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ORGANIZATIONAL CULTURE, PROFESSIONAL ETHICS AND GUANTÁNAMO

Gregory S. McNeal*

In this essay I draw attention to the intersection between the social scientific literature on organizational culture and the legal ethics literature. Drawing from the organizational theory literature I detail a framework for assessing organizational culture and explain how organizational culture reflects more than rules and structure within an organization, but rather represents deeper values, practices, and ways of thinking. While organizational culture is difficult to change, it can be modified or sustained through power, status, rewards, and other mechanisms. After establishing a baseline for assessing organizational culture I highlight efforts by the Bush administration to exercise control over a military culture which was resistant to the administration's legal policy initiatives. This effort at control manifested itself in the creation of the military commissions in 2001, an attempt to minimize the influence of military attorneys in 2003, and efforts to exercise political control over military commissions in 2006; each effort was successfully resisted by members of the military. I conclude by observing that the literature on organizational culture can provide insights into the literature on legal ethics and political control of the military specifically and political control of bureaucracies more generally.

I. INTRODUCTION

In this symposium essay I plan to highlight key points where the literature on organizational culture can aid scholars in understanding the impact of values, practices, and ethical rules on the behavior of attorneys within politicized organizations. To accomplish this goal, I first detail a framework for assessing organizational culture and explain how organizational culture reflects more than rules and structure within an organization, but rather represents deeper values, practices, and ways of thinking. Next, I use the example of the military commissions and the Bush administration's interrogation policy to demonstrate how the Bush administration tried unsuccessfully to exercise control over a military culture which was resistant to its legal policy initiatives. I also explain how members of the military successfully resisted these efforts to modify their organizational culture and

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resisted enhanced political control over the activities of the military. Taken together, these observations suggest that the literature on organizational culture can provide useful insights into the literature on legal ethics and political control of the military specifically and political control of bureaucracies more generally.

II. AN OVERVIEW OF ORGANIZATIONAL CULTURE THEORY

Organizational cultures are slowly evolving reflections of the shared and learned values, beliefs, and attitudes of an organization's members.¹ Culture can be conceived of as a collection of unspoken rules and traditions that play a part in determining the quality and nature of organizational life.² In short, "[t]he culture of an organization influences who gets promoted, how careers are either made or derailed, and how resources are allocated."³ Organizational culture theory places its focus on "the culture that exists in an organization, something akin to a societal culture."⁴ It analyzes "intangible phenomena, such as values, beliefs, assumptions, perceptions, behavioral norms, artifacts, and patterns of behavior."⁵ Organizational culture is seen as "a social energy that moves people to act."⁶ "Culture is to the organization what personality is to the individual—a hidden, yet unifying theme that provides meaning, direction, and mobilization."⁷ 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.⁸

Organizational culture theory challenges rational perspectives regarding "how organizations make decisions and . . . why organizations—

¹ DON HELLRIEGEL & JOHN W. SLOCUM, ORGANIZATIONAL BEHAVIOR 418 (2007).

² *Id.*

³ *Id.* (noting that "organizational culture includes: routine ways of communicating, such as organizational rituals and ceremonies and the language commonly used; the norms shared by individuals and teams throughout the organization . . . the dominant values held by the organization . . . the philosophy that guides management's policies and decision making . . . the rules of the game for getting along in the organization . . . the feeling or climate conveyed in an organization by the . . . way in which [organizational members] interact with . . . outsiders.").

⁴ Gregory S. McNeal, *Organizational Theory and Counterterrorism Prosecutions: A Preliminary Inquiry*, 21 REGENT U. L. REV. 307, 325 (2009) (citing JAY M. SHAFRITZ & JAY STEVENS OTT, CLASSICS OF ORGANIZATION THEORY 352 (2005)).

⁵ McNeal, *supra* note 4 (citing SHAFRITZ & OTT, *supra* note 4).

⁶ McNeal, *supra* note 4 (citing SHAFRITZ & OTT, *supra* note 4 (citing RALPH H. KILMANN ET AL., GAINING CONTROL OF THE CORPORATE CULTURE, at xi (1985))).

⁷ McNeal, *supra* note 4 (citing SHAFRITZ & OTT, *supra* note 4 (citing KILMANN ET AL., *supra* note 6, at ix)).

⁸ McNeal, *supra* note 4 (citing SHAFRITZ & OTT, *supra* note 4).

and people in [them]—act as they do.”⁹ 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.¹⁰ 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.”¹¹ 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.’”¹² 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 different decisions are needed.”¹³ 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].”¹⁴

Organizational culture theorists believe that “[a] strong organizational culture can control organizational behavior.”¹⁵ Such a culture “can block an organization from making [needed] changes” to adapt to its environment.¹⁶ 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.”¹⁷ 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.¹⁸ Furthermore, the effect of organizational cul-

⁹ McNeal, *supra* note 4 (quoting SHAFRITZ & OTT, *supra* note 4).

¹⁰ McNeal, *supra* note 4 (citing SHAFRITZ & OTT, *supra* note 4).

¹¹ McNeal, *supra* note 4 (quoting SHAFRITZ & OTT, *supra* note 4).

¹² McNeal, *supra* note 4 (quoting SHAFRITZ & OTT, *supra* note 4, at 352–53).

¹³ McNeal, *supra* note 4, at 325–26 (quoting SHAFRITZ & OTT, *supra* note 4, at 353).

¹⁴ McNeal, *supra* note 4, at 326 (quoting SHAFRITZ & OTT, *supra* note 4, at 353).

¹⁵ McNeal, *supra* note 4, at 326 (quoting SHAFRITZ & OTT, *supra* note 4, at 353).

¹⁶ McNeal, *supra* note 4, at 326 (quoting SHAFRITZ & OTT, *supra* note 4, at 353).

¹⁷ McNeal, *supra* note 4, at 326 (quoting SHAFRITZ & OTT, *supra* note 4, at 353).

¹⁸ McNeal, *supra* note 4, at 326 (citing SHAFRITZ & OTT, *supra* note 4, at 353).

ture may be pervasive and may include subcultures with similar or distinct influence factors.¹⁹

Various aspects of organizational culture exist on different levels or layers within an organization, and they differ in terms of visibility and resistance to change. “[T]he least visible, or deepest, level of organizational culture is that of *shared assumptions and philosophies*, which represent basic beliefs about reality, human nature, and the way things should be done.”²⁰ *Organizational cultural values* represent the next layer of organizational culture and tend to persist over time, even with changes in organizational membership.²¹ Organizational cultural values are the “collective beliefs, assumptions, and feelings about what things are good, normal, rational and valuable.”²² The next layer of organizational culture is represented by *shared behaviors*, which include “norms, which are more visible and somewhat easier to change than values.”²³ The uppermost layer of organizational culture is the most visible and the most superficial. *Cultural symbols* “are words, gestures, and pictures or other physical objects that carry a meaning with a culture.”²⁴

“[O]rganizational culture forms in response to two major challenges that confront every organization: (1) external adaptation and survival and (2) internal integration.”²⁵ *External adaptation and survival* refer to “how the organization will find a niche in and cope with its constantly changing external environment.”²⁶ *Internal integration* refers to “the establishment and maintenance of effective working relationships among the members of an organization.”²⁷ Organizational culture develops when organizational members share knowledge and assumptions in an effort to develop ways of coping with external adaptation and internal integration.²⁸ External adaptation and survival involves (1) mission and strategy; (2) goal setting; (3) means; and (4) measurement.²⁹ Internal integration refers to “the establish-

¹⁹ McNeal, *supra* note 4, at 326 (citing J. STEVEN OTT, *THE ORGANIZATIONAL CULTURE PERSPECTIVE* ch. 4 (1989)).

²⁰ HELLRIEGEL & SLOCUM, *supra* note 1, at 419 (emphasis in original).

²¹ *Id.*

²² *Id.* (citing C.B. Gibson & M.E. Zellmer-Bruhn, *Metaphors and Meaning: An Intercultural Analysis of the Scope of Teamwork*, 46 ADMIN. SCI. Q. 274 (2001)) (emphasis omitted).

²³ HELLRIEGEL & SLOCUM, *supra* note 1, at 419 (emphasis omitted).

²⁴ *Id.* (citing E.H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* (1985)) (emphasis omitted).

²⁵ HELLRIEGEL & SLOCUM, *supra* note 1, at 421 (citing E.H. SCHEIN, *supra* note 24, at 49–84).

²⁶ HELLRIEGEL & SLOCUM, *supra* note 1, at 421 (emphasis omitted).

²⁷ *Id.* (emphasis omitted).

²⁸ *Id.*

²⁹ *Id.*

ment and maintenance of effective working relationships among the members of an organization.”³⁰ It involves; (1) language and concepts; (2) group and team boundaries; (3) power and status; and (4) rewards and punishments.

III. AN EXAMPLE OF ORGANIZATIONAL CULTURE AND ITS IMPACT

The military commissions established to try alleged terrorists after the attacks of September 11, 2001 were adopted by the Bush administration operating pursuant to an expansive view of executive authority which some have labeled a “New Paradigm.”³¹ This plenary interpretation of presidential war power is based on a reading of the Constitution that few legal scholars share.³² It states that “the President, as Commander-in-Chief, has the authority to disregard virtually all previously known boundaries, if national security demands it.”³³ The public policy behind the New Paradigm was to allow:

[T]he Pentagon to bring terrorists to justice as swiftly as possible. Criminal courts and military courts, with their exacting standards of evidence and emphasis on protecting defendants’ rights, were deemed too cumbersome. Instead, the President authorized a system of detention and interrogation that operated outside the international standards for the treatment of prisoners of war by the 1949 Geneva Conventions. . . . In November, 2001, [Vice President] Cheney said of the military commissions, “We think it guarantees that we’ll have the kind of treatment of these individuals that we believe they deserve.”³⁴

The military commissions which Vice President Cheney referred to were invalidated by the Supreme Court in *Hamdan v. Rumsfeld*³⁵ and were replaced by military commissions created by the Military Commissions Act of 2006 (MCA). The MCA, though, featured a command structure which created a culture within the military commissions system wrought with political influence. One statutory provision designates a political appointee to serve in the powerful role of Convening Authority,³⁶ while a second statuto-

³⁰ *Id.* (emphasis omitted).

³¹ See, e.g., Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House’s War on Terror*, NEW YORKER, July 3, 2006, at 44, available at http://www.newyorker.com/archive/2006/07/03/060703fa_fact1.

³² *Id.* at 44.

³³ *Id.*

³⁴ *Id.* at 46.

³⁵ 548 U.S. 557, 591 (2006).

³⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, § 948(h), 120 Stat. 2600. (“Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.”).

ry provision provides trial counsel with enhanced protection from undue influence.³⁷ The legislative history of the MCA suggests that congressional drafters accepted legislation proposed by the White House in September 2006,³⁸ and while Congress added to the bill an important protection against undue influence,³⁹ they failed to consider how that provision would interact with other provisions within the bill. Moreover, the protection Congress intended to extend to trial counsel has been largely undermined by a broad delegation of authority to the Executive branch to promulgate rules for military commissions outside the normal rulemaking procedures.⁴⁰ As a result, the Department of Defense took advantage of the opportunity to exercise control over military commissions and created a structure and promulgated rules for the military commissions which allowed for political manipulation of nearly all aspects of the trials. It is possible that the creation of this culture of political influence was intentional, a point I will elaborate on below.⁴¹

Section 948(h) of the MCA declares: "Military commissions under this chapter may be convened by the Secretary of Defense or by any officer *or official* of the United States designated by the Secretary for that purpose."⁴² This seemingly innocuous provision allows the Secretary of Defense to select a civilian political appointee to serve in the important role of Convening Authority, a substantial departure from courts-martial practice.⁴³ This raises an obvious problem: a political appointee lacks the presumption

³⁷ *Id.* § 949(b).

³⁸ See Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967 (2009).

³⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, § 949(b), 120 Stat. 2600.

⁴⁰ See Letter from Barry M. Kamins, President, The Association of the Bar of the City of New York, to Senators Patrick Leahy, Arlen Specter, Carl Levin, and John McCain and Representatives John Conyers, Lamar S. Smith, Ike Skelton, and Duncan Hunter (Mar. 12, 2008), available at <http://www.harpers.org/media/image/blogs/misc/guantanamoletterremc311.pdf> (discussing the urgent need for Congressional oversight hearings given the potential for undue political influence and organizational changes which impact the independence of the military commissions). See also Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 379, 382 (2003), available at <http://www.nimj.org/documents/GreenBag.pdf>. (stating that transparency in the form of notice and comment rulemaking for military commissions can contribute to public confidence in government decision-making and improved decisions).

⁴¹ See Letter from Barry M. Kamins, *supra* note 40, at 3 (stating "this restructuring places the General Counsel [a political appointee] at the apex of the military commissions system with the power to influence and direct it from every perspective" and "the supervisory structure underlying the military commissions . . . establishes a blueprint for conflict and political influence on the prosecution and conduct of the military commissions.").

⁴² Military Commissions Act of 2006, Pub. L. No. 109-366, § 948(h), 120 Stat. 2600 (emphasis added).

⁴³ *Cf.* Uniform Code of Military Justice, 10 U.S.C. § 822 (2006).

of unbiased and apolitical decision-making that accompanies the role of a military commander.⁴⁴ The Convening Authority is a unique official with no civilian equivalent.⁴⁵ In the case of the commissions, she also has no *military* equivalent; her position exists solely for the purpose of trying one class of alleged offenders. The Convening Authority's responsibilities include reviewing the sufficiency of charges and whether they should be dismissed, selecting those cases and associated charges that should be referred to trial by military commission, selecting members of the panel (the jury), and reviewing findings of guilt and sentences.⁴⁶

In Section 948(h), Congress created a Convening Authority with all the power found in military commanders but without the attendant command responsibility justification; moreover, by allowing this individual to be a political appointee, Congress allowed for the creation of a politically-motivated organizational culture in what should be an apolitical organizational culture. It is certainly up to Congress to prescribe "the level of independence and procedural rigor" of military courts.⁴⁷ But Section 948(h) also implicates the broader protections of the trial process, and in this respect is governed by Common Article 3 of the Geneva Conventions which is concerned with "matters of structure, organization, and mechanisms to promote the tribunal's insulation from command influence."⁴⁸ It is not clear that Common Article 3 would prohibit an organizational culture that was driven by politics, as politics are an accepted aspect of many ordinary criminal trials. However, in his concurrence in the *Hamdan* opinion, Justice Kennedy made clear that a major failure of the military commissions which preceded those created by the MCA of 2006 was that they were not structurally independent.⁴⁹

The organizational culture and political influence point is key to understanding what section 948(h)'s impact is—by allowing for a politically appointed convening authority it violates the principle that military justice should be insulated from a politically motivated organizational culture.

⁴⁴ Convening Authority under the UCMJ are commanders and military officers. *Id.* As such they are protected from removal from their position, and any such removal would raise significant questions especially in light of their other non-judicial responsibilities. *See id.* § 804 (granting an officer the right to challenge his or her dismissal in a trial by court-martial).

⁴⁵ *See* Lindsay Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169, 170 (2006).

⁴⁶ DEP'T OF DEF., THE MANUAL FOR MILITARY COMMISSIONS, pt. 2., § 2-3, (2007), available at http://www.defenselink.mil/news/Apr2007/Reg_for_Trial_by_mcm.pdf.

⁴⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 645 (Kennedy, J., concurring).

⁴⁸ *Id.* at 646.

⁴⁹ *Id.* *See also id.* at 645 ("[A]n acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted' by the standards of our Nation's system of justice.").

Stated differently, structural insulation for military justice is designed to ensure that a system exists which protects against political influence irrespective of the motivation of individual actors. What the Supreme Court made clear in *Hamdan* was that the Court was not imputing ill motives to any actors within the military commission process, which would include political appointees.⁵⁰ Rather, the Court expressed its certainty that officers in the PMO military commissions “would strive to act impartially and ensure that Hamdan receive[d] all protections to which he is entitled.”⁵¹ Nonetheless, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, reasoned that “the legality of a tribunal under Common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly.”⁵² Structural independence from the influence of Executive actors is the central concern.⁵³ Section 948(h), by departing from this guidance, created a politically-motivated organizational culture and institutional structure which allowed for instances of perceived and actual political influence and coercion.⁵⁴

This possibility of undue political influence is not merely hypothetical or theoretical; in fact, Military Commission Judge Keith Allred in the military commission trial of Salim Hamdan, Osama bin Laden’s body guard, removed the Legal Advisor to the Convening Authority from the Hamdan military commission trial citing “substantial doubts” about that

⁵⁰ *Id.* at 587 (majority opinion).

⁵¹ *Id.*

⁵² *Id.* at 634 n.67. While Justice Kennedy did not join this part of the opinion, he did later recognize the importance of ensuring individual adjudicators would act fairly and impartially. On page fourteen of his concurrence he analyzed the powers of the Convening Authority in courts martial and stated:

[B]y structure and tradition, the court-martial process is insulated from those who have an interest in the outcome of the proceedings As compared to the role of the convening authority in a court-martial, the greater powers of the Appointing Authority here . . . raise[s] concerns that the commission’s decision making may not be neutral.

Id. at 649–50 (Kennedy, J., concurring).

⁵³ *Id.* at 645, 650 (stating “an acceptable degree of independence from the Executive is necessary to render a commission ‘regularly constituted’ by the standards of our Nation’s system of justice” and that “provisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the fact finding process . . .”).

⁵⁴ *Cf.* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES: TOGETHER WITH THE PRACTICE AND PROCEDURE OF COURTS-MARTIAL AND OTHER MILITARY TRIBUNALS, 623–24 (1915) (rehearsing the judge advocate’s oath to the allegiance of the court).

advisor's independence from the prosecutorial function.⁵⁵ Moreover, Colonel Davis, the Chief Prosecutor of the military commissions, resigned after criticizing the process for its politically-motivated undue command influence.⁵⁶ He was subsequently notified that, because of his resignation, he did "not serve honorably" and was denied a medal for his service as prosecutor.⁵⁷ This form of "award discipline" is an example of how organizational culture theorists note that organizational culture can be maintained or changed, specifically by the system of rewards, status, and sanctions within an organization. "The rewards and punishments attached to various behaviors convey to [organizational members] the priorities and values of both individual [leaders] and the organization."⁵⁸ Status also affects certain aspects of an organization's culture by demonstrating which roles and behaviors are valued by the organization.⁵⁹ "An organization's reward practices and culture are strongly linked in the minds of its members," and some argue the use of rewards and status symbols is the "most effective method of influencing organizational culture"⁶⁰ "[T]he criteria used to determine who is assigned to specific jobs or positions, who gets raises and promotions and why, who is removed from the organization by firing or early retirement, and so on, reinforce and demonstrate basic aspects of an organization's culture. These criteria become known throughout the organization and can maintain or change an existing culture."⁶¹ Such an act of discipline against Colonel Davis, a critic of what he viewed as unjust political decision making and interference in military justice, sent a message that those who resist the demands of the political culture supervising the military commissions could expect reprisals should they fail to follow the goals of their political superiors.

Military justice precedents set forth a clear standard for testing whether officials improperly influenced subordinates. The test turns on "whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be

⁵⁵ Ruling on Motion to Dismiss (Unlawful Influence) at 12, *United States v. Hamdan*, D-026 (Military Comm'n, May 9, 2008), available at <http://www.nimj.org/documents/Hamdan%20Hartmann%20Ruling.pdf>.

⁵⁶ See Morris D. Davis, *Historical Perspective on Guantánamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT'L L. 115 (2009).

⁵⁷ Josh White, *Colonel Says Speaking Out Cost a Medal*, WASH. POST, May 29, 2008, at A09, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/28/AR2008052802966.html?hpid=moreheadlines>.

⁵⁸ HELLRIEGEL & SLOCUM, *supra* note 1, at 425.

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ *Id.*

unfair.”⁶² In light of the retaliation against Colonel Davis, this test seems satisfied. In sum, the military commissions’ hierarchy is an example of an organizational culture which demands subservience to Executive branch *political* concerns. This subservience violates the spirit of *Hamdan* which repeatedly referenced the need for structural freedom from a culture of undue political influence.⁶³

As will be made clear in the discussion which follows, organizational culture can be influenced and enforced in a variety of ways. For example, by allowing political officials to prepare fitness reports and make decisions regarding service medals, a political appointee can have the same potential for influence over trials that they would have if they were able to directly control the decisions of organizational members. Moreover, an organizational culture which can allow leaders to push difficult and ethically challenging decisions to subordinates allows political appointees to escape the consequences of potentially unlawful action by pressuring military officers to act in their stead, forcing those officers to choose between resignation, reprisal, or violations of the law. The military commissions are one example of the Bush administration’s efforts to alter a military culture and substitute it with a political culture, and they stand as an example of how such efforts can negatively impact ethical decision making. Other examples during the Bush administration highlight how the military commissions were but one of many instances in a concerted effort to exercise greater political control over the military. This desire for control was rooted in the fact that the military’s culture largely resisted efforts to establish new and questionable legal procedures, disregarding years of established practices grounded in respect for the rule of law.

IV. AN INTENTIONAL POLICY?

Is it accurate to suggest that the military commissions example reflects a broader effort to establish a politically driven culture within the military? Some of the other actions of the Bush administration suggest that this is, in fact, the case. Bruce Fein, former Associate Attorney General in the Reagan administration observed that Bush’s presidential legal advisors had “staked out powers that are a universe beyond any other administration. This President has made claims that are really quite alarming. He has said that “there are no restraints on his ability, as he sees it, to collect intelligence, to open mail, to commit torture, and to use electronic surveillance.”⁶⁴

⁶² *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990) (citing *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979); *United States v. Cruz*, 20 M.J. 873, 890 (A.C.M.R. 1985)).

⁶³ *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 587–88 (2006).

⁶⁴ Mayer, *supra* note 31.

Attorney General Alberto Gonzalez, perhaps unwittingly, provided ammunition to critics of the administration's approach when he stated:

The nature of the new war [against terrorism] places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.⁶⁵

It is in light of these political goals that we must consider what type of organizational culture was associated with the placement of political appointees within a command structure previously reserved for uniformed military officers. Organizational culture theorists contend that organizations can maintain their culture by recruiting individuals that fit the culture and removing those who consistently or markedly stray from accepted behaviors and activities.⁶⁶ However, organizational culture involves more than just the quality of personnel inputs and outputs. Other indicators of organizational culture include: "(1) what managers and teams pay attention to, measure, and control; (2) the ways in which managers react to critical incidents and organizational crises; . . . (4) [sic] criteria for allocating rewards and status; (5) criteria for recruitment, selection, promotion, and removal from the organization; and (6) organizational rites, ceremonies and stories."⁶⁷ Similarly, these same five elements can be used to modify organizational culture.⁶⁸ Most large, complex organizations have more than one culture, referred to as "subcultures." The subculture may reflect the operating culture of line employees, the professional or technical culture, and an executive culture of top management, each stemming from different views typically held by individuals in these differing roles.⁶⁹

Applying these factors to the Bush administration's approach to the government's counterterrorism initiatives generally and the military com-

⁶⁵ Memorandum from Alberto R. Gonzales, Counsel to the President to George W. Bush, President, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban 2 (Jan. 25, 2002), available at <http://slate.com/features/whatistorture/LegalMemos.html>; 37 CASE W. RES. J. INT'L L. 615 (2006).

⁶⁶ HELLRIEGEL & SLOCUM, *supra* note 1, at 423.

⁶⁷ *Id.* (citing J.A. Chatman et al., *Being Different Yet Feeling Similar: The Influence of Demographic Composition and Organizational Culture on Work Process and Outcomes*, 43 ADMIN. SCI. Q., 749-79 (1998)).

⁶⁸ HELLRIEGEL & SLOCUM, *supra* note 1, at 467.

⁶⁹ *Id.* (citing J.B. Sorensen, *The Strength of Corporate Culture and the Reliability of Firm Performance*, 47 ADMIN. SCI. Q., 70-91 (2002)).

missions specifically reveals some key insights about a politically driven organizational culture. Organizational culture theorists note that to maintain or change an organizational culture requires the attention of management and leadership. The “processes and behaviors that managers, individual employees, and teams pay attention to—that is, the events that get noticed and commented on” will largely control whether the organizational culture is sustained or changed.⁷⁰ Stated differently, how an organization deals with events sends strong signals about what is important and expected of members of an organization. The leadership in the military commissions process and those responsible for the Bush administration’s counterterrorism policy generation, all of whom report directly to political appointees—or were political appointees themselves—reacted to the military’s resistance to “the New Paradigm” by seeking to diminish their influence. These political appointees had goals which were, by their very nature, different than un-informed members of the military. As one scholar has noted with reference to the senior civilian attorneys within the Department of Defense:

The General Counsel [in the Department of Defense] is first and foremost a political appointee nominated by the President based on loyalty and commitment to supporting a policy program. . . . Judge advocates, on the other hand, are not political appointees, but nevertheless, above the rank of captain require Senate approval of their regular commissions. While the President can dismiss his General Counsel, dismissing judge advocates is an altogether different procedural matter. . . . Politically appointed General Counsels have a different purpose and function in the [Department of Defense]. They are about partisan policy implementation, whereas judge advocates are about constitutional and statutory duties devoid of partisan policy considerations.⁷¹

As some prominent legal scholars and former military officers point out, the differences between these organizational cultures can have a palpable impact on legal policy because in many respects, “[m]ilitary lawyers seem to conceive of the rule of law differently [than their civilian counterparts]. Instead of seeing law as a barrier to the exercise of their clients’ power, these attorneys understand the law as a prerequisite to the meaningful exercise of power. Law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms. Law makes just wars possible by creating a well-defined legal space within which individual sol-

⁷⁰ HELLRIEGEL & SLOCUM, *supra* note 1, at 423.

⁷¹ Gregory M. Huckabee, *The Politicizing of Military Law—Fruit of the Poisonous Tree* 13–14 (Aug. 21, 2008), available at http://works.bepress.com/gregory_huckabee/1 (unpublished manuscript, on file with the Berkeley Electronic Press).

diers can act without resorting to their own personal moral codes.”⁷² Importantly, the White House’s legislative efforts to insert a provision into the Military Commissions Act of 2006, which ensured that the powerful Convening Authority for Military Commissions would be a political appointee, was not the first effort by the Bush administration to decrease the influence of uniformed military attorneys. On May 15, 2003, the Secretary of the Air Force issued “Secretary of the Air Force Order (SAFO) 111.5. . . . [The] SAFO gave the General Counsel broad authority to set legal policy for the Department, . . . and to review all legal training within the Department. In particular, he made the General Counsel ‘solely responsible . . . for legal aspects of major matters arising in or involving the Department’”⁷³ In addition, the Office of the Judge Advocate General was given a “dotted line reporting relationship to the General Counsel, serving as the Principal Military Advisor to the General Counsel.”⁷⁴ “Predictably all Service Judge Advocates General felt threatened by such a unilateral executive act.”⁷⁵ The Secretary’s order in effect gave the Department General Counsel executive authority over the Service TJAG. In many respects, this earlier change, utilizing a dotted line of authority, reflected a similar hierarchy of control hidden through dotted line authorities, just like that found in the Legal Advisor to the Convening Authority and Convening Authority positions in the Military Commissions.⁷⁶

In 2003, Congress responded negatively to the Bush administration’s efforts to establish a political culture that superseded independent military legal advice, sending:

[A]n unmistakable message to the Pentagon civilian political leadership, [which caused] Congress [to] enact[] legislation stating that no officer or employee of the Department of Defense may interfere with the ability of the Judge Advocates General to give independent legal advice to their respective Secretary or Service Chief, or the ability of judge advocates in the military units to give independent legal advice to commanders. . . . In its report, Congress wanted to send the [Department of Defense] political leadership a message. It made its point clear by stating that this was “the

⁷² Charles J. Dunlap, Jr., *Voices from the Stars? America’s Generals and Public Debates*, 28 A.B.A. NAT’L SECURITY L. REP. 4, 10 (Nov. 2006), available at http://www.abanet.org/natsecurity/nslr.shtml#volume_28 (quoting Richard Schragger, *Cooler Heads: The Difference Between the President’s Lawyer and the Military’s*, SLATE, Sept. 20, 2006, <http://www.slate.com/id/2150050>).

⁷³ Huckabee, *supra* note 71, at 10.

⁷⁴ *Id.* (citing U.S. DEP’T OF THE AIR FORCE, SEC’Y OF THE AIR FORCE ORDER 111.5, FUNCTIONS AND DUTIES OF THE GENERAL COUNSEL AND THE JUDGE ADVOCATE GENERAL (May 15, 2003)).

⁷⁵ Huckabee, *supra* note 71, at 8.

⁷⁶ See Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29, 32–41 (2008). See generally McNeal, *supra* note 38, at 967.

second time in 12 years that attempts to consolidate legal services in the Department of Defense have led to Congressional action [overruling it].⁷⁷

A 2005 independent panel of experts analyzing the 2003 legislation concluded: “The legislation, therefore, appears to set a boundary on Secretarial discretion to give executive control of the legal function of a Military Department to the General Counsel and to subordinate the Judge Advocate General to the General Counsel’s organization.”⁷⁸ Notably absent from the independent panel of experts report was an observation in an earlier draft where the expert noted “this discord has been largely confined within the walls of the Pentagon, and generally it appears not to have impacted commanders in the field. Nonetheless, it is unhealthy and must be resolved.”⁷⁹ Unfortunately, in 2006, perhaps due to the rushed pace of legislation,⁸⁰ Congress failed to recognize the Bush administration’s second attempt to undermine the uniformed military and allowed for the creation of a civilian Convening Authority within the military commissions.

Taken together, what one can see from the Bush administration’s efforts to establish military commissions by executive order in 2001, to diminish the authority of uniformed military attorneys in 2003, and to insert political control over the military commissions in 2006, is that there was a concerted organizational effort to establish enhanced political control at the expense of military culture. The Bush administration’s standard response to events which demonstrated the resistance of military culture to perceived violations of the rule of law was to diminish the power of the military, rather than to heed its advice. These points will become clearer in the sections that follow, as I will illustrate the clash between the existing military culture grounded in respect for international law and customs, and the emergent political culture within the Bush administration which sought a change in established doctrine as a means of achieving specific policy goals.

V. ORGANIZATIONAL CULTURE, ETHICAL BEHAVIOR, AND “PUSHBACK”

Some may question what impact the examples detailed above could have on an organization. In fact, as a normative matter it is fair to suggest

⁷⁷ Huckabee, *supra* note 71, at 10–11 (citing Pub. L. No. 108-375, § 574, 118 Stat. 1811; H. REP. NO. 108-767, at 682 (2004)).

⁷⁸ Huckabee, *supra* note 71, at 11–12 (citing LEGAL SERVICES IN THE DEP’T OF DEFENSE, ADVANCING PRODUCTIVE RELATIONSHIPS 18 (Sept. 15, 2005), available at http://www.wilmerhale.com/files/Publication/35196dbc-fad7-45ad-bc44-5c27d03b4897/Presentation/PublicationAttachment/745b0324-5de9-4d69-8d6f-5fec9cf3761f/Preston_DODReport_0905.pdf).

⁷⁹ Huckabee, *supra* note 71, at 12 (citing LEGAL SERVICES IN THE DEP’T OF DEFENSE, ADVANCING PRODUCTIVE RELATIONSHIPS 26 (Aug. 10, 2005) (draft)).

⁸⁰ See McNeal, *supra* note 38, at 1005–14.

that increased political controls over the military are, in the abstract, a good thing. In light of these considerations, one must consider whether a change in organizational culture can have an impact on ethical behavior. More specifically, can a change in organizational culture from an apolitical to a political one affect ethical decision-making within the military? How might such a change manifest itself? I contend that one way in which such a change might manifest itself is through a perception on the part of the military that their customs and practices, grounded in military culture and ethics, were being abandoned. On this point it is important to highlight some key observations noted by organizational theorists: “[o]rganizational culture involves a complex interplay of formal and informal systems that may support either ethical or unethical behavior.”⁸¹ Thus, an organizational culture like the military’s, which “emphasiz[es] ethical norms[,] provides support for ethical behavior.”⁸² Organizational leaders can thereby play a key role in establishing organizational culture by rewarding moral priorities and influencing how organizational members behave; “the presence or absence of ethical behavior in managerial actions both influences and reflects the culture.”⁸³ The implications of these theories for military decision making are clear; organizational members can take a variety of steps to reduce unethical behavior, such as “secretly or publicly reporting unethical actions to a higher level within the organization; secretly or publicly reporting unethical actions to someone outside the organization; secretly or publicly threatening an offender or a responsible manager with reporting unethical actions; or quietly or publicly refusing to implement an unethical order or policy.”⁸⁴ This type of reporting, or “push back,” can protect an existing organizational culture from change, can expose tension in an evolving organizational culture, and can shed light on what dissenters believe the culture of an organization should be. The example of push back by senior military attorneys against Bush administration counterterrorism policies illustrates these concepts.

In practical terms, the Bush administration’s counterterrorism policy development reflected a disregard for the potential impact that politically-motivated decisions, which failed to respect established organizational

⁸¹ HELLRIEGEL & SLOCUM, *supra* note 1, at 433 (explaining that “[f]ormal systems include leadership, structure, policies, reward systems, orientation and training programs, and decision making processes. Informal systems include norms, heroes, rituals, language, myths, sagas, and stories.”)

⁸² *Id.*

⁸³ *Id.* (“The organizational culture may promote taking responsibility for the consequences of actions, thereby increasing the probability that individuals will behave ethically. Alternatively, the culture may diffuse responsibility for the consequences of unethical behavior, thereby making such behavior more likely.”)

⁸⁴ *Id.*

practices within the military, could have on military culture. The goal of the Bush administration was to develop new “legal policy.” Legal policy can be defined as “those policies that shape the administration of justice.”⁸⁵ That is different from offering an interpretation of the law. It is a policy task. As one commentator described it, the question is: “What do you think the law *should* be? How do we think the administration of justice should be developed?”⁸⁶ For example, the Bush administration decided to disregard the advice of current and former senior military leaders and decided, as a matter of legal policy, that the Geneva Conventions did not apply to al-Qaeda detainees or to the treatment of detainees held in Guantánamo. Secretary of State Colin Powell, a retired Army General, noted with regard to the legal policy change proposed that:

It will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain. Europeans and others will likely have problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice. It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops. It will make us more vulnerable to domestic and international legal challenge and deprive us of important legal options.⁸⁷

Disregarding these insights grounded in the intricacies of military culture, Attorney General Alberto Gonzalez noted that “the argument based on military culture fails to recognize that our military remain bound to apply the principles of GPW because that is what you [the President] have directed them to do.”⁸⁸ This worldview fails to recognize the insights of organizational culture theory which posits that organizational cultures are resistant to changes that fail to respect deep-seeded practices, and that organizational cultures are responsive to the actions of leaders. Colin Powell was not the only prominent individual to criticize the Bush administration’s approach. Former Navy Judge Advocate General John Hutson described the

⁸⁵ Huckabee, *supra* note 71, at 23 (citing Philip D. Zelikow, *Legal Policy in the Twilight War*, 28 ABA NAT’L SECURITY L. REP. 2, 10 (July 2006), available at http://www.abanet.org/natsecurity/nslr.shtml#volume_26).

⁸⁶ Zelikow, *supra* note 85, at 9 (emphasis in original).

⁸⁷ Memorandum from Colin L. Powell, U.S. Sec’y of State, U.S. Dep’t of State to Alberto Gonzalez, Counsel to the President, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan 2–3 (Jan. 26, 2002), in 37 CASE W. RES. J. INT’L L. 615 (2006).

⁸⁸ Memorandum from Alberto Gonzalez, *supra* note 65, at 4.

departure from established military law advanced by the Bush administration as:

[S]hortsighted, narrow minded, and overly legalistic analysis. It's too clever by half, and frankly, just plain wrong. Wrong legally, morally, practically, and diplomatically. Once [Gonzales] reduced his legal analysis to simply the Geneva Conventions don't apply to terrorists without explaining what law, if any does apply, he created a downward spiral of unruliness from which we have not yet pulled out.⁸⁹

Hutson further noted that “[a] careful, honest reading reveals that the legal analysis of the January 2002 memo is very result oriented. It appears to start with the conclusion we don't want the Geneva Conventions to apply in the present situation, and then it reverse engineers the analysis to reach that conclusion.”⁹⁰

Political appointees at the top of the defense hierarchy transmitted the controversial policies detailed above throughout all levels of the military organization. In a policy memo, Secretary of Defense Donald Rumsfeld stated, “[t]he United States has determined that Al Qaida and Taliban individuals under control of the United States are not entitled to prisoner of war status for the purposes of the Geneva Conventions of 1949. . . . [T]he Combatant commanders shall transmit this order to subordinate commanders, including commander, Joint Task Force 160, for implementation.”⁹¹ He further noted “[t]he Combatant Commanders shall, in detaining Al Qaida and Taliban individuals under control of the United States, treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949.”⁹² This “military necessity” clause suggests that an exception to the law could be made based on any grounds that would rise to the level of “military necessity,” however that phrase was interpreted by those detaining al-Qaeda and Taliban members. This was a significant departure from U.S. policy and precedent, a point even John Yoo recognized when he noted that “United States practice in post-1949 conflicts reveals several instances in which our military forces have applied [the Geneva Conventions] as a matter of policy, without acknowledging any legal obligation to do so. These

⁸⁹ *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. (Jan. 6, 2005) (testimony of John D. Hutson, Dean and President of Franklin Pierce Law Center), available at <http://jurist.law.pitt.edu/hutson testimony.htm> (last visited Nov. 18, 2009).

⁹⁰ *Id.*

⁹¹ Memorandum from Donald A. Rumsfeld, Sec'y of Def. to the Chairman of the Joint Chiefs of Staff, Re: Status of the Taliban and Al Qaida (Jan. 19, 2002), available at <http://www.torturingdemocracy.org/documents> (last visited Nov. 18, 2009).

⁹² *Id.*

cases include the Wars in Korea and Vietnam and the interventions in Panama and Somalia.”⁹³

This is a substantial departure from years of military law and training which, according to the definitive military field manual on the subject, “has held that the Geneva Conventions apply and guide the conduct of U.S. military personnel in all international war-conflict situations.”⁹⁴ This departure from settled practice had an impact on the military’s organizational culture and the behavior of organizational members. For example, on October 11, 2002, the Commander of the Guantánamo Bay detention center sent his theater superior a memo requesting that he approve certain interrogation techniques, techniques which had previously been viewed as illegal and contrary to the military’s accepted practices.⁹⁵ The request include a legal review by the commander’s Staff Judge Advocate (SJA) who, despite being a member of the military, relied in large part on the directives from politically appointed attorneys with no ties to the military’s organizational culture. The SJA found no violations of applicable federal law.⁹⁶ The request from the Guantánamo Bay detention center commander and associated legal document represented “a distinct departure from Army custom, training, and policy as embodied in Army Field Manual (FM) 34-52, Intelligence Interrogation. This Army policy manual is enforced by the Uniform Code of Military Justice (UCMJ), 18 U.S.C. § 2340,” making it binding as a legal document.⁹⁷

Organizational cultures do not change without significant resistance,⁹⁸ and in fact oftentimes display “defensive routines” that prevent culture changes from coming about.⁹⁹ In the case of the Bush administra-

⁹³ Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice to William J. Haynes II, Gen. Counsel, Dep’t of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, at 25 (Jan. 9, 2002), *available at* <http://www.torturingdemocracy.org/documents> (last visited Nov. 18, 2009).

⁹⁴ Huckabee, *supra* note 71, at 31 (citing U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956)).

⁹⁵ Memorandum from Michael B. Dunlavey, Major Gen., to Comm’r, U.S. S. Command, Re: Counter-Resistance Strategies (Oct. 11, 2002), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>.

⁹⁶ See Memorandum from Daine E. Beaver, Lieutenant Colonel, to Comm’r JTF 170, Re: Legal Review of Aggressive Interrogation Techniques (Oct. 11, 2002), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>.

⁹⁷ Huckabee, *supra* note 71, at 37–38.

⁹⁸ Edgar H. Schein, *Culture: The Missing Concept in Organization Studies*, 41 ADMIN. SCI. Q. 235 (1996) (noting that “new methods of learning or solving problems do not diffuse or even become embedded in the organizations that first used them.”).

⁹⁹ See CHRIS ARGYRIS AND DONALD A. SCHÖN, ORGANIZATIONAL LEARNING II: THEORY, METHOD AND PRACTICE (1996) (noting that organizations have defensive routines that get in the way of the kind of second-order learning that may be needed in today’s turbulent world).

tion's interrogation policy, resistance was demonstrated by the U.S. Department of the Navy General Counsel Alberto J. Mora who complained of wrongdoing within the Guantánamo detention facility and elsewhere.¹⁰⁰ Mora was concerned that interrogation abuses were occurring at Guantánamo and that Navy Criminal Investigation Service agents believed acts were occurring which were "unlawful and contrary to American values, and that discontent over these practices were reportedly spreading among the personnel at the base."¹⁰¹ In a memorandum detailing his efforts to fight against the legal policy change and its associated impact on military culture, Mora noted his initial skepticism regarding such a blatant effort to change settled law and organizational practices. He stated that he thought the abuses and the memos which supported them were "almost certainly not reflective of conscious policy but the product of oversight—a combination of too much work and too little time for careful legal analysis or measured consideration."¹⁰² In his words, following a meeting with Department of Defense General Counsel Jim Haynes, Mora "left confident that Mr. Haynes, upon reflecting on the abuses in Guantanamo and the flaws in the December 2nd Memo and underlying legal analysis, would seek to correct these mistakes by obtaining the quick suspension of the authority to apply the interrogation techniques."¹⁰³ Weeks later, when the authority to engage in the abusive techniques had not been rescinded, Mora "began to wonder whether the adoption of the coercive interrogation techniques might not have been the product of simple oversight . . . but perhaps a policy consciously adopted—albeit through mistaken legal analysis—and enjoying at least some support within the Pentagon bureaucracy."¹⁰⁴

Mora subsequently confronted for a second time Department of Defense Counsel Haynes who informed Mora that the techniques being used in Guantánamo were necessary to obtain information from Guantánamo detainees who were thought to be involved with the 9/11 attacks and other ongoing al-Qaeda operations. Mora further asserted, in reference to military culture and respect for the rule of law, that:

Even if one wanted to authorize the U.S. military to conduct coercive interrogations, as was the case in Guantanamo, how could one do so without profoundly altering [the military's] core values and character? Societal education and military training inculcated in our soldiers' American values

¹⁰⁰ See Memorandum from Alberto J. Mora, Gen. Counsel, U.S. Dep't of the Navy to Vice Admiral Albert Church, Inspector Gen., U.S. Dep't of the Navy, Statement for the Record, Office of General Counsel Involvement in Interrogation Issues, at 4 (Jul. 7, 2004), in 37 CASE. W. RES. J. INT'L L. 615 (2006).

¹⁰¹ *Id.* at 7.

¹⁰² *Id.* at 8.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 9.

adverse to mistreatment. Would we now have the military abandon these values altogether? Or would we create detachments of special guards and interrogators, who would be trained and kept separate from other soldiers, to administer these practices?¹⁰⁵

Mora was not alone in his concerns regarding the palpable impact these legal policy changes, coming from political appointees (within the Office of Legal Counsel) would have on the military's organizational culture. The Air Force Deputy Judge Advocate General at the time stated:

[T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral "high-road" in the conduct of our military operations regardless of how others may operate. . . . We need to consider the overall impact of approving extreme interrogation techniques as giving official approval and legal sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.¹⁰⁶

Echoing these sentiments, Rear Admiral Michael F. Lohr, the Navy Judge Advocate General, questioned whether "the American people [will] find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values? . . . [I]s this the 'right thing' for U.S. military personnel?"¹⁰⁷ Similarly, the Staff Judge Advocate to the Commandant of the Marine Corps stated, "[t]he common thread among our recommendations is concern for servicemembers. OLC does not represent the services; thus, understandably, concern for servicemembers is not reflected in their opinion. Notably, their opinion is silent on the UCMJ and foreign views of international law."¹⁰⁸

These efforts on the part of senior military attorneys fit within an organizational culture theory definition of whistle blowing. Specifically, "[w]histle-blowing is the disclosure by current or former employees of illegal, immoral, or illegitimate organizational practices to people or organi-

¹⁰⁵ *Id.* at 11.

¹⁰⁶ Memorandum from Maj. Gen. Jack L. Rives, Deputy Judge Advocate Gen., U.S. Dep't of the Air Force to Mary L. Walker, Gen. Counsel, U.S. Dep't of the Air Force, Final Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism, at 2 (Feb. 5, 2003), *in* 37 CASE W. RES. J. INT'L L. 615 (2006).

¹⁰⁷ Memorandum from Rear Admiral Michael F. Lohr, Judge Advocate Gen., U.S. Dep't of the Navy to Mary L. Walker, Gen. Counsel, U.S. Dep't of the Air Force, Working Group Recommendations Relating to Interrogation of Detainees (Feb. 6, 2003), *in* 37 CASE W. RES. J. INT'L L. 615 (2006).

¹⁰⁸ Memorandum from Kevin M. Sandkuhler, Staff Judge Advocate to CMC, U.S. Marine Corps to Mary L. Walker, Gen. Counsel, U.S. Dep't of the Air Force, Working Group Recommendations on Detainee Interrogations (Feb. 27, 2003), *in* 37 CASE W. RES. J. INT'L L. 615 (2006).

zations that may be able to change the practice.”¹⁰⁹ Whistle-blowers often-times “lack the power to change the undesirable practice directly and so [the whistle-blower] appeals to others either inside or outside the organization.”¹¹⁰ In an organizational theory sense, the senior military attorneys referenced above were whistle-blowers (even if they do not meet the statutory requirements for whistle-blower protection).¹¹¹ The important point from an organizational culture perspective is how these efforts represented both an effort to preserve the existing military culture and an effort to resist the imposition of a new politically motivated, and perhaps ethically questionable organizational culture.

VI. IMPLICATIONS FOR LEGAL ETHICS

What do the organizational culture considerations detailed above tell us about the role of military lawyers when faced with challenges to military culture and legal ethics? The Model Rules of Professional Conduct require lawyers to report another lawyer’s misconduct if that conduct “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer”¹¹² Subordinates cannot hide behind a superior or supervisory lawyer’s instructions, unless the supervisory lawyer’s instructions reflect a “reasonable resolution of an arguable question of professional duty.”¹¹³ Despite these rules, Andrew Perlman notes that “research in the area of social psychology suggest that, in some contexts, a subordinate lawyer will often comply with unethical instructions.”¹¹⁴ Stated differently, there seems to be a “significant gap between what the legal ethics rules require and how lawyers will typically behave.”¹¹⁵ In light of these observations, what is remarkable about the resistance by some military attorneys to the efforts of the Bush administration to alter the military’s ethical warrior ethos was the public and strenuous resistance mounted by these members of the military. Conventional wisdom would suggest that members of the military, accustomed to taking orders, would have merely saluted and executed the

¹⁰⁹ HELLRIEGEL & SLOCUM, *supra* note 1, at 433 (emphasis omitted).

¹¹⁰ *Id.* See also Janet P. Near et al., *Does Type of Wrongdoing Affect the Whistle-Blowing Process?*, 42 BUS. ETHICS Q. 219 (2004); Dae-il Nam & David J. Lemak, *The Whistle-Blowing Zone: Applying Barnard’s Insights to a Modern Ethical Dilemma*, 13 J. MGMT HIST. 33 (2007); Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757 (2007).

¹¹¹ See, e.g., Michael P. Scharf & Colin T. McLaughlin, *On Terrorism and Whistle-Blowing*, 38 CASE W. RES. J. INT’L L. 567, 575–78 (2007).

¹¹² MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2004).

¹¹³ *Id.* R. 5.2(b).

¹¹⁴ Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 451–52 (2007).

¹¹⁵ *Id.* at 452.

orders of their superiors. I contend that the fact that they did not is grounded in the durability of the military's organizational culture.

Military culture is steeped in legal rules and ethical constraints and a respect for the role of leaders within the military hierarchy. As Martin Cook notes:

Morally serious and thoughtful military officers feel a deep tension in the moral basis of their profession. On the one hand, there are very few places in our society where the concepts of duty and service above self have such currency. On the other hand, there is the reality that the military exists to serve the will of the political leadership of a particular state and will, at times, be employed for less-than-grand purposes.¹¹⁶

Another aspect of military culture is the recognized role of leaders in shaping the behavior of their subordinates; this leadership role is echoed in the literature on organizational culture which posits that leaders play a role in establishing and changing organizational culture.¹¹⁷ But if members of the military embrace the concept of obedience to orders, what explains their resistance to the efforts of the Bush administration? This is an especially apt question in light of the fact that "[s]tudies on conformity and obedience suggest that professionals, whom we would ordinarily describe as 'honest,' will often suppress their independent judgment in favor of a group's opinion or offer little resistance in the face of illegal or unethical demands."¹¹⁸ Perhaps a key element of the resistance of military lawyer's was the fact that the term culture, as I am using it here, refers to "an evolved context . . . rooted in history, collectively held, and sufficiently complex to resist many attempts at direct manipulation."¹¹⁹ Resistance on the part of military attorneys was more than just a behavior or a climate; it was rooted in deeply held beliefs developed through life within the military organizational environment and culture.

Earlier, I noted that the service judge advocates voiced overwhelming resistance to the efforts of the Bush administration. To fully understand what prompted that resistance, it is instructive to look specifically at the grounds on which these senior military attorneys advanced their concerns. The Air Force Deputy Judge Advocate General noted a concern for historic

¹¹⁶ MARTIN L. COOK, *THE MORAL WARRIOR: ETHICS AND SERVICE IN THE U.S. MILITARY* 39 (2004).

¹¹⁷ See, e.g., Gerard George et al., *Organizing Culture: Leader Roles, Behaviors, and Reinforcement Mechanisms*, 13 J. BUS. & PSYCHOL. 545 (1999).

¹¹⁸ Perlman, *supra* note 114, at 453 (footnote omitted).

¹¹⁹ Daniel R. Denison, *What is the Difference Between Organizational Culture and Organizational Climate? A Native's Point of View on a Decade of Paradigm Wars*, 21 ACAD. MGMT REV. 619, 644 (1996) (emphasis omitted).

practice, the “legal and moral ‘high road,’” and the impact on U.S. forces.¹²⁰ Similarly, the Navy Judge Advocate General questioned the Bush administration’s policies on values grounds, while the Staff Judge Advocate to the Commandant of the Marine Corps noted the overarching concern for servicemembers.¹²¹ Distilling the central concerns of these senior military attorneys provides insights which are grounded in the literature in legal ethics. One factor which scholars have noted can impact ethical compliance is one’s perception of the impact compliance or non-compliance can have on victims. For example, psychologist Stanley Milgram conducted psychological experiments to determine when people will follow unethical or immoral orders of an authority figure.¹²² Legal scholars have extrapolated from those experiments key variables which will prompt attorneys to not comply with ethical rules—one of those key variables is “the physical separation of the person carrying out the orders and the victim”¹²³ The senior military lawyers who resisted the Bush administration’s legal policies seem to have perceived the victims of these policies as service members, not detainees, and their concerns were aimed at those victims who they, as senior military leaders, were responsible for leading.

Moreover, members of the military in general and senior military leaders in particular are trained to take responsibility for their actions and not to blame actions (even unfavorable ones) on orders from superiors. Thus, while in some contexts subordinates may “discount their responsibility for their conduct . . . by shifting moral responsibility to the person issuing orders,”¹²⁴ military officers see themselves as the person responsible for issuing orders and are trained to resist orders which they believe are unlawful and to do so without equivocation; military officers do not enjoy the luxury of questioning whether (to paraphrase Model Rule 5.2) their superior reasonably resolved an arguable question of legality. Unlike an attorney who, facing ambiguous legal and ethical duties may frequently find that a supervisory lawyer’s instructions are reasonable,¹²⁵ military officers are trained to recognize that the defense of superior orders will not protect them from wrongdoing.¹²⁶

¹²⁰ Memorandum from Maj. Gen. Jack L. Rives, *supra* note 106, at 2.

¹²¹ See Memorandum from Kevin M. Sandkuhler, *supra* note 108.

¹²² See STANLEY MILGRAM, OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

¹²³ Perlman, *supra* note 114, at 462.

¹²⁴ *Id.* at 466.

¹²⁵ See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 3–10 (1988).

¹²⁶ See, e.g., FIELD MANUAL 27-10, *supra* note 94, ¶ 509(a). The provision reads:

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to

Another factor cited in the legal ethics literature which may prompt unethical compliance but which is less applicable to military attorneys is the fact that professional and financial self-interest is less relevant to military officers. In a civilian setting a subordinate lawyer has much to lose by refusing to obey. For example, in the case of attorneys in the Office of Legal Counsel, they stood to lose prestigious politically appointed positions¹²⁷ with the possibility of successive appointments with greater responsibility¹²⁸ or even a position in the federal judiciary.¹²⁹ While military attorneys may share similar political interests, appointment as a service staff judge advocate is truly the pinnacle of a military attorney's career. Thus, military attorneys in general, and senior military attorneys specifically, were not only steeped in a military culture which armed them to resist controversial policies, but they also did not face the type of professional and financial concerns which could have moderated their resistance; in fact, their job security emboldened them.

These observations have implications for the literature on legal ethics, as senior military attorneys in some instances behaved in a manner consistent with the legal ethics and social psychology literature, but in other instances departed in their behavior from what the social psychology and legal ethics literature would have predicted. First, military attorneys, steeped in military culture, values, and training, publicly and strenuously objected to orders which ran counter to their ethical obligations, despite the fact that those orders came from superior officials. Second, the military attorneys viewed other servicemen as the victims of the new policies being urged by the Bush administration, suggesting that personalizing the impact of legal policy can encourage ethical behavior. Finally, the fact that the senior military attorneys were financially secure and not subject to the allure of immediate benefits in the form of promotions or political appointments

know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

Id.

¹²⁷ See, e.g., Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 *FORDHAM INT'L L.J.* 642, 644 (2007) ("While government lawyers do not bill by the hours, they do compete for power, prestige, and influence. In the national security arena, government lawyers compete for influence on decision-makers by signaling their willingness to tolerate conduct that is close to the line of legality."). See also Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 *RUTGERS L. REV.* 939 (2006).

¹²⁸ John Yoo was floated as a possible Assistant Attorney General candidate to head the Office of Legal Counsel.

¹²⁹ Head of the Office of Legal Counsel Jay Bybee went on to be appointed as a judge in the Ninth Circuit, while Department of Defense General Counsel Jim Haynes was unsuccessfully nominated for a judgeship on the 4th Circuit Court of Appeals.

reinforces the legal ethics literature's predictions regarding professional and financial self interest.

VII. CONCLUSION

In this essay I have outlined some key points of intersection between the social scientific literature on organizational culture and the legal ethics literature. First, I detailed a framework for assessing organizational culture and detailed how organizational culture reflects more than rules and structure within an organization, but rather represents deeper values, practices, and ways of thinking. Organizational culture is a response to external factors and is exhibited most strongly in an organization's need to survive. Organizational culture is difficult to change, but, as the examples above illustrate, it can be modified or sustained through power, status, rewards, and other mechanisms. Second, the examples detailed above demonstrate how the Bush administration tried unsuccessfully to exercise control over a military culture which was resistant to its legal policy initiatives. This effort at control manifested itself in the creation of the military commissions in 2001, an attempt to minimize the influence of military attorneys in 2003, and efforts to exercise political control over military commissions in 2006. Finally, members of the military successfully resisted these efforts to modify their organizational culture and exercise greater political control over the military through legal policy innovations. This resistance was accomplished through objections to orders which ran counter to military values. Taken together, these observations suggest that the literature on organizational culture can provide insights into the literature on legal ethics and political control of the military specifically and political control of bureaucracies more generally.