organizational culture may be pervasive and may include subcultures with similar or distinct influence factors.[136]

Given the multitude of influence factors, organizational culture theorists contend that studying structure alone is not enough.[137] "[P]ositivist, quantitative, quasi-experimental research methods favored by . . . [rational] schools cannot identify or measure unconscious, virtually forgotten basic assumptions."[138] Because such methods cannot identify or measure these unconscious assumptions, organizational culture theorists believe that other rational and "modern" schools "are using the wrong tools (or the wrong 'lenses') to look at the wrong organizational elements."[139]

2. Application to the DOJ's National Security Division

When one considers the organizational environment and new culture in which the Counterterrorism Section operates, faith in structure and control becomes harder to accept. Culture in this circumstance may best be described in three ways: (1) "A set of common

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[130] *Id.* at 353.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* (citing J. STEVEN OTT, THE ORGANIZATIONAL CULTURE PERSPECTIVE ch. 4 (1989)).

[137] *Id.*

[138] *Id.*

[139] *Id.*

understandings around which action is organized . . . finding expression in language whose nuances are peculiar to the group."[140] (2) "[A] set of understandings or meanings shared by a group of people . . . [that] are largely tacit among the members [and] are clearly relevant [and distinctive] to [the] particular group" which are also passed on to new members.[141] (3) "[A] system of knowledge, of learned standards for perceiving, believing, evaluating and acting."[142] Each definition seeks to relate human communities to their environmental settings and reveals that when applied to the National Security Division, organizational culture may drive prosecutors to be torn between their law enforcement and intelligence mission mandates because of the nuances, standards, and knowledge of the group of which they are a part.

Unlike the classical theory approach, which may lend itself to rational and efficient resolution, when one considers the organizational environment in which the Counterterrorism Section operates, one can see how the set of common understandings and beliefs embodied in organizational culture theory can reveal potential tension within the new DOJ organization. For example, a systems theory perspective would acknowledge that the Counterterrorism Section relies upon inputs (in the form of intelligence and investigatory leads) from intelligence agencies for successful prosecutions. The Counterterrorism Section must necessarily avoid blowback from those intelligence agencies by acting in a manner that preserves their interests (secrecy and protection of sources). A trial by its very nature, however, is a public and overt process that "effectively terminates covert intelligence investigation" and necessarily risks exposing sources.[143] If the Counterterrorism Section must rely on intelligence agencies for its success, and presumably may be overruled in its law enforcement decisions by intelligence agencies when prosecutorial decisions involve the potential disclosure of intelligence, a shift in the organizational culture may occur. This organizational culture may be further influenced by the propensity of leaders and peer subdivisions who may favor their role as an intelligence agency over their role as a law enforcement agency, especially in light of

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[140] Nat'l Def. Univ., *Organizational Culture* (citing Howard S. Becker & Blanche Geer, *Latent Culture: A Note on the Theory of Latent Social Roles*, 5 ADMIN. SCI. Q. 304, 305 (1960)), *available at* http://ww2.jhu.edu/jhuonpoint/content/organizational-culture.pdf (last visited Apr. 10, 2009).

[141] JOANNE MARTIN, ORGANIZATIONAL CULTURE: MAPPING THE TERRAIN 57 (2002), *as reprinted in* SHAFRITZ, *supra* note 16, at 393, 396 (citing Meryl Reis Louis, *An Investigator's Guide to Workplace Culture*, *in* P. FROST ET AL., ORGANIZATIONAL CULTURE 73–74 (1985)).

[142] Yvan Allaire & Mihaela E. Firsirotu, *Theories of Organizational Culture*, 5 ORG. STUD. 193, 198 (1984).

[143] NSD REPORT, *supra* note 2, at 12.

the negative externalities associated with trials.[144] In fact, recent DOJ statistics may support this conclusion, demonstrating that the amount of covert intelligence surveillance initiated by the DOJ has increased while the number of prosecutions has decreased.[145]

The consequences for Counterterrorism Section prosecutors are that their organizational culture, as assessed by analyzing their vertical relationships (leadership above and intelligence agents below) and horizontal relationships (office of intelligence), are all inclined to disfavor prosecutions. Moreover, Counterterrorism Section prosecutors must rely on these elements for success, and presumably will lose any conflict with their horizontal intelligence counterparts when disagreements are appealed to National Security Division superiors, who have an intelligence orientation. Taken together, these structural components and incentives, combined with the attitudes and knowledge base of intelligence agents and other personnel, form a culture surrounding the Counterterrorism Section that is predisposed toward an intelligence role, not a law enforcement role.

There are significant consequences that flow from this. The prosecutors in their law enforcement role in supervising intelligence investigations may be more likely to presume guilt when it comes time to make charging decisions because by supervising an investigation, they are cognitively aligned with the justifications offered by an investigator for continued surveillance. The Counterterrorism Section prosecutors, because they are less insulated, may be more susceptible to the day-to-day influence of an investigation and its incremental suggestions of a defendant's guilt. In this respect, organizational theory predicts that a close working relationship will generate a unifying influence between prosecutors and intelligence agents—their shared commitment will dominate.

As a consequence, prosecutors closely tied to investigations may, without much scrutiny, come to trust the conclusion of an investigator that a target is in fact a terrorist. Comparative studies into the practices of prosecutors in Germany and New Zealand reinforce this potential for risk through prosecutor-law enforcement coordination. A German study

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[144] *But see* SERRIN TURNER & STEPHEN J. SCHULHOFER, LIBERTY & NATIONAL SECURITY PROJECT, THE SECRECY PROBLEM IN TERRORISM TRIALS 9–10 (2005), *available at* http://brennan.3cdn.net/2941d4bea7c3c450d2_4sm6iy66c.pdf (describing concerns with disclosure of intelligence information in trials as "a myth" noting that "[p]rosecutors and defense counsel responsible for trying the embassy bombings case agree that the case did not result in disclosure of any sensitive intelligence information. Indeed, before September 11th, the government won a number of significant terrorism convictions in federal court; yet no credible claim has been made that any of these cases resulted in the disclosure of sensitive intelligence secrets" (footnote omitted)).

[145] *See* Shapiro, *supra* note 93.

documented how prosecutors in organized crime cases were drawn into the concerns of police efficiency and away from judicial criteria.[146] A New Zealand study noted that separation of prosecution and investigation ensures checks and balances and impartiality.[147] For example, Daniel Richman notes that "[k]nowledge itself can influence perspective. The prosecutor who, while taking *no* part in the conduct of investigations, regularly learns from agents about their false starts and tactical gambles [and] may find himself more sympathetic to agency travails than would a more removed official accustomed to hearing seamless narratives."[148] Such a prosecutor may be cognitively limited as well— ready to find that any new information confirms her original impressions of a case or target.[149] In terrorism cases, where the commitment is at its highest due to the high stakes, and immersion in the investigation is at its greatest, these cognitive biases that stem from a distinct organizational culture will be at their apex.

CONCLUSION

As stated from the outset, this Essay is intended as a preliminary organizational theory inquiry into institutional issues raised by the creation of the DOJ's National Security Division. The theories explored highlight how structure, power and politics, organizational behavior, and organizational culture can all be impacted by this reorganization and consolidation. What is clear is that there exists at least the potential for unintended consequences that are worthy of future research and attention by scholars and policymakers.

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[146] Heiner Busch & Albrecht Funk, *Undercover Tactics as an Element of Preventive Crime Fighting in the Federal Republic of Germany*, *in* UNDERCOVER: POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE 55, 65–67 (Cyrille Fijnaut & Gary T. Marx eds., 1995).

[147] NEW ZEALAND LAW COMMISSION, REPORT NO. 66: CRIMINAL PROSECUTION 3 (2000), *available at* http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_73_150_R66.pdf.

[148] Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 803 (2003) (emphasis added). When directing an investigation,

> [t]he risks to prosecutorial judgment are even greater . . . . Just as corporate lawyers [may] "cease to objectively evaluate transactions that are often their own creations," prosecutors who have helped call the shots in an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter.

Id. (quoting Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 545 (1994)).

[149] *See* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 102 (1993).