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I. INTRODUCTION

When the development of legal policies regarding detainees during the war on terror is viewed uncritically, it is easy to understand the cynicism surrounding it. Although U.S. officials have asserted that these detentions were ultimately necessary for the preservation of democracy, legal pronouncements often seemed far more hegemonic.[1] Indeed, in the immediate aftermath of 9/11, the system of checks-and-balances appeared to have been overdrawn by the executive, and neither the legislature nor the judiciary was eager to immediately intervene to limit the perceived presidential overreach.[2] When the Supreme Court finally did, its efforts were viewed by some as attempts to seize authority vested by the Constitution in the President or legislature.[3] The issue of detentions during the war on terror quickly spiraled into "only one more

1. *See* President Barack Obama, Remarks by the President on National Security: Our Security, Our Values (May 21, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/) ("[T]he decisions that were made over the last eight years established . . . a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass."); JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR x (2007) ("As patriots of democratic freedom understand, [actions by the Bush administration] threaten our democracy and the rule of law."); ALASDAIR ROBERTS, THE COLLAPSE OF FORTRESS BUSH: THE CRISIS OF AUTHORITY IN AMERICAN GOVERNMENT 3 (2008) (citation omitted) (noting that in the United States, "the Bush administration was alleged to have launched a 'rolling coup' against the U.S. Constitution").

2. In fact, one scholar has asserted that "[t]he bias towards aggressive action . . . is not unique to the executive. Legislators must appear responsive to the life and property interests of citizens. In the four months following 9/11, 97 percent of all bills, resolutions, and amendments proposed by Congress . . . were related to terrorism." Laura K. Donohue, *The Perilous Dialogue*, 97 CAL. L. REV. 357, 370 (2009) (citations omitted).

3. *See*, *e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2279 (2008) (Roberts, C.J., dissenting) (suggesting that the majority's decision was "not really about the detainees at all, but about control of federal policy"); Rasul v. Bush, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting) ("For this Court to create such a monstrous scheme [of habeas corpus review for foreign nationals detained at Guantanamo Bay] in time of war . . . is judicial adventurism of the worst sort."); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 574 (2006) (arguing that the Court "unwisely injected itself into military matters" and "press[ed] the federal courts far beyond their normal areas of expertise").

episode in the never-ending tension between the President exercising executive authority . . . and the Constitution," which "embodies *some sort* of system of checks and balances."[4] The problem was, though, that no one within the government seemed to be sorting out precisely what sort of checks and balances system was necessary.

In light of these institutional tensions, it is no wonder that some have questioned whether the three branches of government even shared the same end-goal of preserving democracy.[5] Arguably, however, this institutional friction is as much an example of what is right with a constitutional democracy as it is of what is wrong with it. Created in this case by the exigencies of war, this tension often arises when the Constitution does not explicitly delegate to any one branch exclusive authority to act, and consequently each branch assumes that it must intervene in order to preserve fundamental rights.[6] The trouble is that "[a] society intent on achieving the highest liberty for all runs smack into a basic institutional quandary: liberty requires both protection *by* the government and protection *from* the government."[7]

This problem and the concomitant challenge of "deciding who decides"[8]—particularly as pertaining to detainee issues during the war on terror—is the focus of this Comment. Admittedly, the study of institutional choice is not novel,[9] nor are more general inquiries into which branch of government has the institutional competency

4. Dames & Moore v. Regan, 453 U.S. 654, 662 (1981) (emphasis added).

5. *See*, *e.g.*, CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007); Nadine Strossen, *American Exceptionalism, the War on Terror, and the Rule of Law in the Islamic World*, 32 HARV. J.L. & PUB. POL'Y 495, 495 (2009) ("[T]he 'War on Terror' has violated . . . fundamental precepts of the Federalist Society in numerous ways, with devastating consequences for liberty, democracy, and national security alike.").

6. *See* Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721, 724 (2007).

7. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 43 (1994); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) ("This case brings into conflict the competing demands of national security and our citizens' constitutional right to personal liberty.").

8. KOMESAR, *supra* note 7, at 3.

9. *See*, *e.g.*, Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225 (2005); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 106–14 (2009); Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557 (2002).

to address particular vexing questions.[10] But, as explained more fully below, existing scholarship has failed to provide comprehensive answers regarding how and when power ought to be allocated between, and exercised by, the government's three branches.[11] For the most part, these failings have occurred because the executive, legislature, and judiciary are too often viewed as simplistic, frictionless institutions.[12] In recognition of this shortfall, Neil Komesar, a prominent law and public policy scholar, has proposed a novel analytic approach to examine institutions comparatively and determine when intervention by one branch over another would offer a superior outcome.[13] Though Komesar's focus has not been directed specifically on the war on terror, his theory nevertheless provides a potential resolution to the issues surrounding the institutional tensions that have arisen within that context.

This Comment thus explores institutional frictions and the development of legal policies related to detainee issues within the framework of Komesar's comparative institutional analysis theory. In order to understand the value of comparative institutional analysis, Part II discusses previous attempts to determine "who decides" and explains why these theories have failed to fully resolve the problem of how and when decision-making power should be allocated to any specific branch of government. Part III explains Komesar's comparative institutional analysis theory, and highlights ways in which this approach fills the gaps left by previous theories. Part IV applies Komesar's theory to the institutional frictions that arose as detainee policies were created by the U.S. government. Part V concludes with the proposition that applying comparative institutional analysis to post-9/11 legal policies highlights the theory's utility and can also serve to alleviate cynicism related to the development of law during times of crisis.

10. *See, e.g.*, Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255 (1996); Michael H. Page, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 CORNELL L. REV. 1243, 1267–75 (2008).

11. *See* KOMESAR, *supra* note 7, at 233.

12. *Id.* at 39.

13. *See id.* at ix–x.

II. PREVIOUS EFFORTS TO "DECIDE WHO DECIDES"

Because the Constitution is often vague as to how and when any particular branch of government may intervene into a particular issue, scholars have proposed a number of disparate approaches to resolve these questions. Most prominently, these have included attempts to assign power based on original intent, the protection of fundamental rights, law and economics, or institutional choice. Unfortunately, as the following survey reveals, though these efforts have provided some insight into the issue of who decides, each has failed to yield a wholly satisfactory answer.

A. Original Intent

Essentially, proponents of an original intent approach to allocation of powers suggest that deciding who decides ought to be done in accord with the intent of the Constitution's Framers.[14] Adherents claim this is necessary because the Framers themselves ratified the Constitution with such a presupposition and expected their intent to inform future decision-making processes.[15] Under this approach, proposals to vest authority in any particular branch based on the belief that it would be best suited to apply a philosophical or moral theory are generally rejected.[16] "Thus, for example, although the Constitution emerged in the general context of modern natural rights theory, most originalists deny that the judiciary is therefore legitimately enabled to invoke such theory for creating rights beyond those enumerated in the document."[17] Instead, the original intent approach would suggest that the choice as to which institution should make a particular decision was decided long ago—by the Framers of the Constitution.[18]

Though original intent certainly has influenced modern constitutional theory,[19] its assumptions have been questioned and,

14. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886 (1985).

15. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 365–66 (1977).

16. JOHNATHAN GEORGE O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 2 (2005).

17. *Id.* (citation omitted).

18. *See* KOMESAR, *supra* note 7, at 197.

19. *See*, *e.g.*, BERGER, *supra* note 15, at 364 (arguing that theories beyond original intent constitute judicial attempts "to revise the Constitution"); Antonin Scalia, *Originalism:*

perhaps more importantly, its practical application has often fallen flat. Scholars assert, for example, that historical evidence does not support the notion that the Framers wished to impose their intent in perpetuity.[20] Moreover, even if they did, the fact remains that "original intent" is not always discoverable.[21] Difficulties related to ambiguities of language and the enterprise nature of the Constitution's drafting make discerning intent nearly (if not entirely) impossible.[22] More to the point, as pertaining to allocation of decision-making powers, "[t]he brief text of the Constitution offers little detail on specific substantive outcomes or even on institutional allocation; most of the detailed provisions in the Constitution concern institutional design."[23] In the end, therefore, while original intent may offer a starting point as to how decision-making authority should be divided amongst the branches, it fails to offer a completely cogent approach.

B. Protection of Fundamental Rights

In contrast to the original intent approach, proponents of fundamental rights analysis suggest that the desire to protect certain essential values, such as equality, liberty, and justice, ought to drive determinations about which branch should be allocated decision-making powers.[24] As used in the present context, the fundamental rights approach entails determining which branch of government could best preserve these rights and should, therefore, be given the relevant authority to do so. Usually, proponents of this theory support the proposition "that the *Supreme Court* should give content to the Constitution's open-ended provisions by identifying

The Lesser Evil, 57 U. CIN. L. REV. 849, 863 (1989) ("While it may indeed be unrealistic to have substantial confidence that judges and lawyers will find the correct historical answer to such refined questions of original intent as the precise content of 'the executive Power,' for the vast majority of questions the answer is clear."); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986) ("[O]riginal intent is the only legitimate basis for constitutional decisionmaking.").

20. *See* Powell, *supra* note 14, at 948.

21. For an interesting post-9/11 example of this, see Boumediene v. Bush, 128 S. Ct. 2229, 2244–51 (2008). There, after trying to discern whether the Framers would have intended for the writ of habeas corpus to extend to detainees at Guantanamo Bay, the Court declined to "infer too much, one way or the other, from the lack of historical evidence on point." *Id.* at 2251.

22. *See*, *e.g.*, KOMESAR, *supra* note 7, at 263.

23. *Id.*

24. *See id.* at 255–59.

and enforcing upon the political branches those values that are, by one formula or another, truly important or fundamental."[25] In *Hamdi v. Rumsfeld*, for example, a plurality of the Court noted that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[26]

Unfortunately, this approach also fails to fully address issues related to the separation of powers. For one thing, because there is no clear means of determining which values are essential, decision-makers "can make serious mistakes in identifying fundamental rights."[27] One scholar has sardonically suggested, for instance, that the preeminent example of this is *Lochner v. New York*, when the Supreme Court held that the right of bakers to work more than sixty hours per week was fundamental.[28] Decisions of this nature are indicative of the difficulties surrounding attempts to precisely discern fundamental rights, and can lead to skepticism that they even exist. Even more challenging, those rights generally thought of as fundamental are often in conflict with one another and there is no clear means of establishing a hierarchy as to which right is *more* fundamental. "[V]ague, idealized institutions" thus "easily support polar opposite constitutional responses" to the question of how best to protect these essential values.[29] The institutional tensions related to detainee issues provide a perfect example of this, with the President operating to protect the liberty and security of the general American public and the Supreme Court intervening to check executive authority and preserve individual liberties.[30] This conflict

25. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 43 (1980) (emphasis added); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1943-1946 (4th ed. 1873) ("When life and liberty are in question there must in every instance be judicial proceedings . . . .").

26. 542 U.S. 507, 536 (2004).

27. DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE 175 (2007).

28. *Id.*

29. KOMESAR, *supra* note 7, at 43.

30. *See*, *e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2279 (2008) (Souter, J., concurring) (responding to the dissenters' claim that the majority had engaged in "triumphalism" by asserting that the authority of the executive "is necessarily limited by habeas corpus jurisdiction to enquire into the legality of executive detention"); Hamdan v. Rumsfeld, 548 U.S. 557, 677 (2006) (Scalia, J., dissenting) (criticizing the majority for interrupting

highlights the fact that the "choice of social goals or values is insufficient to tell us [much] about law and public policy."[31]

C. Law and Economics

Another approach to deciding who decides has been put forth by legal economists. While law and economics is a diverse and complex field, as relevant here, one of the discipline's primary objectives is to maximize efficiency.[32] Thus, in making determinations about which institution should be given authority to make various decisions, legal economists posit that the distribution should be based on a comparison of associated institutional costs. Law and economics was accordingly an early predecessor to institutional choice, since "[t]ransaction cost economics is inherently comparative."[33]

As an example, one might examine the costs associated with access to different institutions in order to determine which could most efficiently address a particular matter. Scholars have noted, for instance, that though Congress is "responsive to public pressure as reflected through the media and constituents," legislative access usually depends on campaign contributions and political support.[34] Conversely, while not influenced by such interests groups, courts have their own access costs given the time and expense associated with the litigation process.[35] The point, according to legal economists, is to evaluate the legal issue at hand to determine which institution could address it most efficiently in light of these costs.

Despite the fact that law and economics analysis may result in the most efficient solution to a problem, the discipline has been widely criticized. Paramount among the critiques is the observation that

military commissions the President had deemed necessary for national security); Hamdi v. Rumsfeld, 542 U.S. 507, 528 (2004) (acknowledging "the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right").

31. KOMESAR, *supra* note 7, at 271.

32. *See* Margaret Oppenheimer & Nicholas Mercuro, *Law and Economics: Making the Case for a Broader Approach*, *in* LAW AND ECONOMICS: ALTERNATIVE ECONOMIC APPROACHES TO LEGAL AND REGULATORY ISSUES 3, 5 (Margaret Oppenheimer & Nicholas Mercuro eds., 2005).

33. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1413 (1996).

34. Yoo, *supra* note 3, at 592.

35. *Id.*

efficiency alone fails to account for principles of social justice.[36] In other words, while it may be more costly for one particular institution to address a legal challenge, that institution may nevertheless offer other compelling advantages. Similarly, law and economics has also been disparaged for commodifying legal rights.[37] If rights truly are "fundamental," it would thus be inappropriate to withhold them solely in the name of efficiency. Finally, detractors also note that, often, there is a failure to adequately capture all relevant costs and, consequently, sole reliance on an efficiency calculus inaccurately skews the decision allocation process.[38] For these reasons, law and economics as a mechanism to decide who decides ultimately fails to provide wholly adequate guidance to those charged with resolving these difficult issues.

D. Institutional Choice

While the aforementioned approaches have failed to independently address the issue of "who decides," each offers valuable insight into the process of allocating decision-making authority. In an effort to capture and build on those insights, "a new, unified methodology for legal scholarship based on the analysis of institutions" emerged in the mid-1990s.[39] Essentially, institutional analysis calls for an examination of how various legal institutions operate and which would therefore be best suited to pursue certain objectives.[40] Institutional choice theorists claim that achieving desired results occurs only if decision-making authority related to those goals is allocated to the "right" institution.[41] The organizations relevant to this analysis depend on the legal issue at hand, but may include the market, judiciary, executive, legislature, administrative agencies, and perhaps even the international

36. *See* Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 470–71 (Peter Newman ed., 1998).

37. *See* Spencer Weber Waller, *The Law and Economics Virus*, 31 CARDOZO L. REV. 367, 367–68 (2009).

38. *See* Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829, 860 (2009).

39. Rubin, *supra* note 33, at 1424.

40. Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 593 (1998).

41. KOMESAR, *supra* note 7, at 5 ("It is institutional choice that connects goals with their legal or public policy results.").

community. Once the relevant institutions are identified, their particular competencies must be examined in order to determine which can appropriately address any given legal quandary. For present purposes, an understanding of the more widely recognized institutional competencies of the executive, legislative, and judiciary is important.

1. The executive

Generally, the principal advantages of executive authority are that it can be exercised quickly, flexibly, and decisively.[42] Moreover, given the centralized power of the executive branch, its actions are more unified, which is especially important in managing foreign affairs.[43] In times of war, the executive is often seen as the primary institutional actor because of the President's constitutional role as commander-in-chief.[44] Likewise, the executive is also generally presumed to be more informed about national security and foreign affairs issues. "Thus, unless Congress specifically has provided otherwise, courts *traditionally* have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[45] This, of course, is counterbalanced by the fact that, in light of electoral politics, executive action is tempered by popular will.

42. *See* JAMES M. MCCORMICK, AMERICAN FOREIGN POLICY & PROCESS 293–94 (2010).

43. *See*, *e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) ("The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("In th[e] vast external realm [of foreign affairs], with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."); Yoo, *supra* note 3, at 598.

44. U.S. CONST. art. I, § 2. Even in this area, there is debate, of course, as to how far inherent presidential authority extends. *See*, *e.g.*, Medellin v. Texas, 552 U.S. 491, 494 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 375 (2000); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

45. Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (emphasis added). *But see Hamdi*, 542 U.S. at 536 (noting that the Supreme Court has "long since made clear that a state of war is not a blank check for the President").

Indeed, "the President's accountability to the popular will is the best means of ensuring that he will do a decent job."[46]

However, for all the advantages of executive authority there are several features that can be troubling. While centralized power may be useful, for instance, insofar as it results in unified action, this centralization also makes the executive authority ripe for abuse. As one Supreme Court Justice aptly noted, "though we live under the form of a republic we [can be] in fact under the absolute rule of a single man."[47] Relatedly, unified authority may also lead to secretive policymaking and associated abuses—especially those directed against minorities.[48] For an example of this, one need not look beyond the war on terror. In late 2005, *The New York Times* broke a story regarding the executive decision to permit the National Security Agency to conduct warrantless wiretaps in the aftermath of 9/11.[49] While there were, perhaps, some members of Congress who were at least marginally aware of the program,[50] by and large members expressed outrage at being "rolled" by the executive.[51] This example highlights the fact that while the executive has the

46. ARTHUR M. SCHLESINGER JR., THE IMPERIAL PRESIDENCY 474 (1973) (arguing also that "the President's duty is not to ignore and override popular concerns but to acknowledge and heed them").

47. Letter from Justice Joseph Story to Hon. Judge Fay (Feb. 18, 1834), *in* 2 LIFE AND LETTERS OF JOSEPH STORY, at 154 (William W. Story ed., 1851). *See also* Obama, *supra* note 1 ("In our constitutional system, prolonged detention should not be the decision of any one man.").

48. *See* SCHLESINGER, *supra* note 46, at xx–xxi.

49. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

50. *Id.* (noting that while it was unclear precisely "how much the members of Congress were told about the . . . program," at least a few had been generally informed of it).

51. *See*, *e.g.*, *Turning Spy Satellites on the Homeland: The Privacy and Civil Liberties Implications of the National Applications Office: Hearing Before the H. Comm. on Homeland Sec.*, 110th Cong. 59 (2007) (statement of Hon. Jane Harman, Member, H. Comm. on Homeland Sec.). More fully, Rep. Harman observed that "we have been rolled on the Terrorist Surveillance Program in Congress. That thing was full blown before I as a member of the Gang of Eight was briefed on its operations." *Id.* Rep. Harman also stated that the Bush administration "feels free to disregard the law Congress passes in exercising the President's Commander in Chief authorities." *Id.* (The Gang of Eight includes "the Speaker and Minority Leader of the House, the Majority and Minority Leaders of the Senate, and the Chairmen and Ranking Members of the Congressional Intelligence Committees." REP. JOHN C. CONYERS, JR., THE HIGH CRIMES OF THE BUSH ADMINISTRATION AND A BLUEPRINT FOR IMPEACHMENT: DECEPTION, MANIPULATION, TORTURE, RETRIBUTION, ILLEGAL SURVEILLANCE, AND COVER-UPS 142 (2007)).

ability to quickly react to threats, the lack of deliberation may lead to uninformed—and perhaps even unconstitutional—responses.[52]

2. The legislature

By contrast, one of the strengths of the legislature is that its processes may lead to more deliberative and informed decision-making. For example, Congress can call upon executive officials and other experts to conduct studies or hearings before enacting legislation.[53] This arguably results in the avoidance of "imprudent wars that may be too costly and ineffective."[54] John Hart Ely has further argued that, as relating to the legislature's constitutional role in war-making, "the point [is] not to exclude the executive from the decision—if the president's not on board we're not going to have much of a war—but rather to 'clog' the road to combat by requiring the concurrence of a number of people of various points of view."[55] Another obvious advantage of the legislature is that, like the executive, it is designed to be responsive to popular will. In fact, the actions of legislators are thought to be even more representative, since they are more closely connected to the people.[56] Finally, because they too are subject to the vagaries of the electoral process, the presumption is that legislators' efforts will generally serve to advance the common good.[57]

Again, however, though the Framers may have envisioned that constitutional design would eliminate biases within the legislature, the reality is that the institution's operations often do fall prey to them. Most prominently, legislators have been criticized for

52. *See*, *e.g.*, Benham Gharagozli, *War of Words or a Regional Disaster? The (Il)legality of Israeli and Iranian Military Options*, 33 HASTINGS INT'L & COMP. L. REV. 203, 210 (2010) ("[T]he Bush Doctrine is not only unnecessary and dangerous as a matter of public policy, but is also illegal."); Dennis Jett, *Thoughts on the Changing Face of International Law*, 21 FLA. J. INT'L L. 161, 167 (2009) ("The Bush administration undoubtedly used torture and committed other illegal acts during its so-called war on terror.").

53. Yoo, *supra* note 3, at 593.

54. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2516 (2006). These authors ultimately argue, however, that "[a] cursory review of previous American wars does not suggest that requiring congressional authorization before the use of force invariably produces better decision-making." *Id.* at 2517.

55. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 4 (1993).

56. *See* William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1281 (2009).

57. Rubin, *supra* note 33, at 1397.

pandering to minority interest groups at the expense of the public's welfare.[58] Thus, a concentrated few are overrepresented in the eventual outcomes of legislative processes.[59] Alternatively, the legislature may also be overly influenced by the "power of majoritarian influence [that] can severely skew political results and produce what might be termed majoritarian bias, [or] the overrepresentation of the many."[60] In these cases, though the minority usually suffers the greatest harm, "it simply cannot overcome the power of the majority to outvote them," either because the minority's voting polity is simply not large enough or because its members are altogether excluded from the voting process.[61] Ultimately, if the legislative process suffers from either minoritarian or majoritarian bias, the "best" legislation is arguably sacrificed in order to satisfy a particular constituency.[62]

3. The judiciary

Given the biases just noted, the judiciary is often thought to protect individual liberty interests—especially of those in the minority—better than other institutions.[63] The primary reason for this is that "courts are designed to be independent from politics, to passively allow parties to drive the litigation, and to receive information in highly formal ways through litigation. These

58. *See*, *e.g.*, Yoo, *supra* note 3, at 592 ("It is generally thought that interest groups must provide campaign contributions or political support in order to attain access to political leaders . . . .").

59. *See* KOMESAR, *supra* note 7, at 55–56.

60. *Id*. at 54.

61. L. Song Richardson, *Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem*, 26 BERKELEY J. INT'L L. 62, 93–94 (2008).

62. It is worth noting, however, that these processes may in fact create the "best" legislation. Whether or not this is true depends, of course, on the values one expects to be preserved by the legislative process.

63. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 495 (1989) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)) ("[O]ne aspect of the judiciary's role under the Equal Protection Clause [may be] to protect 'discrete and insular minorities' from majoritarian prejudice or indifference . . . ."); Tonja Jacobi, *The Role of Politics and Economics in Explaining Variations in Litigation Rates in the U.S. States*, 38 J. LEGAL STUD. 205, 210 (2009) ("[T]he judiciary often protects minorities and disadvantaged groups."); Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067, 1099 (2008) ("The independent judiciary embodied in the U.S. Constitution, at least according to most non-popular constitutionalist accounts, is designed to protect individuals and minorities from overreaching by the majority.").

characteristics may make courts more neutral in their decision making and fairer in their attitude toward defendants or detainees."[64] To the extent that its decisions are publicly available, and that citizens can witness proceedings, the judiciary's decision-making process is also more transparent than that of the political branches.[65] Lastly, the judiciary is also generally thought to be more deliberative in its intervention and decision-making processes, which arguably leads to better results.[66]

Conversely, however, the deliberativeness of the judiciary may make it ill-suited for dealing with certain issues—especially those surrounding national security and war-making. On the one hand, the contemplative approach of the judiciary may fail in times of crisis because such circumstances require rapid and agile responses to address threats faced by the nation. On the other hand, once the judiciary does choose to intervene, its margin for error is arguably smaller than that of other branches, since opportunities for self-correction will be available with far less frequency.[67] The judiciary's purposive operations thus create situations where "[j]udicial errors or deviations from policy may take years to reverse or may even go entirely uncorrected."[68] Beyond issues of deliberativeness, the judiciary is also characterized as largely lacking in competence to address national security matters.[69] This incompetence springs from the fact that judges are generalists and that many issues are political questions best left to other branches.[70] Moreover, even if they possessed such competence, the relative lack of judicial resources

64. Yoo, *supra* note 3, at 591.

65. *See* Robert Stein, *Rule of Law: What Does it Mean?*, 18 MINN. J. INT'L L. 293, 301–02 (2009) ("The judiciary plays an essential role in giving life to other values, such as predictability and transparency.").

66. *See*, *e.g.*, Roger C. Hartley, *Congressional Devolution of Immigration Policymaking: A Separation of Powers Critique*, 2 DUKE J. CONST. L. & PUB. POL'Y 93, 157 (2007) ("The judiciary benefits . . . from a more reflective, deliberative lawmaking process.").

67. Yoo, *supra* note 3, at 599.

68. *Id.*

69. Competence here is defined as the ability of judges "to investigate, understand, and make the substantive social decisions that may come to them." KOMESAR, *supra* note 7, at 138. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2276–77 (2008) ("Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."); Yoo, *supra* note 3, at 597; KOMESAR, *supra* note 7, at 138–42. *But see* Obama, *supra* note 1 ("Some have derided our federal courts as incapable of handling trials of terrorists. They are wrong.").

70. *See*, *e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979); Yoo, *supra* note 3, at 597.

makes it such that courts "cannot call their own number too often."[71] Finally, because the judiciary is often seen as the protectorate of minorities, it is frequently placed in the unenviable position of having to adjudicate issues related to fundamental rights. As alluded to above, defining such rights, and resolving conflicts between them, is extremely difficult, and courts' attempts to do so have created skepticism about the actual neutrality of the judiciary.[72]

In sum, institutional choice analysts would suggest that decision-making authority for any specific issue ought to be allocated in light of these various institutional competencies. But while the theory has advanced legal scholarship by merging many of the underlying principles of the approaches outlined previously, it has also been the subject of criticism.[73] Most notably, Komesar has asserted that "[s]implistic, frictionless institutional specifications always make institutional choice trivial and empty."[74] In other words, institutional choice alone fails because it views the decision-making process through the lens of "single institutionalism," or, as a process that merely lists the advantages of one institution without making comparisons between them.[75] This analysis ultimately proves fruitless, since "[s]imply cataloging the available institutions without engaging in any comparison amongst them leaves unanswered the questions of which institution will *best* serve the desired policy."[76]

III. COMPARATIVE INSTITUTIONAL ANALYSIS

Komesar developed comparative institutional analysis to fill the vacuum left by these previous theories. In contrast to simple institutional choice, Komesar's theory calls for comparisons between

71. KOMESAR, *supra* note 7, at 250.

72. *See*, *e.g.*, *Boumediene*, 128 S. Ct. at 2279 (Roberts, C.J., dissenting) ("One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.").

73. *See* Richardson, *supra* note 61, at 69–70 (suggesting that institutional choice alone is insufficient, because "all institutions can fail under similar circumstances," so a comparative view is necessary "to determine which is least likely to fail in a given context").

74. KOMESAR, *supra* note 7, at 39.

75. *Id.* at 199. For an important example of this, see Yoo, *supra* note 3, at 590–600. There, Yoo essentially offers a litany of reasons explaining why the judiciary lacks the capacity to address national security issues. While he calls his institutional analysis "comparative," there is no real indication as to why another branch would be *better* at addressing such matters. *Id.*

76. Richardson, *supra* note 61, at 73 (emphasis added).

institutions to determine which would be best suited to address a particular legal problem under a specific set of circumstances. "Under comparative institutional analysis, the appropriate question is not whether a particular institution works better in one setting than in another. Rather, the correct question is whether, in any given setting, one institution is better or worse than its available alternatives."[77] As suggested by the title of his book *Imperfect Alternatives*, Komesar begins with the assumption that every institution has its own malfunctions, and is therefore imperfect.[78] In light of these malfunctions, deciding who decides becomes a choice of which institution, imperfect though it may be, has the highest likelihood of achieving the desired result.

A full appreciation of the utility of comparative institutional analysis theory can be arrived at through a more thorough examination of some of the institutional malfunctions discussed above.[79] As explained by Ely:

> Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[80]

Given these circumstances, Ely asserts that the political process is simply incapable of policing itself; therefore, the judiciary's role is vital. While this conclusion seems intuitive, it rests on precisely the type of reasoning comparative institutional analysis challenges as overly simplistic. Such frictionless assessments "simply do not work in the complex world of institutional choice"[81] because the judiciary itself also has malfunctions which ought to be accounted for. The question thus becomes how the impact of these malfunctions can be quantified and relatively compared so that the institution with the

77. *Id*. at 70.

78. KOMESAR, *supra* note 7, at 6.

79. *See supra* notes 47–76 and accompanying text.

80. ELY, *supra* note 25, at 103.

81. KOMESAR, *supra* note 7, at 201.

best chance of reaching the desired result is given the necessary authority to do so.

When framed this way, it is easy to see why deciding who decides is so complex and situationally dependent. As one commentator has fittingly noted, society "cannot decide whether courts or legislatures can do a job better, in the abstract."[82] Indeed, though fundamental rights analysis on its own fails to entirely address questions about who should decide, the fact remains that even under comparative institutional analysis, the decision-making process will always be driven by the values people hope to protect. "One must know what the job is, [and] what values and goals one is trying to achieve or protect. Only then can one discuss whether people selected and sheltered—as judges are—make preferable decision makers to, say, people elected and exposed—as legislators are."[83]

IV. COMPARATIVE INSTITUTIONAL ANALYSIS & DETAINEE LEGAL ISSUES

This Part thus begins with the assumption that "the job" is to determine, using comparative institutional analysis principles, which institution within the U.S. government was best postured to address detainee issues at various points in the aftermath of 9/11. As mentioned above, this requires acknowledgement of the goals and values the American people wished to protect. Though there was no doubt some divergence amidst such a large polity, the principles of "freedom, fairness, equality, and dignity"[84] will serve as guideposts for this analysis since the President has stated that these goals should drive U.S. policy.[85] Beyond recognizing those values, however, one must also have an appreciation for the development of detainee policies, and the institutional malfunctions evident throughout their creation.

82. Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2124 (2003).

83. *Id*. at 2124–25.

84. Obama, *supra* note 1.

85. Importantly, these values exist in the American psyche in both the collective and individual sense, so individual liberty must be balanced against collective liberty interests preserved through national security.

A. Legal Framework for Detainee Issues

One week after the attacks of September 11, 2001, Congress enacted the Authorization for Use of Military Force (AUMF) granting the President authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . ."[86] Though the AUMF did not explicitly authorize detention of combatants captured on the battlefield, the Supreme Court addressed the issue in *Hamdi v. Rumsfeld*.[87] Recognizing the institutional tension created by its involvement in national security issues,[88] however, the Court "answer[ed] only the narrow question" of whether those individuals like Hamdi—a U.S. citizen captured in a combat zone—could be detained pursuant to the AUMF.[89] Because the plurality determined that such detentions were fundamentally incident to war-making, and that "[a] citizen, no less than an alien,"[90] could represent a force hostile to the United States, the majority held that Congress had inherently authorized such detentions via the AUMF.[91] Just as importantly, the Court also noted that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[92] Accordingly, the Court held that "due process demands some system for a citizen-detainee to refute his classification" as an enemy combatant.[93] Thus, while acknowledging the vital interest of the government to protect national security, the Court also asserted that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse."[94]

86. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

87. 542 U.S. 507 (2004).

88. *Id*. at 520 ("We recognize that the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable.").

89. *Id*. at 516.

90. *Id*. at 519.

91. *Id*. at 518. Given the statutory authority, the Court declined to address the constitutional question of whether such authorization was necessary in light of inherent authority the President may have as commander-in-chief.

92. *Id*. at 536.

93. *Id*. at 537.

94. *Id*. at 530.

The same day, the Court issued a similarly reasoned opinion in *Rasul v. Bush*.[95] In *Rasul*, the majority held that federal courts had jurisdiction to adjudicate habeas corpus petitions filed by foreign nationals detained at Guantanamo Bay, Cuba.[96] After a lengthy historical review of the purpose of the writ, the Court reached its conclusion based on the fact that "habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[97] In other words, the Court again appeared to rest its conclusion on its perceived duty to serve as a check against executive overreach. Such reasoning was criticized, however, by the dissenters.[98] They argued that, in light of Congress's superior institutional competence over national security issues, Congress, rather than the Court, should have addressed any perceived executive overreach.[99] The fact that it failed to do so, the dissenters asserted, should have served as a signal that Congress evidently approved of the President's actions.[100]

Both the executive and legislature responded swiftly to these decisions. On July 7, 2004, just days after the *Hamdi* and *Rasul* decisions, the executive issued an order establishing procedures whereby detainees could challenge their designation as enemy combatants.[101] To effect this purpose, the order created Combatant Status Review Tribunals (CSRTs), which essentially incorporated into their operational procedures the minimal due process protections the Court had required in *Hamdi*.[102] Likewise, in 2005, Congress passed the Detainee Treatment Act (DTA), essentially overruling *Rasul* by statutorily stripping federal courts of jurisdiction

95. 542 U.S. 466 (2004).

96. *Id*. at 485.

97. *Id*. at 474 (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001)).

98. *Id*. at 488–506 (Scalia, J., dissenting). Justice Scalia was joined in dissent by Justices Rehnquist and Thomas.

99. *See id*. at 506 (Scalia, J., dissenting). In fact, during oral argument, Justice Scalia had rhetorically asked: "Can we hold hearings to determine the problems that are bothering you? . . . We can't call witnesses and see what the real problems are, can we, in creating this new substantive rule that we are going to let the courts create. Congress could do all that, though, couldn't it?" Transcript of Record at 45–46, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334).

100. *See Rasul*, 542 U.S. at 506 (Scalia, J., dissenting).

101. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (July 7, 2004) (http://www.defense.gov/news/Jul2004/d20040707review.pdf).

102. *Id*.

to hear habeas petitions filed by foreign nationals detained at Guantanamo Bay.[103]

What apparently was not clear, however, was whether the DTA applied to cases pending at the time of its passage. In *Hamdan v. Rumsfeld*, the Court answered this question with a resounding "no."[104] Perhaps more importantly, *Hamdan* also established that the military commissions that had been created to try detainees violated federal law largely because of their procedural departures from the Uniform Code of Military Justice and Geneva Conventions.[105] While the Court accepted that the AUMF had "activated the President's war powers . . . includ[ing] the authority to convene military commissions," it found no indication that either the AUMF or DTA authorized an approach denying procedural safeguards contained in standard military commissions.[106]

Again, Congress responded with great haste, passing the Military Commissions Act (MCA) within four months of the *Hamdan* decision.[107] In addition to authorizing the military commissions that the executive had established for the war on terror, the MCA also clarified that federal courts were stripped of jurisdiction to hear habeas petitions of Guantanamo detainees, regardless of when their cases were filed.[108] Notably, however, even as the MCA was being debated, several senators expressed concern about the bill.[109] One specifically noted that the United States had lost its "moral compass," while another stated that, though the MCA was "patently unconstitutional on its face," he would nevertheless vote for the bill since "the court [would] clean it up."[110]

103. Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2739 (2005).

104. 548 U.S. 577, 584 n.15 (2006).

105. *Id.* at 567.

106. *Id.* at 594.

107. Military Commissions Act, Pub. L. No. 109–366, 120 Stat. 2600 (2006).

108. *Id.*

109. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, WASH. POST, Sept. 29, 2006, at A1.

110. *Id.* In fact, one author has argued that "[i]n passing the MCA, Congress demonstrated that it does not just tolerate, but depends upon, the Court to be the primary, if not exclusive, interpreter and guardian of the Constitution, at least in the national-security context." Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 284 (2008).

In *Boumediene v. Bush*, the Court did in fact clean it up.[111] While the scope of the case precluded analysis of the validity of the military commissions authorized by the MCA, it did allow the Court to review the constitutionality of the Act's denial of detainees' rights to the writ of habeas corpus.[112] In large part, the holding rested on the majority's belief that the procedures related to the CSRTs did not provide adequate procedural protections to replace traditional habeas petitions.[113] Thus, the Court stated that:

> Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures.[114]

Affirming that the Suspension Clause was "designed to protect against . . . cyclical abuses"[115] and that the writ of habeas corpus is "the surest safeguard of liberty,"[116] the Court held that Congress's attempt to circumvent it via the MCA was unconstitutional.[117]

Several issues remain unlitigated, but it is, of course, this institutional ping-pong that has created skepticism about the development of legal policies related to detainee issues. In the midst of the fog of war, no single institution seemed to know precisely what was appropriate or where to draw lines as to decision-making authority. The Court's decisions "[gave] rise to the popular notion that the judiciary had thoroughly rebuked the executive branch,"[118] though the Court itself often seemed reluctant to engage in constitutional issues seemingly within its purview. Beyond the fact that the various branches were perhaps operating to achieve different goals, another explanation for this tension rests in the various malfunctions at play during the development of detainee policies.

111. 128 S. Ct. 2229 (2008).
112. *Id.* at 2240.
113. *Id.* at 2265.
114. *Id.* at 2269.
115. *Id.* at 2247.
116. *Id.*
117. *Id.* at 2240.
118. Yoo, *supra* note 3, at 573.

B. Institutional Malfunctions Related to Detainee Issues

Komesar has largely limited his analysis of malfunctions to those that occur within the market, or those within the political process that develop because of majoritarian and minoritarian biases. Though majoritarian biases have indeed played an instrumental role in the institutional frictions surrounding detainee policies, other malfunctions not specifically identified by Komesar also appear to have been important. This Part explores those malfunctions in order to set the stage for analyzing the comparative advantage of having any particular branch intervene—at any particular time—in detainee issues.

1. Majoritarian biases

One of the most obvious malfunctions evident in the creation of detainee legal policies has been the extreme majoritarian bias against detainees within the government's political branches. This is not wholly surprising, given that those incarcerated were almost exclusively marginalized out of the political processes. While groups like the American Civil Liberties Union tried to lobby for detainee rights,[119] their efforts evidently held little immediate sway over the legislature and executive. A comparison can be drawn to the general criminal defense lobby, about which one commentator said: "They could not credibly threaten activation of the majority. While they could bring politicians' attention to the risk of convicting the innocent . . . legislators are aware that most citizens believe that those accused of crime have too many rights."[120] Likewise, it is hardly surprising that "[i]n the four months following 9/11, 97 percent of all bills, resolutions, and amendments proposed by Congress, totaling more than 450 measures, were related to terrorism."[121]

Indeed, whatever deliberativeness may otherwise be attributable to Congress, in the midst of crisis legislators do not generally seem interested in holding hearings and gathering facts. Nothing has been more indicative of this disinterest during the war on terror than the speed with which Congress enacted the AUMF—just seven days

119. *See* American Civil Liberties Union, http://www.aclu.org/national-security/john-adams-project-american-values (last visited Oct. 14, 2010).

120. Richardson, *supra* note 61, at 96.

121. Donohue, *supra* note 2, at 370 (citations omitted).

after the September 11th attacks. The primary explanation for this haste is that "at the time of an attack governments recalculate the 'security versus freedom' framework . . . [and] the perceived security risks posed by terrorism dramatically increases and eclipses other types of security concerns (such as security from undue government interference or arbitrary power)."[122] Moreover, the public at large likely makes the same calculation, and given electoral concerns, the majoritarian bias thrives.

2. Conflicts of interest

In somewhat related fashion, various conflicts of interests within institutional actors have created their own malfunctions as the government has created detainee policies. For example, the executive as commander-in-chief has the responsibility of protecting national security, and also of protecting the principles of individual liberty embodied by the Constitution. In light of the aforementioned majoritarian bias, and as evidenced by the Bush Administration's detainee policies, the executive inclination appears to have been to err on the side of acting as commander-in-chief.[123] This tension led Justice Souter in his *Hamdi* concurrence to observe that "[f]or reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory."[124]

Similarly, members of Congress affirm an oath that they will defend the Constitution against both foreign and domestic enemies.[125] As noted above, in times of crisis legislators have a proclivity of trying to sustain this oath by passing hasty and extreme statutes.[126] "[L]egislators hedge" against checking the President because "they are reluctant to hamstring the executive."[127] Accordingly, they aggressively pass what they think will be temporary

122. *Id*. at 371–72.

123. For a similar argument related to the executive's role as chief law enforcement officer, see Richardson, *supra* note 61, at 102.

124. Hamdi v. Rumsfeld, 542 U.S. 507, 545 (Souter, J., concurring).

125. U.S. Senate, http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm (last visited Oct. 14, 2010).

126. Donohue, *supra* note 2, at 371–72.

127. *Id*. at 372.

measures in order to provide the executive the flexibility it needs.[128] Once these laws are enacted, though, they are difficult to repeal.[129] "New provisions thus become the baseline upon which further measures build to expand the executive authority and promise citizens more security at the expense of civil liberties."[130] Within the context of war on terror detentions this can be seen in the language authorized by Congress in the AUMF. More to the point, the AUMF's sweeping grant authorizing the President to "use *all* necessary and appropriate force"[131] in responding to the 9/11 attacks has been a nagging thorn for those seeking protection from executive dictates.[132]

3. Differing institutional foci

Flowing from these principles is the idea that the executive and legislature have a different focus than the judiciary. While judicial decisions obviously have effect beyond the litigants of any particular case, the cases and controversies requirement serves largely to ensure that the Court is focused on an individual's personal liberties. Even the dissenters in *Boumediene*, who claimed that the majority sought "control of federal policy regarding enemy combatants," acknowledged that the decision was modest in other ways.[133] On the other hand, the legislature and executive necessarily have a wider constituency and therefore a broader focus. This of course is not to suggest that one is, in some abstract sense, better, but it does serve to highlight that in different situations one institution may be better situated to address a certain issue in light of its particular institutional focus.

128. *Id.*

129. *Id.*

130. *Id.* at 372–73.

131. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (emphasis added).

132. *See*, *e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 587 (2004) (Thomas, J., dissenting) (suggesting that the plurality "qualifies its recognition of the President's authority [via the AUMF] to detain combatants in the war on terrorism" in ways inconsistent with the AUMF and other legal precedent).

133. Boumediene v. Bush, 128 S. Ct. 2229, 2279 (2008) (Roberts, C.J., dissenting).

4. Lack of competency

A final set of systemic malfunctions worth mentioning is that each institution inherently possesses a certain ignorance regarding the issues surrounding the war on terror. As Richard Posner has said, "[j]udges aren't *supposed* to know much about national security."[134] For that reason, and others already explored,[135] courts are often reluctant to engage in legal challenges related to national security, even though it may otherwise be prudent for them to do so. This obviously creates a situation, however, where the executive and legislature have free reign to engage in what may be illegal activity. From a more charitable perspective, even those actors operating in good-faith may also overstep constitutional authority based on a mistaken belief as to the precise contours of the law. The fact that the judicial opinions cited above were so divisive for the Court should be an indication that these issues were not easily resolvable, especially to those lacking the competence of the judiciary over constitutional interpretation.

C. So, Who Should Have Decided?

"For the legal process school, institutions possessed fixed identity, and the task of assigning roles to them was like a game of animal, vegetable, or mineral."[136] As evidenced by the post-9/11 institutional malfunctions, however, comparative institutional analysis suggests that there was no perfect solution as to which branch of government should have addressed detainee issues at any given moment in the aftermath of 9/11. Thus, while many believe the Court should have interjected itself more aggressively to protect individual liberties, the judiciary's own limitations prove that "[i]nstitutional superiority is not always obvious, and superiority is often a choice of bad over worse."[137] With this perspective, though the development of detainee legal policies at times appeared meandering and unclear, the system of checks and balances appears to have worked precisely as it should have.

134. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 37 (2006).

135. *See supra* notes 63–76 and accompanying text.

136. Rubin, *supra* note 33, at 1428.

137. KOMESAR, *supra* note 7, at 255.

1. September 11th and the AUMF

In the first instance, it seems imminently appropriate for the executive to be vested with a certain degree of authority to act independently and without delay in times of national crisis. While in normal circumstances such aggressive responses as those embodied in President Bush's detainee policies may prove objectionable, 9/11 spawned an "unconventional war,"[138] the precise parameters of which were immediately unclear even to those with the most national security competence. Moreover, although the President may possess inherent constitutional authority to act in such true emergencies,[139] the fact is that here, Congress had granted the executive sweeping authority to address the national threat via the AUMF.[140]

All of this seems to have rightly occurred without judicial intervention, because there is nothing to suggest that, up to that point, the courts could have done a better job of meeting the twin goals of protecting national security and preserving civil liberties. Also, given the judiciary's general incompetence in dealing with national security policy, it seems prudent to have expected the judiciary to yield to the executive and legislature in the immediate aftermath of a related threat. This is because the "efficacy—the consequences generally—of a security measure adopted to deal with a novel threat cannot be determined if the measure is blocked early on by a constitutional interpretation. The post-9/11 responses to the newly apprehended terrorist threat [were] entitled to a chance to prove themselves—good or bad."[141]

2. Hamdi *and* Rasul

Eventually, though, detentions became less abstract matters of national security policy and more individualized infringements on personal liberties. Hamdi was no longer a nameless, faceless, potential terrorist, but rather a U.S. citizen incarcerated for over two

138. *See*, *e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004).

139. *See* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

140. Perhaps Congress's authorization was not necessary as an antecedent to action, but it certainly imbued the executive's activity with far more legitimacy. *See id.*

141. POSNER, *supra* note 134, at 37.

years without formal charges or proceedings.[142] Likewise, by the time of their case, the petitioners in *Rasul* had been detained at Guantanamo Bay for over two years without facing charges.[143] Any institutional advantage provided by the executive's ability to quickly comprehend and respond to a national security threat became less meaningful as detentions like those represented in *Hamdi* and *Rasul* dragged on. Moreover, despite cries to the contrary, the Court went to great lengths to limit the scope of its holdings. Though it determined in *Hamdi*, for example, that some sort of due process was required for detentions, it explicitly indicated that given the exigencies of war "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[144] In further recognition of the executive's authority over war-making, the Court also avoided the more extreme question potentially presented by *Rasul* as to what process may be due those captured and incarcerated within the combat zone itself. But despite the Court's reservations in those areas, its intervention became necessary for Guantanamo detainees because "as the period of detention stretch[ed] from months to years, the case for continued detention to meet military exigencies [became] weaker."[145]

Thus, comparative institutional analysis seems to indicate that judicial intervention was appropriate at the time of *Hamdi* and *Rasul*. Obviously the Court's involvement advanced the goal of protecting individual liberty. On the other hand, as the Court itself noted, it was unlikely that the basic process called for by the majority in *Hamdi*, or the habeas reviews mandated in *Rasul*, would "have the dire impact on the central functions of warmaking that the Government forecasts."[146] While the dissenters criticized the judiciary for making such forecasts in light of the Court's institutional incompetence in national security matters, the criticism is misplaced. Simply because judges are generalists (by design) does not imply that they are incapable of becoming competent. In fact, the very framework under which the judicial system operates is one in which a litigant must convincingly prove his case to the trier of

142. *Hamdi*, 542 U.S. at 552 (Souter, J., concurring).

143. Rasul v. Bush, 542 U.S. 466, 470 (2004).

144. *Hamdi*, 542 U.S. at 533.

145. *Rasul*, 542 U.S. at 488 (Kennedy, J., concurring).

146. *Hamdi*, 542 U.S. at 534.

fact. To the extent that the executive truly believed that judicial interference would outweigh individual liberty interests, it simply failed to prove it. Indeed, this is likely exactly what happened, given that the executive itself could not precisely measure any potential threat posed by providing the limited procedural protections called for in these cases. In contrast, however, the threat to individual liberties was perfectly clear. As the *Hamdi* Court notes, "detention could last for the rest of [a detainee's] life."[147] While such extreme measures may have been appropriate in the immediate aftermath of 9/11, after two years the least the Court could do was impose minimal procedural requirements on the executive.

Finally, while the issues underlying *Hamdi* and *Rasul* could arguably have been left to the political processes of the executive and legislature, as highlighted above, malfunctions within those systems made such reliance impractical. In a majoritarian system, minorities are marginalized and lack the voice necessary to promote change. Judicial intervention may therefore be necessary when the malfunctions are so egregious—as here—that change cannot wait for the voting cycle or for the majority to become more informed or enlightened.

3. Hamdan *and* Boumediene

As with *Hamdi* and *Rasul*, the tipping point for judicial intervention in *Hamdan* and *Boumediene* seems to have been connected to the length of both the war on terror and the detainees' incarceration. By the time his case was decided in 2006, Hamdan had been in U.S. custody for nearly five years. Moreover, the Court noted that at least some of the petitioners in *Boumediene* had been detained for six years "without the judicial oversight that habeas corpus or an adequate substitute demands."[148] Perhaps just as importantly, there was recognition by at least one member of the Court that the nature of the war on terror was fundamentally different than previous wars, and that institutional roles needed to adapt accordingly. Specifically, Justice Kennedy noted that "[b]ecause our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose

147. *Id.* at 520.

148. Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008).

dangerous threats to us for years to come, the Court might not have this luxury."[149] Despite this sweeping language, the Court still took a measured approach. It did not, for example, address any potential claim as to whether the CSRT procedures created after *Hamdi* were sufficient to satisfy due process. Likewise, the Court did not ban the use of military commissions altogether; it simply imposed a requirement that they be conducted in accord with existing law.

Again, applying comparative institutional analysis principles to these issues seems to suggest that it was wholly appropriate for the Court to intervene as it did. This is perhaps especially true in light of the fact that even some within the legislature were, by this time, calling upon the Court to clean up the mess related to detainee issues.[150] Though times of crisis may in fact call for limitations on civil liberties, the necessity for such detentions without process inevitably became less pronounced as the war on terror continued. On this account, it is critical to underscore that the Court never suggested that detainees should be released or that there was necessarily cause to question their detention. Instead, the Court simply established that in order to preserve the nation's goals of liberty, equality, and justice, detainees should have been afforded an opportunity to challenge their incarceration. With the executive's detention policies, as well as the DTA and MCA passed by Congress, it is plainly obvious that no other institution was doing much to preserve those values for the detainees themselves. Conversely, given the limited nature of the Court's involvement and the executive's continued bias toward aggressive protection of national security, the appropriate balance seemed to have been struck. "Valid institutional comparison calls upon the courts to function when they can do a better job,"[151] which is precisely what the Supreme Court did in both *Hamdan* and *Boumediene*.

V. CONCLUSION

Undoubtedly, detainee issues during the war on terror have presented vexing constitutional challenges to the institutional actors within the U.S. legal system. Given the oft-competing goals of protecting both national security and individual liberty, the

149. *Id*. at 2277.

150. *See supra* note 110 and accompanying text.

151. KOMESAR, *supra* note 7, at 149.

development of the legal framework surrounding detainee issues necessarily resulted in a certain degree of friction. While it is easy to view this friction during times of crisis with cynicism, comparative institutional analysis supports the proposition that in the aftermath of 9/11 the constitutional system operated essentially as it was designed to operate. It has been observed that "[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law."[152] This is not to suggest, however, that the reconciliation process will always run smoothly. Instead, each opportunity to "decide who decides" will require an analysis of the institutional competencies of each organization and a comparison between other alternatives. As evidenced by the development of the law related to detainees, there is no perfect solution as to who decides. But engaging in comparative institutional analysis can lead to the conclusion that, in light of everything known about a problem, the institution with the best chance of achieving the entirety of a nation's goals has been left to decide the problem.

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152. *Boumediene*, 128 S. Ct. at 2277.

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