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Form and Function in the National Security Constitution

DEBORAH N. PEARLSTEIN

Since Alexander Hamilton first wrote of the functional virtues of the presidency in matters of foreign affairs, his claim that a unitary executive is specially blessed with advantages of “[d]ecision, activity, secrecy, and dispatch” has been invoked regularly to argue for a limited role for Congress in national security decision-making, and even more rigorous deference to executive preferences by the courts. The Hamiltonian virtues have proven particularly compelling to a modern set of functionalist scholars, from Bruce Ackerman to John Yoo, who rely on the same metrics of institutional competence to defend executive-heavy security detention programs (and other initiatives) against separation-of-powers arguments that the Constitution requires greater multi-branch engagement.

While embracing the relevance of functional considerations in separation-of-powers disputes, this Article rejects the notion that unitary executive power is the structural arrangement most functionally advantageous for combating terrorism and associated threats. Although some terrorist-related events are “emergencies” that may implicate the Hamiltonian virtues, the new functionalist tendency to view counterterrorism only through the lens of emergency power exaggerates the importance of high-speed rights-security trade-offs, and obscures the range of trade-offs any security decision-making structure must confront—including regular trade-offs between strategy and tactics. Moreover, as organization theory helps demonstrate, while flexibility, unity, and speed can have advantages in the management of high-consequence risk, they also carry significant disadvantages that traditional separation-of-powers interpretation ignores, and that bear directly on the efficacy of executive-only decision structures. In the end, the alternative approach to evaluating comparative institutional competence proposed here leads to a far more favorable view of the functional desirability of multi-branch participation in programs geared to addressing the terrorist threat.

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Form and Function in the National Security Constitution

DEBORAH N. PEARLSTEIN*

I. INTRODUCTION

While scholarly and judicial debate about the constitutional power of the American executive is broad and deep, constitutional understanding of the functional virtues of the executive branch in matters of national security policy is remarkably little changed since Alexander Hamilton wrote of them more than two hundred years ago. Those who advocate broad executive power in national security have long invoked Hamilton's belief that a unitary executive is specially blessed with advantages of "[d]ecision, activity, secrecy, and dispatch" to argue in favor of a limited role for Congress in national security decision-making, and even more rigorous deference to executive preferences by the courts.¹ Recent claims of executive functional supremacy in matters of national security are much the same. Since 9/11, an ideologically diverse array of scholars, from Bruce Ackerman to John Yoo, have argued that the most pressing modern threats to national security—particularly terrorism and the threat of "weapons of mass destruction"—demand more than ever the flexibility to act with secrecy and dispatch, qualities unique to the unitary executive and essential to the preservation of national security.² Accordingly, these new

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¹ THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Hamiltonian arguments in favor of executive functional supremacy are addressed in Part II.

² See, e.g., BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 3–4, 13–14 (2006) (arguing for "emergency constitution" in face of growing terrorist threats); ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 56 (2007) ("Our original constitutional structure, with a relatively weak presidency, reflects the concerns of the eighteenth century and is not well adapted to current conditions."); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 813–22 (2004) (arguing that post-September 11th world poses threats that require affording President greater flexibility in decisions involving the use of force); see also PHILIP B. HEYMANN & JULIETTE N. KAYYEM, LONG-TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 9 (2004), available at http://belfercenter.ksg.harvard.edu/files/lts_final_5_3_05.pdf ("The ability of the United States to successfully fight the war on terrorism requires giving the President the power and flexibility to respond quickly and effectively to terrorist

functionalists tend to favor national security decision-making structures with loose (if any) emergency-driven congressional engagement, and deferential (if any) judicial review.³

The staying power of the Hamiltonian virtues in constitutional analyses of executive power is striking in light of the radical changes that have occurred in the nature of executive branch decision-making since the Constitution's founding—changes driven in no small part by the advent of the administrative state and by the two-hundred-plus years of post-Hamilton study of organizational decision-making. Indeed, the new functionalist commitment to this vision of executive competence is particularly puzzling. In a world where the security threats are, it is often argued, so different from those posed by “traditional war” (one nation-state against another), why would Hamilton's vision of a competent executive, forged in precisely that state-against-state world, remain salient?

Part of the puzzling stasis in separation-of-powers thinking in the national security context might be explained by lines drawn in the centuries-old debate over formal and functional approaches to resolving separation-of-powers disputes. Formalists, broadly speaking, look to the Constitution's text, structure, and history in an attempt to discern which powers are “executive,” which are “legislative,” and which are “judicial” in nature. Functionalists, a more diverse group, look more to considerations of actual effectiveness (what works in a given policy context?) or constitutional purpose (why separate powers in the first place?) in resolving such disputes.⁴ When it comes to matters of national security, those advocating broad executive power have made some mostly unsuccessful attempts at formal support for their position, but they have been uniform in embracing the importance of functionalist concerns.⁵ At the same time, those seeking limits on executive power have fiercely defended the formal textual, structural and historical arguments for allocating to Congress an equal or greater role in national security affairs. But they have not much challenged the idea that the executive wins the functional battle of the branches, either as to which has key functional competences in dealing with matters of national security (the executive) or why that is the case (unity, secrecy and dispatch).⁶

The result of these traditional battle lines has been to ensure that when it comes to national security, the separation-of-powers debate about the executive's functional strengths has yet to be joined. This Article is an

threats.”); RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (advocating allowing greater executive flexibility to respond to modern security threats).

³ See *infra* Part II.B.

⁴ The contours of the formalist v. functionalist interpretive debate are sketched in Part II.A.

⁵ See *infra* text accompanying note 28.

⁶ See *infra* text accompanying note 38.

attempt to do so. It engages the new functionalist approach to separation of powers in two ways. First, it considers whether functional considerations should matter at all in interpreting the structural provisions of the Constitution, and if so, what guidance the Constitution offers as to what those considerations should be. While the Article embraces the conclusion that functional considerations must play a role in resolving separation-of-powers disputes, it urges against the new functionalists' scattershot approach to deciding which functions rise to the level of mattering in constitutional law.

Second, and more to the heart of the new functionalist project, this Article considers what kinds of structural arrangements might be most functionally advantageous for a government tasked with, among other things, protecting its population from terrorist attack. It is in answering this latter question that some of the most critical errors in the new functionalist project emerge. Perhaps most significant, the new functionalist inclination to understand vast swaths of government counterterrorism efforts as principally the subject of "emergency" powers is not only empirically problematic, it falsely elevates the importance of individual rights trade-offs in the policy program of counterterrorism security, obscuring the variety of trade-off decisions (beyond just considerations of individual liberty) that any security decision-making structure must make. Here, the presumed importance of rights in relationship to effective security policy only compounds the deeply rooted—but false—expectation that executive branch security decision-making is categorically different from any other kind of executive function.

It is in highlighting the effects of this expectation that an additional key error becomes apparent: the new functionalists' attention to the structural *benefits* of flexibility, unity, and speed grossly discounts the *burdens* such organizational characteristics impose on the executive branch security structures tasked with carrying out counterterrorism operations. Drawing on insights from organization theory, one can begin to identify why and how such burdens emerge day-to-day. Organization analysis can teach, for example, how competitive organizational structures inside today's complex executive branch (unitary in theory only) can make actors more likely to shirk core responsibilities. The focus on organizational incentives makes it possible to see, for instance, why deferential review in some contexts may be worse than no review at all. To be clear, this Article does not claim that there are no circumstances in which judicial deference may be appropriate. Rather, the claim is that, given a fair weighing of the costs and benefits of review, these circumstances are likely far fewer than common understandings of executive branch competence would allow. In the end, the alternative approach to evaluating the branches' comparative institutional competences proposed here leads to a far more favorable view

of multi-branch participation in programs geared to addressing the terrorist threat.

This Article proceeds as follows. Part II begins by situating current functionalist claims for broad executive power in the context of classic formal versus functional interpretive debates past. It concludes by embracing a core functionalist position: while formal interpretation can shed critical light upon, and sometimes resolve, key disputes about the scope of executive power, functional analysis is often unavoidable and sometimes required when it comes to understanding the structural provisions of the Constitution. Part II then considers the new functionalists' interpretive approach in particular, exploring whether their model is consistent with the functional concerns that animate the Constitution's separation of powers. After identifying a series of flaws in their interpretive approach, the remainder of Part II proposes a different model of analysis that more fairly reflects the Constitution's functional interests. In this context, this Article distinguishes between interpretations based on familiar purposive interests (the separation-of-powers purpose of, for example, promoting political accountability), and more complex effectiveness considerations (applied questions of what works), both of which, this Article argues, must play a role in functional interpretation.

Part III then delves more directly into the national security effectiveness considerations at the heart of the new functionalist project, evaluating core new functionalist claims that the more effective national security decision-making structure is one with expansive, flexible executive power and modified (if any) judicial review. After highlighting key deficiencies in the new functionalist approach, Part III suggests instead that effectiveness assessments in the national security context have much to gain from the insights of organization theory. A field that has grown up to inform the structure of both private firms and public administration, organization theory has engaged the methodologies of economics, sociology, political science, anthropology, and psychology to understand how organizations reach decisions and why.⁷ By identifying common decision-making pathologies, and by applying decision-making models to real-world examples of security problems, organization theorists have taken our understanding of executive functionality far beyond Hamilton's analysis. Political scientists, in particular, offer a growing body of empirical work exploring how executive branch organizations have responded to national security challenges, and how structural characteristics of those organizations have helped (or hurt) in crafting an effective response. To the extent the functional demands on executive power play a role in constitutional reasoning, such insights offer a more

⁷ See generally CHARLES PERROW, *COMPLEX ORGANIZATIONS: A CRITICAL ESSAY* (3d ed. 1986) (giving developmental overview and examination of recent approaches to organizational theory).

realistic set of expectations of institutional competence.

Indeed, as applied in Part IV to one of the new functionalists' most important policy interests—a security detention regime—organization analysis appears to favor functional characteristics that yield a very different kind of decision-making structure from one whose core features are unity, secrecy, and dispatch. Instead, the more effective detention system is one that is designed to handle principally non-emergency cases, to incorporate planning incentives and other mechanisms that help avoid emergency decision-making, and to use monitoring and review to correct for certain known pathologies—like excessive secrecy—of the institutions engaged in security operations. In closing, Part V returns briefly to the full set of formal and functional factors relevant to separation-of-powers questions to put in context the significance of its findings on effectiveness—namely, that separation-of-powers concerns in security detention lean vigorously against a unitary executive with deferential outside review.

II. THE PERSISTENT FORMAL–FUNCTIONAL DIVIDE

A. *The Age-Old Debate*

When constitutional scholars talk about the debate between formalists and functionalists, they are most often engaging in a discussion about what method of interpretation should govern disputes over powers among government branches under the Constitution. Though the general debate is familiar, the terms formal and functional have been used less than precisely to encompass a range of approaches to resolving separation-of-powers disputes.⁸ In most conceptions, “formalist” interpretation relies on the Constitution’s text, structure, and, to an extent, on the framers’ asserted intent.⁹ Most would add to this that formalist methodology prefers black-letter rules to flexible standards, and, perhaps relatedly, that formalism prioritizes “rule of law” interests like openness, predictability, and

⁸ See William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21–22 (1998) (contrasting formal and functional approaches to separation-of-powers interpretation). Compare, e.g., Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489–92 (1987) (using term “functionalist” to refer to essential executive, legislative, and judicial functions of three branches of government), with Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1734 & n.34, 1740–42 (1996) (using “functionalist” to describe interpretation based on the purposes for which the separation-of-powers doctrine was developed).

⁹ See, e.g., Flaherty, *supra* note 8, at 1734 (“Formalist catechism posits three discrete branches, each exercising one of three distinct powers.”); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1138–39 (2000) (“The rules are derived from specific sources: the text of the Constitution and, for some but not all commentators, the original understanding of that text.”).

reliability in law (much as *stare decisis* is said to do).¹⁰ Either way, the formalist methodology asks whether a disputed power is essentially legislative or executive *by its nature*. As one account explains it: “[T]he constitutional validity of a particular branch action, from the perspective of separation of powers, is to be determined not by resort to functional balancing, but solely by the use of a definitional analysis.”¹¹ Only the executive branch may exercise “executive” functions; only Congress may exercise “legislative” functions.¹²

In the separation-of-powers case law, formalists classically point to support for their approach in cases such as *INS v. Chadha*¹³ and *Bowsher v. Synar*.¹⁴ Whether invalidating the so-called legislative veto of executive agency action as beyond the power of one house of Congress to exercise (*Chadha*), or rejecting a statute through which Congress vested executive powers in an ‘agency’ official but reserved for itself the power to remove him from office (*Bowsher*), the Court has looked to textual and historical sources to inquire whether the challenged allocation of power to one branch impermissibly interfered with the essential functions of the other branch.¹⁵ The veto power, the removal power—these are essentially executive in nature, the Court has held; for Congress to reserve to itself such prerogatives would disrupt the Constitution’s central scheme. While the centrality of the essential function inquiry might lead one to call this brand of interpretation “functionalist,” the formalist courts have been at pains to clarify what their inquiry was not:

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . .¹⁶

In contrast, the label “functionalist” has most helpfully been used to describe those who would embrace such pragmatic concerns, typically of one of two varieties. A first species of functionalist looks to the purposes

¹⁰ Eskridge, *supra* note 8, at 21–22; Magill, *supra* note 9, at 1138–39.

¹¹ Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 454 (1991).

¹² Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997 (2006); see also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–26 (1991) (noting formalists’ commitment to “strong substantive separations between the branches of government”).

¹³ *INS v. Chadha*, 462 U.S. 919 (1983).

¹⁴ *Bowsher v. Synar*, 478 U.S. 714 (1986).

¹⁵ *Bowsher*, 478 U.S. at 732–33; *Chadha*, 462 U.S. at 951.

¹⁶ *Chadha*, 462 U.S. at 944.

underlying the idea of separated powers to resolve disputes among the branches; they ask what works to achieve a broader constitutional goal. Without discounting traditional interpretive methodologies, these purposive functionalists find incomplete or otherwise unsatisfying answers in the Constitution's text and history—and the reality of a vast and entrenched administrative state in which any given executive branch agency may simultaneously be rule-making, adjudicating, and rule-enforcing on any given day.¹⁷ Looking beyond strictly textual cues, purposive functionalists ask whether an allocation of power serves the purpose of separating powers in the first place—for example, to constrain the exercise of tyrannical government powers, to ensure that government accurately reflects democratic preferences, or to allocate power according to the institutional capacity of each branch (a purposive interest this Article refers to as “role effectiveness” hereinafter).¹⁸

A second species of functionalist is drawn to more immediate issues of effectiveness, efficiency, and the circumstantial needs of modern government. Effectiveness functionalists ask, for example, which allocation of power produces a better raw policy outcome than another; or slightly more abstractly, which branch or branches of government can offer the best decision-making process to meet a particular kind of policy need. Such approaches find some of their greatest ammunition in decisions evaluating (and generally upholding) the constitutionality of administrative agency action. A standard example is *Commodity Futures Trading Commission v. Schor*, in which the Supreme Court upheld the Commission's power to adjudicate customer claims about whether a broker had violated provisions of the Commodity Exchange Act (CEA), along

¹⁷ See Eskridge, *supra* note 8, at 21 (noting that functionalist reasoning “might be understood as induction from constitutional policy and practice,” as opposed to “constitutional text, structure, [and] original intent”); Magill, *supra* note 9, at 1142 (noting that if the formalist approach were “consistently followed in the courts,” it would “require dramatic alteration of contemporary institutional arrangements and prevent experimentation along similar lines in the future”); Strauss, *supra* note 8, at 492–93 (noting that “[v]irtually every [one of these agencies] exercises *all three* of the governmental functions”); see also Barkow, *supra* note 12, at 999 (noting that the “Court’s acceptance of modern administrative agencies poses the greatest challenge to the formalist approach to separation of powers”); Brown, *supra* note 12, at 1528–40 (offering alternatives to formalism and functionalism).

¹⁸ See, e.g., Barkow, *supra* note 12, at 1034–40 (urging formal approach to separation-of-powers questions in criminal law for “functional” reasons related to purpose of separation-of-powers doctrine); Brown, *supra* note 12, at 1531 (proposing an “ordered liberty” analysis that would settle separation-of-powers disputes depending on “the degree to which they may tend to detract from fairness and accountability in the process of government”); Redish & Cisar, *supra* note 11, at 489 (identifying functional purposes to be protected in separation-of-powers analysis as fostering political values of “diversity, [popular] accountability, and checking”). Such an approach may be seen in Supreme Court separation-of-powers decisions across a range of cases. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) (pointing to framers’ purposes in establishing separation of powers); see also *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”) (citing *Morrison v. Olson*, 487 U.S. 654, 685–96 (1988); *Bowsher*, 478 U.S. at 725.

with brokers' state law counterclaims involving the same transaction.¹⁹ While recognizing that applying a formalist analysis to the dispute—which would identify adjudications as essentially judicial functions under Article III of the Constitution—would be more consistent with one line of separation-of-powers cases, the *Schor* Court was nonetheless avowedly pragmatic in its approach, blending purposive interests and effectiveness interests in its functional assessment.

[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. This inquiry, in turn, is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'²⁰

The Court did hint later at the limits of efficacy's relevance:

It was only to ensure the effectiveness of [the regulatory] scheme that Congress authorized the [Commodity Futures Trading Commission (CFTC)] to assert jurisdiction over common law counterclaims. Indeed, . . . absent the CFTC's exercise of that authority, the purposes of the reparations procedure would have been confounded. . . . [The assertion of CFTC] jurisdiction is limited to that which is necessary to make the reparations procedure workable.²¹

By this view, the essential function of Article III courts was a factor to be considered, but the effectiveness concerns that led Congress to enact the CEA scheme could trump.²²

As a number of scholars have by now pointed out, each version of formalism and functionalism is plagued with problems. Formalists'

¹⁹ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); see also *Mistretta*, 488 U.S. 361 at 382 ("Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'") (quoting *Buckley*, 424 U.S. at 121).

²⁰ *Schor*, 478 U.S. at 847–48 (citations and internal quotation marks omitted).

²¹ *Id.* at 856.

²² See *id.* at 851–56 ("The CFTC adjudication of common law counterclaims is incidental to, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim. In such circumstances, the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*. Conversely, were we to hold that the Legislative Branch may not permit such limited cognizance of common law counterclaims at the election of the parties, it is clear that we would defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. We do not think Article III compels this degree of prophylaxis.") (citations and internal quotation marks omitted).

inquiry into the identification of which functions are quintessentially “executive” or “legislative” in nature problematically implies the existence of Platonic governmental ideals of power that may or may not line up with the universe of possible forms of state action. Formalists must face the reality of life in the modern administrative state, where strict adherence to formalist power divisions would likely result in the dismantling of much of the executive agency apparatus—today daily engaged in both rule-making (i.e., legislative) and adjudicative (i.e., judicial) functions.²³ At the same time, effectiveness functionalists struggle both with how to align interests of efficiency and effectiveness for a given branch, and with the overarching separation-of-powers principle that no one branch should be able to exercise unlimited or tyrannical powers.²⁴ Even purposive functionalists face the charge that allowing room for such broad considerations leaves the structural boundaries of our government open to a degree of indeterminacy inconsistent with the idea of law in a constitutional democracy.²⁵ More than one scholar has noted how the black-and-white terms of the formal versus functional debate simply serve to obscure the issues underlying why we draw lines between the branches at all.²⁶

Yet to the extent formal and functional lines can be drawn in the jurisprudence and scholarship of administrative law, scholars have drawn them, noting that formalist analysis has been deployed to support powerful executive and functionalist arguments tend to favor shared power among the branches.²⁷ The line-drawing exercise in the national security context, however, reveals the opposite divide. As discussions of the scope of executive power have recurred during periods of security crisis in the United States, those favoring expansive executive power have been uniform in embracing the tools of functional analysis. From Hamilton forward, the urgency of modern threats, the advent of new technological

²³ Strauss, *supra* note 8, at 492–96.

²⁴ See, e.g., Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 375–76 (1990) (“I recognize that the will of the Founders always has about it a somewhat musty, antiquated, even shabby air, like a quaintly decorated table that is old enough to be a valuable antique but not sufficiently well preserved. And yet the single most pertinent fact about an old table is that it has survived . . .”).

²⁵ See, e.g., MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 100–02 (1995) (arguing functional interpretation “inherently guts the prophylactic nature of the separation-of-powers protections”); Larry Alexander, “*With Me, It’s All er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534–36 (1999) (favoring formalism as reducing error and decision-making costs in separation-of-powers disputes); Carter, *supra* note 24, at 375–76 (criticizing indeterminacy of functional approaches).

²⁶ Barkow, *supra* note 12, at 992–93; Magill, *supra* note 9, at 1129.

²⁷ See Flaherty, *supra* note 8, at 1740 (describing functionalist scholars as tending to favor greater congressional and judicial supervision of executive power). Note, however, that Flaherty’s bifurcation was based on the assumption that functionalists were concerned about purposive effectiveness (constraining power, protecting liberty), not raw effectiveness (developing good agricultural policy). *Id.* at 1734–37.

challenges, and assertedly pragmatic assessments of presidential competencies required to meet them have all been staples of arguments made by those favoring broad executive power.²⁸ As Richard Neustadt put it in his landmark 1964 book, *Presidential Power*: “[W]hen it comes to action risking war, technology has modified the Constitution: the President perforce becomes the only such man in the system capable of exercising judgment under the extraordinary limits now imposed by secrecy, complexity, and time.”²⁹ Indeed, the Supreme Court has, from time to time, given such functionalist claims at least passing cause to warrant their perennial invocation.³⁰

In contrast, the most vigorous advocates against the “imperial presidency’s” tendencies have generally embraced some form of the

²⁸ Hamilton believed that it was impossible to set precise limits on the federal executive power “because it is impossible to foresee or to define the extent and variety of national exigencies.” THE FEDERALIST NO. 23, at 184 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis omitted). Because “[t]he circumstances that endanger the safety of nations are infinite,” Hamilton explained, “no constitutional shackles can wisely be imposed on the power to which the care of it is committed.” *Id.* at 184–85. The federal government, therefore, had to have all power necessary to “insure domestic Tranquility” and “provide for the common defence.” U.S. CONST. pmbl. In the twentieth century, scholars continued to invoke Hamilton to support claims of broad executive power in times of security threat. See, e.g., Robert H. Bork, *Foreword* to THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH, at ix, x (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (“The respective roles of Congress and the President developed according to their structural capacities and limitations. Congress, consisting of 535 members assisted by huge staffs, is obviously incapable of swift, decisive, and flexible action in the employment of armed force.”); Robert Bork, *Erosion of the President’s Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 698 (1990) (“The need for Presidents to have that power [to use force abroad without waiting for congressional authorization], particularly in the modern age, should be obvious to almost anyone.”); J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 1–2, 7 (1961) (asking “whether in the face of the harsh necessities of the 1960’s we can afford the luxury of 18th century procedures of measured deliberation”); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, LAW & CONTEMP. PROBS., Autumn 1993, at 293, 305–07 (noting that “the structure of the presidency as a single office possessed by one person also gives the executive unique capabilities of acting with ‘secrecy and dispatch’”); John O. McGinnis, *The Spontaneous Order of War Powers*, 47 CASE W. RES. L. REV. 1317, 1320–21 (1997) (“The Framers understood that the conduct of war must be entrusted to executive.”); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 871 (1972) (“The circumstances of modern world politics, however, require Presidents to act quickly, and often alone.”).

²⁹ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER* 187–88 (1964). For a thoughtful historical account of Neustadt’s and others’ influence on the case for an “imperial” presidency, see Louis Fisher, *The Law: Scholarly Support for Presidential Wars*, 35 PRESIDENTIAL STUD. Q. 590 (2005).

³⁰ See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (“The President . . . manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”) (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, at 24 (Feb. 15, 1816)); see also *Dames & Moore v. Regan*, 453 U.S. 654, 683 (1981) (“The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.”) (quoting *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951)).

formalism defined above.³¹ In the 1980s and 1990s, the approach was crystallized in the writings of scholars like Harold Koh and John Hart Ely.³² Writing largely in response to perceived executive excesses during Vietnam and the Iran-Contra affair, Ely, for example, rejected arguments that modern threats and longstanding practice had made the Constitution's initial allocation of war powers to Congress obsolete. Except for the presidential power to "repel sudden attacks," and the President's power as Commander-in-Chief to assume tactical control of a war *once declared*, the government's so-called war powers (in particular, the power to deploy military force) were vested in Congress by the Constitution's text and intent.³³

Koh's interpretive sources were broader than Ely's. In addition to constitutional text, structure and history, Koh looked to "framework" national security statutes and "quasi-constitutional custom" (the last only as persuasive, not controlling authority) for insight into the separation of national security powers.³⁴ But his conclusion was formal in nature: the Constitution establishes a system of "balanced institutional participation," with the core war powers, and their allocation among the branches, visible first and foremost in the text.³⁵ While Koh was deeply critical of the formalist approach taken by the Supreme Court in *Chadha*, the alternative interpretive mode he embraced was not functionalist in an effectiveness

³¹ Peter Spiro is a notable exception to this, though his brand of functionalism would essentially extend the classically formal interpretive sources (text, history, case law) to include the historical practice of presidential power. Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1341 (1993) (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)) ("[T]extual instruments cannot meaningfully alter an historically developed balance of interbranch powers, and . . . where the attempt is made such instruments will not reflect actual norms governing institutional behavior among the branches. The resulting cleft between text and practice promotes the perception that war powers is a matter of politics, not law; this perception in turn undermines the efficacy of norms established by history and important to our constitutional order."); see also Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 650, 652–53 (2002) (arguing that globalization has changed makeup of "international decision-making" and that historical constitutional rules need to be reexamined).

³² JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 6 (1993) (asserting that "the constitutional requirement that Congress express its formal approval before the president [sic] leads the nation into war is not remotely obsolete"); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 122–23 (1990); see also THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 91 (1992) (noting that Constitution does not assign "absolute discretion" to executive with respect to national security but instead delegates separate authority to both executive and legislative branches); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 17 (1990) (challenging President's constitutional authority to send forth troops); Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1637 (2000) (reasserting clear intent of Constitution to divide war power between executive branch and Congress); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 30 (1991) (arguing that President Bush's order to commence military action against Iraq in 1990 violated Constitution in that "Congress alone has the power to declare 'war'").

³³ ELY, *supra* note 32, at 3–10.

³⁴ KOH, *supra* note 32, at 69–70.

³⁵ *Id.* at 67–72.

sense, but rather an inquiry favored by some members of the Court that appeared only to beg the formalist question: whether the allocation of power to one branch infringes on the “central . . . functioning” of another branch.³⁶ Thus, even as the Court looked to increasingly pragmatic considerations to resolve separation-of-powers disputes,³⁷ the predominant functional perspectives on security largely favored broad executive power, or were viewed as relevant, at most, in rebuttal to the broad-executive-power account.³⁸

B. *The New National Security Functionalists*

In the years since September 11th, formalist interpretation has retained its central place in the arguments of those advocating the protection of individual liberty,³⁹ while functionalist arguments respecting national security matters have proliferated. Scholars from Bruce Ackerman to Eric Posner, Adrian Vermeule, and John Yoo, among others, have seized upon functional claims in the service of advocating adjusted constitutional structures—enhanced executive power and limited judicial review—to accommodate the threat, perceived as newly acute, of terrorism and so-called weapons of mass destruction.⁴⁰ While the new functionalists

³⁶ *Id.* at 143–44 (citing *Morrison v. Olson*, 487 U.S. 654 (1988)).

³⁷ See cases cited *supra* note 19.

³⁸ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 185–90 (1995) (responding to arguments that the post World War II world “is far more dangerous and much more in need of decisive presidential action”); KOH, *supra* note 32, at 118–23, 212–18 (1990) (“Given the president’s superior institutional capacity to initiate governmental action, the burden of generating reactive responses to external challenges has almost invariably fallen on him.”).

³⁹ See, e.g., Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT’L L. 263, 292 (2004) (noting that Constitution “allot[s] war powers to Congress and to the President”); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (arguing constitutional text and history supports active congressional engagement in presidential conduct of war); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (rejecting textual and historical arguments that Vesting Clause provides broad source of inherent executive authority); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1266 (2002) (“[I]n the absence of an emergency that threatens truly irreparable damage to the nation or its Constitution, that Constitution’s text, structure, and logic demand approval by Congress if life, liberty, or property are to be significantly curtailed or abridged.”); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL’Y REV. 153, 154–55 (2004) (arguing that “inherent, constitutional executive detention power, particularly as invoked against U.S. citizens, simply does not exist”) (footnote omitted). *But cf.* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006) (arguing formal separation-of-powers structures provided inadequate check on executive authority post-September 11).

⁴⁰ ACKERMAN, *supra* note 2, at 3–4, 13; POSNER & VERMEULE, *supra* note 2, at 56; YOO, *supra* note 2, at 816–21; see also HEYMANN & KAYYEM, *supra* note 2, at 9 (“It is the President who has the information and expertise necessary to detect and infiltrate terrorist networks and incapacitate terrorists. Having outsiders second-guessing these steps would inevitably lead to undue executive branch caution. In addition, trying to exercise oversight without knowing facts that must be kept secret would be ineffective at best. Courts, legislatures and even Inspectors General undermine confidence, move much too slowly and need information that they cannot safely be given. Oversight of executive actions,

disagree about some things, they share at least two core premises in common: (1) modern security threats, especially international terrorism and “weapons of mass destruction,” are different in kind from past threats, and the separation of powers of the eighteenth century Constitution is unlikely adequate to meet them;⁴¹ and (2) these threats put a premium on competencies—namely speed, secrecy, and/or unity of decision-making—that the executive uniquely holds.⁴² It is in large part this new functionalist vision that has informed the structural constitutional interpretation invoked to support presidential power to torture detainees, engage in warrantless domestic surveillance, and, in key respects, exclude courts from ex post review of executive practices of interrogation, detention, and trial of terrorism suspects.⁴³

Among constitutional scholars, a relatively detailed account of the first proposition comes from John Yoo. Contrasting today’s threats from those faced by previous American generations involving “set-piece battlefield matches between nation-states,” Yoo argues that post–Cold War national security threats feature far different challenges, such as the proliferation of

therefore, should lie exclusively within the operating arms of the executive branch.”).

⁴¹ See, e.g., ACKERMAN, *supra* note 2, at 3–4, 13–14 (arguing that modern terrorist threats are different than historical enemies and that “proliferation of destructive technologies” has made viable threats out of terrorist groups where previously only nation-states had such capability); POSNER & VERMEULE, *supra* note 2, at 56 (“Our original constitutional structure, with a relatively weak presidency, reflects the concerns of the eighteenth century and is not well adapted to current conditions.”); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1027 (2003) (“The compression of time and space brought about by technological innovation, the communications revolution, and advancements in transportation brings new challenges and threats to states while significantly reducing the state’s available time for response.”); Yoo, *supra* note 2, at 813, 816–22 (arguing that “significant changes in the international system and the national security interests of the United States” have changed approach necessary in dealing with threats); see also MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 146–48, 152–53, 159, 163 (2004) (describing new challenges posed to “[o]ur constitutional commitments” by threat of mass casualty terrorism).

⁴² See ACKERMAN, *supra* note 2, at 45–48, 61, 109 (emphasizing need for speed but rejecting, in part, unitary decision-making); POSNER & VERMEULE, *supra* note 2, at 17–18 (“There is a premium on the executive’s capacities for swift, vigorous, and secretive action”); Gross, *supra* note 41, at 1029, 1097 (“The government’s ability to act swiftly, secretly, and decisively against a threat . . . becomes superior to the ordinary principles of limitation on governmental powers and individual rights.”); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006) (arguing that executive has access to greater information than legislative branch in regards to foreign affairs and can make more accurate security decisions).

⁴³ See, e.g., Memorandum from Jay S. Bybee, Head of Justice Department’s Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), at 36–37, available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (“As Hamilton explained, . . . ‘there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.’”) (quoting THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)); U.S. Dep’t of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), at 6–7, 13–14, available at <http://www.fas.org/irp/nsa/doj011906.pdf> (“Because of the structural advantages of the Executive Branch, the Founders also intended that the President would have the primary responsibility and necessary authority as Commander in Chief and Chief Executive to protect the Nation and to conduct the Nation’s foreign affairs.”).

“weapons of mass destruction,” the emergence of “rogue nations,” and the mass casualty threat posed by terrorist organizations of global reach like Al Qaeda.⁴⁴ Bruce Ackerman’s account similarly suggests that the threat posed by twenty-first-century terrorism is categorically different:

There have always been millions of haters in the world, but their destructive ambitions have been checked by the state’s monopoly over truly overwhelming force. Terrorists might assassinate a nation’s leader or blow up a building, but they could not devastate a great city or poison an entire region. These are things that only states could do. With the proliferation of destructive technologies, the state is losing this monopoly.⁴⁵

Curiously, while arguing that today’s world features fundamentally novel security threats, most new functionalists simultaneously embrace Hamilton’s eighteenth century assessment of the executive’s comparative advantages in meeting those threats.

From the standpoint of institutional design, it seems that the executive branch has critical advantages over a multi-member legislature in reaching foreign policy and national security decisions that are more accurate. As Alexander Hamilton argued in *The Federalist No. 70*, the executive is structured for speed and decisiveness in its actions and is better able to maintain secrecy in its information gathering and its deliberations: “Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”⁴⁶

Characteristics of novel emergency threats have changed the policy needs of the United States, making “flexibility” in the powers allocated to the branches—especially flexibility for the President to act with secrecy

⁴⁴ Yoo, *supra* note 2, at 813–20 & n.69 (citing NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002)).

⁴⁵ ACKERMAN, *supra* note 2, at 13. *Accord* IGNATIEFF, *supra* note 41, at 147–48. While Posner and Vermeule chronically disclaim any effort to assess the substantive merits of today’s threats, or the relative merits of the United States’ response, POSNER & VERMEULE, *supra* note 2, at 158, they regularly identify favored executive programs on the merits, *see, e.g., id.* at 184–85 (supporting coercive interrogation). Such an equivocal relationship with the substance of security policy leads the authors to some troublingly tautological reasoning: wars, which include the “war on terror,” are, or at least contain, emergencies; emergencies are, by definition, novel threats; the “war on terror” is thus, at least in part, a novel threat. *Id.* at 18, 42.

⁴⁶ Nzelibe & Yoo, *supra* note 42, at 2523 (quoting THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

and dispatch—more important than ever before.⁴⁷ Only a “unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.”⁴⁸ Further, unlike “ordinary policing” or other standard protective activities the government undertakes, “there is no general template that can be used for evaluating the government’s response” to an emergency threat.⁴⁹ With no time for ex ante deliberation, and no metric for ex post assessments, “the executive’s capacities for swift, vigorous, and secretive action” are at a premium.⁵⁰

To understand how the new functionalists proceed from these premises to assess the merits of particular allocations of constitutional power—regulating, for example, the deployment of military force, or the detention of terrorist suspects—it is helpful to recall the different species of functionalist approach.⁵¹ As in the administrative law context, some functionalist claims are based on an assessment of purposive merit. Here, the question of interest is whether a particular allocation of power serves or deserves an asserted separation-of-powers goal—for example, ensuring democratic accountability. Another species of claim entails security-based assessments of raw effectiveness. Such claims ask which allocation of power is likely to produce more good national security outcomes than bad ones. Still a third approach is a claim of role effectiveness—asking which branch or branches of government, in light of their given institutional

⁴⁷ Yoo, *supra* note 2, at 813, 816–22; John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1200 (2004); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1642–43, 1676–77 (2002) [hereinafter Yoo, *Constitutional Text*].

⁴⁸ Yoo, *Constitutional Text*, *supra* note 47, at 1676.

⁴⁹ POSNER & VERMEULE, *supra* note 2, at 18.

⁵⁰ *Id.*; see also ACKERMAN *supra* note 2, at 61 (“The realities of globalization, mass transportation, and miniaturization of weapons of destruction suggest that bombs will go off too frequently for the judicial cycle to manage crises effectively.”); JACK GOLDSMITH, *THE TERROR PRESIDENCY* 67 (2007) (describing administration’s frustration with “vague criminal laws” designed before advent of “the Internet, cell phones, and miniaturized weapons of mass destruction”). Exactly what new miniaturization reality the authors have in mind here is less than clear. Conventional bombs have fit in backpacks for decades, as have, of course, microbial biological agents. The technology required to “miniaturize” a nuclear weapon is highly complex, intensely hard to come by, and for these and a host of other reasons, unlikely to be a terrorist group’s weapon of choice. See Albert Narath, *The Technical Opportunities for a Subnational Group to Acquire Nuclear Weapons*, in XIV INTERNATIONAL AMALDI CONFERENCE ON PROBLEMS OF GLOBAL SECURITY 19–32 (Rome: Accademia Nazionale Dei Lincei, 2003) (describing serious technical complexities of crafting backpack-size nuclear weapons and challenging a passing report of a “suitcase” nuclear weapon stolen from Soviet Union as “shaky on technical and other grounds”). The author is former director of Sandia National Laboratories, one of the United States’ three major nuclear weapons laboratories. The United States nuclear arsenal includes such devices, and bombs of this size may or may not have been mastered by the Soviets. But design challenges of developing such a small device are substantial, and pose significant hurdles even for the largest, most established state nuclear powers. Unconfirmed reports in the 1990s suggested that the Soviets had manufactured “miniaturized” nuclear weapons, and that one such device had been stolen. These reports were widely viewed as not credible by the U.S. security community. See *id.* at 16.

⁵¹ See *supra* text accompanying note 41.

competences, can offer the best security-appropriate decision-making process to meet a particular kind of security threat.

Despite the potentially thorough set of inquiries a combination of such considerations would allow, the new functionalists fail in different respects to take them into account. Consider a few examples. Bruce Ackerman's exploration of an "emergency constitution" for dealing with security crises is classically functionalist in approach—an approach Ackerman intends to have both purposive and effective components.⁵² He takes as his purposive interest the protection of individual liberties as a core separation-of-powers function.⁵³ At the same time, he intends his emergency constitution provisions to be measured by their raw effectiveness—a system that does "everything plausible to stop a second strike" terrorist attack.⁵⁴ The system that fits this bill, in Ackerman's account, is one that would grant the executive emergency powers for a set period of time, including, but not limited to, expanded powers to detain people with less-than-usual process or review.⁵⁵

Ackerman's purposive assessment has much to recommend it. He recognizes, as had other purposive functionalists of pre-9/11 vintage, that protecting liberty is a core function of separated powers.⁵⁶ On the effectiveness side, Ackerman also acknowledges, albeit in passing, the idea that various organizational pathologies can undermine the effectiveness of executive-alone decision-making.⁵⁷ But along both purposive and effectiveness axes, Ackerman's analysis is incomplete. From a purposive perspective, he accounts for the concerns of what is almost certainly only one of the goals of separating powers; but other goals, such as promoting democratic accountability, may also have some historical and jurisprudential priority.⁵⁸ Perhaps more problematic, Ackerman sets up effectiveness as a measure of the validity of his scheme, but then engages in no actual analysis of security needs or policy impact. From his very broad position declaring that a general state of emergency will help prevent a second terrorist strike, to his specific interest in emergency authorizations of dragnets and administrative detention, Ackerman's recommendations

⁵² ACKERMAN, *supra* note 2, at 3–9.

⁵³ *Id.* at 3.

⁵⁴ *Id.*

⁵⁵ *Id.* at 80–87.

⁵⁶ See Barkow, *supra* note 12, at 1012 ("Even before the adoption of the Bill of Rights, the Constitution provided protection for the rights of those accused of crimes through its structural provisions."); Brown, *supra* note 12, at 1530–31 (arguing central focus of separation-of-powers analysis should be its structural purpose of protecting "ordered liberty"); see also Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 640, 715–26 (2000) (discussing how "the separation of powers protect[s] fundamental rights").

⁵⁷ ACKERMAN, *supra* note 2, at 86–87, 119–20.

⁵⁸ See *infra* Part II.C.2 ("[E]nsuring that government functions remain adequately accountable to the electorate has long been thought of as a proper judicial concern, in the separation-of-powers context and out.").

rely on significant substantive policy judgments, but his constitutional analysis leaves all effectiveness assessments assumed. To the extent he does engage in empirical or policy analysis, his assertions face significant but unaddressed challenges in each respect.⁵⁹ Having thus invited a sweeping revision of executive power under circumstances based centrally on his own functional claims of raw effectiveness, the elaborate “emergency constitution” mechanism only begs the question it asks—would this emergency power *help* prevent a “second” terrorist attack?

Jide Nzelibe and John Yoo take a somewhat different approach, though again purport to embrace both purposive and effectiveness interests in considering the question how the branches should share authority over the deployment of military force.⁶⁰ Like Ackerman’s, Nzelibe and Yoo’s analysis is limited to examining only some measures of purposive functionality, albeit different measures than Ackerman’s: (1) which allocation of power best promotes the goal of responsiveness to the democratic preferences of the voters, and (2) which branch is best structurally designed to carry out a specific function (the interest earlier referred to as role effectiveness).⁶¹ As one can already discern in the difference from Ackerman’s focus, Nzelibe and Yoo’s purposive measures fail to take full account of the Constitution’s functional interests in dividing powers. Indeed, their purposive assessment seems particularly arbitrary; neither protecting individual rights nor constraining power—likely among the framers’ central goals⁶²—factor into their analysis.

Nzelibe and Yoo’s purposive account also highlights another potential pitfall of functional inquiry: assuming that certain features of institutional character are inherent to the institution, as opposed to characteristics that may be, constitutionally, shared or bargained away. Thus, for example, Nzelibe and Yoo discount Congress’s functional effectiveness in making use-of-force decisions in part on the grounds that the executive is likely to have better or more relevant information.⁶³ But there is nothing inherent in the structural constitutional design of Congress that prohibits it from getting independent information, or even from sharing access to information that the executive has; there is no *constitutional* barrier here, (and many constitutional imperatives) to such information sharing. Lack of information, then, does not provide a *structural* reason why Congress is ill suited to making the decision to use force.

As for testing war-making effectiveness, Nzelibe and Yoo select one particular measure of effectiveness, asking which allocation of power is

⁵⁹ See *infra* Part III.A (arguing that Ackerman’s effectiveness claims are “suspicio[us] . . . when . . . held up against even a modest review of the open security literature”).

⁶⁰ Nzelibe & Yoo, *supra* note 42, at 2522–23.

⁶¹ *Id.* at 2522–26.

⁶² See *infra* Part II.C.1, 2.

⁶³ Nzelibe & Yoo, *supra* note 42, at 2522–24.

more likely to send appropriate or helpful signals of U.S. intent to potential enemies.⁶⁴ The authors contend that because signaling may have more or less value depending on the type of enemy regime at issue—democratic enemies are capable of using signals to bargain away from war, terrorist or “rogue” authorities lack the internal political pressure required to make bargaining to avoid war necessary—the President should have the option of pursuing force without first seeking the approval of Congress (thereby revealing, unnecessarily, our war-making intent).⁶⁵

Nzelibe and Yoo deserve credit for making some effort to practice what they preach, applying a combination of rational choice theory and political science to evaluate the suitability of having Congress or the executive authorize first uses of force. But even apart from the deeply questionable merits of their conclusions on empirical and other grounds,⁶⁶ their approach suffers from more fundamental flaws as a matter of constitutional interpretation. Consider two examples. First, even within the inherently flexible boundaries of functional separation-of-powers analysis, an approach that makes the availability of power solely dependent upon the nature of a particular external threat (including the quality of other governments’ internal deliberations) makes U.S. governmental institutions and war decision-making processes particularly unpredictable, subject in the first instance to the happenstance of our enemy du jour. In part for this reason, the Supreme Court’s interest in efficacy in separation-of-powers cases has been circumscribed to evaluate not simply effectiveness in an absolute sense, but effectiveness as internal to the allocation of power among the branches, with adjustments to traditional allocations of power “limited to that which is *necessary* to make” a particular policy work.⁶⁷ The Nzelibe and Yoo effectiveness criterion embodies neither of these limits—limits the Court has recognized as centrally entwined with the rule of law.⁶⁸ Their effectiveness concern—

⁶⁴ *Id.* at 2526–36. The authors may be criticized for neglecting to explain why they select this one of the many potential metrics of effectiveness in dealing with a threat—for example, fewest American lives lost, fastest route to strategic victory, etc. Arguably such other measures are much more instructive in testing whether or not “good” policy is being made. But any one criterion, if rigorously applied, may provide at least some helpful insight into the “most effective” allocation of power. Selecting just this one metric might make their theory incomplete, but one must begin by attempting to understand whether the single metric is even partially correct.

⁶⁵ *Id.* at 2532–36.

⁶⁶ See Paul F. Diehl & Tom Ginsburg, *Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo*, 27 MICH. J. INT’L L. 1239, 1251–52 (2006) (“Though the authors claim that ‘little or no empirical data’ supports the idea that congressional involvement leads to superior selection of wars, in fact a wealth of empirical information addresses the effectiveness of democracies in coercive bargaining and war.”).

⁶⁷ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 855–56 (1986) (emphasis added).

⁶⁸ See *id.* at 856–67 (“[T]his case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.”); see also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221,

how our enemies make decisions—will produce a different outcome case-by-case, but their allocation of decision-making power (to the President) will apply even if our enemies make decisions in a way that would make congressional involvement beneficial (by their terms).

Second, while the Supreme Court (and the framers) no doubt recognized the relevance, at times, of functional concerns both purposive and effective, those concerns have never been understood as the only factors relevant to constitutional interpretation.⁶⁹ As Msrs. Yoo and Nzelibe surely agree, effectiveness considerations are only part of any legitimate interpretation of the separation of powers. While stand-alone functional inquiries in the scholarly literature can be extremely helpful (just as stand-alone historical or textual analyses), the reality that effectiveness concerns are only part of a larger scheme of constitutional interpretation imposes some limits on the outcomes that effectiveness may legitimately support. Thus, for example, an effectiveness assessment that is demonstrably at odds with the Constitution's text cannot be sustained.⁷⁰

A final new functionalist model comes from Eric Posner and Adrian Vermeule. They purport to look exclusively to role effectiveness concerns, particularly the question of which branch is best structurally designed to strike the balance between security and liberty in an emergency. Unlike Ackerman, Nzelibe and Yoo, Posner and Vermeule expressly (and repeatedly) disclaim any interest in raw effectiveness assessments—questions of whether or not a particular allocation of power has produced bad policy.⁷¹ Having put all their functional eggs in the purposive basket, Posner and Vermeule do better in some respects, by, for example, acknowledging purposive interests in both the protection of individual rights as well as in the allocation of power to promote role effectiveness.⁷² Nonetheless, their argument encounters its own set of pitfalls.⁷³

1246 (1995) (“The central characteristic of this new school is a willingness to treat even the architecture-defining, power-conferring provisions of the Constitution as merely suggestive—as though they offer teasing hints about the design of any number of possible government frameworks. . . . I emphatically reject any such treatment of our Constitution’s architectural provisions. Constitutions that merely proclaim political aspirations, like those of the former Soviet Union and its satellites, might be so regarded. Not so for constitutions that create an edifice of law. Ours is a constitution that calls certain institutions into being. Thus, we must look to that Constitution to determine how these institutions are to operate and when their products are to be regarded as law.”).

⁶⁹ See *infra* text accompanying notes 80–84.

⁷⁰ See *infra* text accompanying notes 78–83.

⁷¹ POSNER & VERMEULE, *supra* note 2, at 9–10.

⁷² *Id.* at 16.

⁷³ For example, they too confuse circumstantial characteristics of one or another branch with inherent features of institutional character that cannot be transmitted. Information is not an institutional feature; it is a commodity that can be transferred among institutions, either by rule or by less formal mechanisms. For other criticisms of the Posner and Vermeule approach, see, for example, Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007); Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from Hamdan*, 91 MINN. L. REV. 1451, 1451 n.5 (2007).

Perhaps most important among these is the authors' dismissal of raw effectiveness as relevant to the functional inquiry. The problems with this approach become evident when one considers their given reasons for rejecting such a metric. A first reason appears something like a sense of modesty, coupled with an asserted interest in (role effectiveness) deference to "the expertise of security professionals."⁷⁴

Whether the government justifiably detains al Qaeda suspects without charging and trying them depends to a large extent on the magnitude of the threat, the importance of secrecy, and other factors that few people outside of government are in a position to evaluate. . . . [W]e have no opinion about the merits of particular security measures adopted after 9/11 Our point is that we are not well positioned to judge the merits of those policies, nor are the civil libertarian critics of those policies.⁷⁵

The second reason the authors disclaim an interest in raw effectiveness is itself a raw assertion of policy reality: "[E]mergency threats vary in their type and magnitude across jurisdictions, depending heavily on the geopolitical position of the state in question. Thus, there is no general template that can be used for evaluating the government's response."⁷⁶

The problem of internal contradiction here is stark: the authors insist they do not know enough about emergency security decisions to evaluate whether such decisions are good or bad, but do know enough to claim, *inter alia*, that good responses are necessarily "swift, vigorous, and secretive"; that power should be concentrated in an emergency and should "move up from the states to the federal government"; that limiting liberties can enhance security; and that it is not possible generally to evaluate whether decisions taken in an emergency are good or bad.⁷⁷ Although their (avowedly inexpert) opinion leads them to conclude that it is not possible to evaluate the effectiveness of government responses to "unique" security threats, the authors will need more than this assertion to explain the fruitlessness of such activities to the large part of the American security community devoted to doing just that.⁷⁸

⁷⁴ POSNER & VERMEULE, *supra* note 2, at 10.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.* at 15–16, 18. Indeed, the authors regularly offer substantive evaluations of the effectiveness of various security decisions. *See, e.g., id.* at 22 (positing their "tradeoff thesis" as idea that neither liberty nor security can be "maximized without regard to the other"); *id.* at 184–85 (supporting regulated use of coercive interrogation). For a critique of this and other raw effectiveness claims made by new functionalists, see Part III.A.

⁷⁸ Indeed, it is in part the regular engagement in after-action review for the purpose of gleaning lessons for future action that gives the security community, military and otherwise, the expertise that Posner and Vermeule argue is worthy of deference. *See generally* CHARLES PERROW, *THE NEXT*

The impact of these various omissions in the new functionalist approach becomes apparent when one evaluates the constitutionality of a specific policy such as security detention. This example is considered below.⁷⁹ For present purposes, it may suffice to conclude that the new functionalists offer a mixed bag. On one hand, they introduce important purposive interests—including those of individual rights and role effectiveness—into the constitutional calculation. Where formal methodologies produce uncertain answers to the constitutionality of government action, such considerations may offer useful guidance. On the other hand, each considers only some among various potentially legitimate functional interests—and some in far greater detail than others. And there is the overlaying puzzle of Hamilton’s prolonged sway on raw effectiveness analyses—even in a world, the new functionalists contend, of security interests different from those of the eighteenth century. Understanding how and whether to fill the gaps the new functionalists leave requires a theory of what role functional considerations should play in the constitutional law of separation of powers.

C. *Functionalism as a Factor: Purposes and Effects*

The new functionalists are right on at least one score: there is often no way to avoid functional considerations when it comes to the analysis of separation-of-powers problems in matters of national security. While there is considerable attractiveness in the idea that national security authority is shared amongst the branches according to established, formal commitments based on the nature of particular powers, the evidence seems overwhelming that it is rarely that simple. For instance, the text does not expressly allocate to the executive any power to detain prisoners seized on the field of combat. Yet it is broadly agreed that the President must have such power, at least to some extent, as part of any inherent or delegated authority to wage war. As the Court put it recently in recognizing presidential authority to detain individuals captured in a zone of military combat: “[D]etention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”⁸⁰ Why is detention a “fundamental

CATASTROPHE: REDUCING OUR VULNERABILITIES TO NATURAL, INDUSTRIAL, AND TERRORIST DISASTERS (2007) (assessing mechanisms for improving disaster prevention); STEPHEN PETER ROSEN, WINNING THE NEXT WAR: INNOVATION AND THE MODERN MILITARY (1994); *see also* NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 393–95 (2004) [hereinafter 9/11 COMMISSION REPORT] (detailing why review is worthwhile, and what lessons have been gleaned). Does the possibility of evaluation of emergency responses mean that every emergency-related decision should be subject to searching judicial or other review, and tested against a measure of best-possible-response? Not necessarily. But it does mean that one might doubt the validity of rejecting all post hoc evaluation of emergency actions on the grounds that such evaluation is categorically impossible.

⁷⁹ *See infra* Part IV.

⁸⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

incident”)? Only functional analysis provides a complete answer. Indeed, as should become clear in the discussion that follows, there is a strong basis in history and precedent for accepting that functional interests are part of the constitutional calculus.⁸¹

This is not to say that formal considerations are irrelevant. On the contrary, the Court’s analysis invariably, and appropriately, integrates such considerations.⁸² There are a number of reasons to reject the notion that constitutional structures are so flexible that any particular Congress and President may work out for themselves what power arrangement a given threat demands. The powers vested in the branches by the Constitution are limited by something more than circumstantial effectiveness. It is a core constitutional principle that ours is by law a government of limited powers, a principle crystallized in the textual insistence that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁸³ Accordingly, while the government as a whole may have all the power it needs to ensure the defense of the nation,⁸⁴ the power of the President “must stem either from an act of Congress or from the Constitution itself.”⁸⁵ In part for this reason, the structural provisions of the Constitution—“the architecture-defining, power-conferring provisions” setting out the basic allocation of power among the branches—have been appropriately interpreted in a less circumstantially dependent way than provisions aimed at specified individual rights.⁸⁶

⁸¹ See Flaherty, *supra* note 8, at 1729–30 (1996) (“The Founders embraced separation of powers to further several widely agreed-upon goals. Among these were certain ends or values that today are commonly at the center of separation of powers debates, including balance among the branches, responsibility or accountability to the electorate, and energetic, efficient government.”); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 354–553 (1998); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 173–83* (1985) (on failures of Articles of Confederation); see also *id.* at 261–62 (describing framers’ discussion at Constitutional Convention of allocation of powers among branches and arguing that “theory was even less relevant, and experience itself was inadequate: they could rely ultimately only on common sense, their collective wisdom, and their willingness to compromise.”); see generally HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 71 (1981) (explaining that Constitution was created to ensure against “tyrannical government” and to protect liberty).

⁸² See Eskridge, *supra* note 8, at 22, 24 (explaining that Justices have relied upon both formalistic and functional analysis in deciding cases).

⁸³ U.S. CONST. amend. X; see also Tribe, *supra* note 68, at 1247–48 (“Those provisions of the Constitution that are manifestly *instrumental* and *means-oriented* and that frame the architecture of the government ought to be given as fixed and determinate a reading as possible—one whose meaning is essentially frozen in time insofar as the shape, or topology, of the institutions created is concerned.”).

⁸⁴ THE FEDERALIST Nos. 23, 28 (Alexander Hamilton).

⁸⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

⁸⁶ Tribe, *supra* note 68, at 1246–47. This, in contrast to, for example, the Fifth and Eighth Amendments, where the Court has rarely engaged in foreign comparative analysis in cases involving the structural provisions of the Constitution. See Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 905–06 (2005) (“Many clauses of the Constitution—for example, the Contracts Clause and the Vesting Clauses of Articles II and III—have

What matters for interpretive purposes, then, is what the Constitution's functional interests are, how they should be weighted against formal insights, and how to determine what allocation of powers best serves both. This section recommends a functionalist approach that aims to address gaps left by both the pure formalist and the new functionalist analyses. For while opposed in many respects, the framers were united in identifying a core set of purposes that separating powers among the branches should achieve: (1) the protection of individual liberty through the constraint of government power; (2) the preservation of democratic accountability; and (3) the promotion of effectiveness—an idea that decision-making and effectiveness could be enhanced if the branches develop a degree of specialization and a level of competence lacking in the Confederation government.⁸⁷ In understanding what role functional analysis can play in the national security context, it is worth briefly recalling each of these interests.

1. *The Protection of Individual Rights*

It should be—but evidently is not⁸⁸—beyond question that a core goal of dividing roles among different branches is to limit power and thereby to protect individual liberty. For the framers, “remembering the many instances in which governments vested solely in one man, or one body of men, had degenerated into tyrannies, they judged it most prudent that the three great branches of power should be committed to different hands.”⁸⁹ Hamilton himself was one of the key proponents of this view. As he put it: “The true principle of government is this—make the system complete in its structure, give a perfect proportion and balance to its parts, and the powers you give it will never affect your security.”⁹⁰ Hamilton thus championed the centrality of the balance of constitutional powers to secure the

not proved to be as amenable to borrowing from foreign court decisions or legal rules as the ambiguous and developing Eighth Amendment has proved to be. And, while a textbook on issues of criminal law might be satiated with cases referring to foreign sources of law, a legal textbook on the jurisdiction of the federal courts or on the federal government's separation of powers would be quite lacking in such references.”).

⁸⁷ Other scholars have described a similar set of interests, using somewhat different terminology. See, e.g., Ackerman, *supra* note 56, at 715–27 (2000) (identifying separation-of-powers goals as protection of fundamental rights, democracy, and professional competence); Flaherty, *supra* note 8, at 1767 (identifying separation-of-powers goals of “balance,” “accountability,” and constraining “governmental power”).

⁸⁸ See Nzelibe & Yoo, *supra* note 42, at 2519–20 (identifying promotion of effectiveness and political accountability—but not constraint of government authority or protection of individual rights—as central concerns of separation-of-powers analysis).

⁸⁹ WOOD, *supra* note 81, at 549 & n.42; see also THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the definition of tyranny.”).

⁹⁰ Flaherty, *supra* note 8, at 1802 (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 350 (Jonathan Elliot ed., 1941)).

protection of individual rights. While agreeing there were individual human rights so fundamental that no government could legitimately abridge them, Federalists Hamilton and Madison famously opposed adding the Bill of Rights to the Constitution. A bill of rights was unnecessary in their view *because the checks and balances of the federal governmental structure were themselves adequate* to protect the people's fundamental rights.⁹¹ Thus, in attacking the constitutionality of the Alien and Sedition Act of 1798 (passed during the quasi war with France, criminalizing speech critical of the federal government), Madison's first point of contention was not that the provision violated the First Amendment right to free speech, but rather that Congress *lacked the structural authority* to regulate the press.⁹²

It is thus unsurprising that the Supreme Court has regularly recognized the protection of individual liberty as a core purpose of separated powers—and that it has done so even in those cases often considered formalist in approach. For instance, in defending the formal requirement of bicameralism from executive encroachment, the *Chadha* Court emphasized the fear of tyranny that drove the framers to embrace it: “Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there danger of Legislative despotism? Theory & practice both proclaim it.”⁹³ The same concern appeared with greater emphasis in *Buckley v. Valeo*, finding a violation of the Appointments Clause and separation-of-powers principles in an act reserving to Congress the power to appoint members of the executive branch Federal Elections Commission:

When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. . . . Were the power of judging joined with the legislative, the life and liberty of the subject would be

⁹¹ Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63, 68–69 (1987).

⁹² *Id.* at 74–75.

⁹³ *INS v. Chadha*, 462 U.S. 919, 948–49 (1983) (quoting 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254 (1911)); *see also id.* at 949 (quoting Hamilton arguing against adopting unicameral legislature on grounds that “we shall finally accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert.”) (quoting THE FEDERALIST NO. 22, at 135 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888)); *id.* at 950 (“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”) (quoting THE FEDERALIST NO. 51, at 324 (James Madison) (Henry Cabot Lodge ed., 1888)).

exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.⁹⁴

Notably, the recognition that individual liberty is a fundamental purpose of the separation of powers has appeared with at least as much frequency in the Court's separation-of-powers cases involving national security concerns as in its traditional separation-of-powers cases.⁹⁵

2. Political Accountability

While perhaps by comparison a marginal interest in the Court's

⁹⁴ *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) (quoting *THE FEDERALIST* NO. 47, at 302–03 (James Madison) (Henry Cabot Lodge ed., 1888)) (emphasis omitted); see also *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”) (citing *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714, 725 (1986)).

⁹⁵ See *Loving v. United States*, 517 U.S. 748, 756 (1996) (“Even before the birth of this country, separation of powers was known to be a defense against tyranny.”) (citing *MONTESQUIEU, THE SPIRIT OF THE LAWS* 151–52 (T. Nugent trans. 1949)); 1 *W. BLACKSTONE, COMMENTARIES* 146–47, 269–70); *Reid v. Covert*, 354 U.S. 1, 23–24 (1957) (“The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”); *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (“Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued.”) (citing *Ex parte Quirin* 317 U.S. 1, 19 (1942)). The Court's recent jurisprudence in this area has emphasized this point repeatedly:

[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. . . . Whatever 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. . . . [I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge.

Hamdi v. Rumsfeld, 542 U.S. 507, 535–37 (2004) (opinion of O'Connor, J.) (emphasis omitted) (quoting *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“[I]t was ‘the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.’”); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[T]he war power . . . is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.”)); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring) (“Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid. It is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive.”).

separation-of-powers jurisprudence, appearing in dissents more often than in majorities,⁹⁶ the idea that separating powers would serve to promote the accountability of the government to the people is also a recognizable theme in constitutional history and interpretation.⁹⁷ As Hamilton put it in arguing that the executive power should be vested in a single President, “[O]ne of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility. . . . [T]he multiplication of the executive adds to the difficulty of detection”⁹⁸ One can of course debate whether the highly complex executive branch of the modern administrative state is better or worse than the original Hamiltonian vision in securing the kind of accountability Hamilton had in mind. But the basic claim should remain valid: promoting political accountability is a purpose of separated powers.

Indeed, ensuring that government functions remain adequately accountable to the electorate has long been thought of as a proper judicial concern, in the separation-of-powers context and out. As the Court put it recently: “By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.”⁹⁹ Thus, in the administrative law context, the political accountability of the executive forms a significant part of the rationale supporting judicial deference to executive agency decisions based on often broad congressional authorization.¹⁰⁰ The particular ability of the

⁹⁶ See, e.g., *Mistretta*, 488 U.S. at 393–94 (determining that Sentencing Commission “does not exercise judicial power” and is sufficiently separate from judicial branch to maintain separation of powers); *id.* at 421–22 (Scalia, J., dissenting) (arguing against Congressional delegation of lawmaking to commissions that are not accountable to political process); *Morrison*, 487 U.S. at 731 (Scalia, J., dissenting) (“[T]he difference is the difference that the Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished.”).

⁹⁷ Flaherty, *supra* note 8, at 1767, 1785 (“As it promised balance, separation of powers also reflected a reconceptualization of accountability. . . . No less important, the Constitution continued the recent constitutional trend of harnessing separation of powers to joint accountability.”); see also Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42 (1995) (arguing that “key consideration” for unitary executive “was accountability to the electorate”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994) (rejecting strong “unitary executive” theory but noting the continued salience of “important values of accountability, coordination, and uniformity in the execution of the laws”).

⁹⁸ THE FEDERALIST NO. 70, at 405–06 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

⁹⁹ *Loving*, 517 U.S. at 757. Of course, it is not the President but Congress that is most commonly thought of as the most politically accountable branch. *Id.* at 757–58 (“Article I’s precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.”) (citation omitted); see also Barkow, *supra* note 12, at 997 (noting process mechanisms designed to promote public accountability of executive agencies).

¹⁰⁰ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely

electorate to hold political actors accountable for bad (or even unlawful) decision-making is likewise near the center of the political question doctrine, which is based in part on a notion that the courts can and should decline to exercise jurisdiction in the interest of allowing some uniquely political questions to be settled by the voters.¹⁰¹ The importance of political accountability has also appeared in converse, as the Supreme Court has urged against constructions of criminal laws that would create a constitutional question by allowing Congress (and potentially the executive) to effectively reap the political benefit of appearing tough on crime without bearing the political cost.¹⁰²

It is thus perhaps ironic for the new functionalists that in the foreign affairs context, political accountability has been at times antithetical to the Court's primary concerns. As the Court explained in *Curtiss-Wright*:

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.¹⁰³

Put differently, foreign affairs are complicated, and may at times require more operational delicacy than that permitted by popular democracy full-bore.

Thus, even acknowledging the relevant, if indeterminate, effect of political accountability, it is important to keep in mind some important

appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”)

¹⁰¹ See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 323–30 (2002) (defending some form of political question doctrine on grounds of promoting accountability).

¹⁰² For example, in requiring that the maximum sentence accompanying a given crime be provided by the legislature and proven to a jury—rather than affording judges the discretion to exceed the sentence provided by statutory law—the Court insisted that our democratic structures discourage legislatures from saying one thing while enabling the courts to do another. Rather, a state is required “to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices” behind having adopted the underlying law in the first place. *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000) (quoting *Patterson v. New York*, 432 U.S. 197, 228–29 n.13 (1977) (Powell, J., dissenting)). In such a way, the Court noted, “[t]he political check on potentially harsh legislative action is then more likely to operate.” *Id.* For a discussion of this argument in the context of the enforcement of the Geneva Conventions following the passage of the Military Commissions Act of 2006, see Deborah N. Pearlstein, *Saying What the Law Is*, 1 HARV. L. POL’Y REV. (Online), Nov. 6, 2006, http://www.hlpronline.com/2006/11/saying_what_the_law_is.html.

¹⁰³ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

limits on its impact in separation-of-powers analyses. First, appropriate government interests in secrecy surrounding certain aspects of national security may make it impossible for political accountability checks to function effectively. Where in other realms of administrative law it may be plausible to argue that strong presidential engagement with agency decision-making enhances transparency (and therefore accountability),¹⁰⁴ just the opposite effect is more likely to be at work in the national security context. That is, it is precisely *because* security sometimes requires secrecy that the involvement of more than one branch may be required to make popular accountability possible at all.¹⁰⁵

Second, as classic republicanism teaches, the interest in political accountability contemplated by the framers was something other than ensuring governance by pure reflection of popular will. On the contrary, the prevention of tyranny was regularly valued in the Constitution's structure over the idealization of direct democracy. Popular election of the chief executive would be mediated by an electoral college; the risk of legislative demagoguery would be limited by a presidential veto; both "political" branches would be held in check by the judiciary's constitutional review, and so on.¹⁰⁶ Bearing far greater emphasis was that "[t]he true policy of the axiom [of separation of powers] is that legislative usurpation and oppression may be obviated."¹⁰⁷ Under the circumstances

¹⁰⁴ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) ("Presidential administration promotes accountability in two principal and related ways. First, presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy . . .").

¹⁰⁵ This conclusion is the opposite of that reached by Yoo, who argues that executive discretion to, for example, deploy military force without interbranch consultation, is adequately checked by political accountability by the President to the electorate. Yoo, *supra* note 2, at 821; see also Nzalibe & Yoo, *supra* note 42, at 2519–23. Yoo does not address the concern that public elections may be ineffective in rejecting certain kinds of executive initiative if no information is publicly available about the full scope and nature of executive activities.

¹⁰⁶ See WOOD, *supra*, note 81, at 446–63; Flaherty, *supra* note 8, at 1784–85, 1804–05 (discussing Founders' concerns with legislative tyranny and in distributing political accountability among the branches); Robert O. Keohane et al., *Democracy-Enhancing Multilateralism* 8–10 (Inst. for Int'l Law and Justice, Working Paper NO. 2007/4, 2007) (describing Constitution's republican structures). On the presidential veto power, see *INS v. Chadha*, 462 U.S. 919, 947–48 (1983) ("The President's role in the lawmaking process also reflects the Framers' careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures."). On judicial review, see especially THE FEDERALIST NO. 78, at 438 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.").

¹⁰⁷ 4 THE WRITINGS OF JAMES MADISON: THE JOURNAL OF THE CONSTITUTIONAL CONVENTION 208 (Gaillard Hunt ed., 1903); see also McDONALD, *supra* note 81, at 150, 156, 165 (describing framers' reaction against state legislative tyranny of Articles of Confederation).

then, it seems reasonable to consider political accountability as a factor in purposive functionalism, but recognize that it is unlikely to be as salient—or as clear in its consequences—as other purposive separation-of-powers interests in the context of national security.

3. *The Promotion of Effectiveness*

In contrast, a third set of interests are indisputably at the core of both historic and modern separation-of-powers debate, and are perhaps the most central to the new functionalist mission. Here, purposive and effectiveness species of functionalism commingle, the latter emerging as a separate but integral part of the purposive analysis. That is, it is a core purpose of separating powers to ensure that the specialization and competence of the branches are used together in a way necessary to run an effective government (role effectiveness), and to ensure that the division of power leaves room for a good outcome as a matter of policy (raw effectiveness). This section explains why these interests constitutionally matter. The following Part considers how one might go about evaluating functional effectiveness claims in matters of national security.

Here, it is first essential to understand what the framers' discussions of executive competence were not. There is little question, for example, that Hamilton believed the Articles of Confederation government, lacking in unitary executive control, was grossly unprepared to fight a war repelling foreign attack.¹⁰⁸ Indeed, Hamilton's contention that national defense "most peculiarly demands those qualities which distinguish the exercise of power by a single hand,"¹⁰⁹ was in large measure a response to the particular war-related incompetence of the Articles of Confederation-model government. From this historical motive, however, subsequent assertions of the nature of Hamilton's views of effective national security mechanisms have elaborated rather broadly.¹¹⁰ Broadest of all are among

¹⁰⁸ THE FEDERALIST NO. 15, at 146 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government.").

¹⁰⁹ THE FEDERALIST NO. 74, at 422 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

¹¹⁰ See *supra* Part II.B (discussing recent scholarly accounts of executive competences). Notably, there are only two occasions on which a Justice of the Supreme Court has quoted the famous passage on secrecy and dispatch from Hamilton's FEDERALIST NO. 70, and on both occasions it was Justice Thomas in dissent. *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–81 (2004) (Thomas, J., dissenting) (alterations in original) ("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. 'Energy in the executive is a leading character in the definition of good government.' . . . The principle 'ingredien[t]' for 'energy in the executive' is 'unity.' This is because '[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.'") (quoting THE FEDERALIST NO. 70, at 471–72 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2823 (2006) (Thomas, J., dissenting) (quoting *Hamdi*, 542 U.S. at 581 (Thomas, J., dissenting)). Thomas was the sole justice to find that the President had inherent authority not only to detain Hamdi,

today's new functionalists: "[A] unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch."¹¹¹ At least the former two assertions find no support in Alexander Hamilton.

Rather, advocates like Hamilton of the so-called unitary executive urged their case on the grounds, among others, that such a figure would bring an "energy" that had been sorely missing in the Confederation scheme.¹¹² But the notion of "energy" in the executive was not energy in the sense of speed, activism or power *per se*, but energy for the purpose of ensuring *effectiveness* in government more generally. As Hamilton explained:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; *it is not less essential* to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. . . . A feeble execution is but another phrase for a bad execution¹¹³

Energy was a valued characteristic not solely (or even especially) because it was understood to enhance the executive's *security*-related capabilities, but because it was essential to every governmental function the executive was assigned, including the obligation to "take care" that the laws are faithfully executed. Asserting that such "energy" is uniquely important in national security misconstrues Hamilton; claiming "energy" in

but also to make "virtually conclusive factual findings" about his status, unchecked by the courts. *Hamdi*, 542 U.S. at 589.

¹¹¹ Yoo, *Constitutional Text*, *supra* note 47, at 1676.

¹¹² See Flaherty, *supra* note 8, at 1786 ("The advocates of [a unitary executive] prevailed over noisy opposition—primarily with the argument that a single magistrate would give the most 'energy' . . .") (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64–65 (Max Farrand ed., rev. ed. 1937)); see also THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Energy in the executive is a leading character in the definition of good government."); JOSEPH STORY: COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 767, at 546–47 (Ronald D. Rotunda & John E. Nowak eds., 1987) ("Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.").

¹¹³ THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis added); see also THE FEDERALIST NO. 37, at 243 (James Madison) (Isaac Kramnick ed., 1987) ("Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government."); THE FEDERALIST NO. 27, at 201 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("I believe it may be laid down as a general rule, that [the people's] confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration.").

the executive requires effectively unlimited power suggests far more about the nature of American government than even the new functionalists would likely claim.

Hamilton thus defined energy as requiring not only unity (with its potential for dispatch), but also “duration [in office]; an adequate provision for its support; and competent powers.”¹¹⁴ These characteristics of “energy” were equally as important, and in key respects tended to balance the idea that good executive policy was necessarily pursued swiftly and in secret. For Hamilton, adequate time in office was necessary to ensure, among other things, that there would be time both to plan initiatives and time for the public to evaluate their effect.¹¹⁵ “[C]ompetent powers” likewise referred to the presidential veto, designed to protect against undue “haste, inadvertence, or design” in legislation—a failing in government Hamilton was keen to guard against.¹¹⁶ In this context, decision, activity, secrecy, and dispatch were not the mark of good security policy *per se*, but were rather qualities—lacking in the Confederation government—that could aid (or not) the competent execution of any sound policy. Either way, the task of public administration was one that by definition engaged all branches of government.¹¹⁷ Recognizing that different branches have different institutional decision-making qualities—some can act faster than others, for example—does not presume a conclusion about when or whether these qualities are most effective in managing any particular kind of policy. The new functionalists risk confusing institutional description for policy prescription. Just because the executive *can* act faster than Congress (or the courts) in some circumstances does not mean security policy is always (or even generally) served by the deployment of such a skill.

Properly understood as reflecting something other than the constitutional endorsement of particular skills for particular problems, the Hamiltonian interests in both raw effectiveness (good policy) and role effectiveness (effective execution) emerge repeatedly in the Supreme Court’s separation-of-powers jurisprudence. On the raw effectiveness side,

¹¹⁴ THE FEDERALIST NO. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987); *see also* WOOD, *supra*, note 81, at 350–52; 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 52 (Max Farrand ed., 1911) (“We must either then renounce the blessings of the Union, or provide an Executive with sufficient vigor to pervade every part of it.”); 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1097–98 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (arguing for unitary executive with four-year term).

¹¹⁵ Richard T. Green, *Alexander Hamilton: Founder of the American Public Administration*, 34 ADMIN. & SOC’Y 541, 545, 549 (noting Hamilton’s concept that executive “[e]nergy consisted of four elements,” and that “[t]he second element is ‘duration,’ meaning long tenure in office”) (citation omitted).

¹¹⁶ THE FEDERALIST NO. 73, at 418–19 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

¹¹⁷ THE FEDERALIST NO. 72, at 412 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“The Administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary . . .”).

it should be apparent that the Court has never been shy about considering the policy efficacy of a given separation-of-powers outcome, whether in the security context or out.¹¹⁸ For instance, in the course of explaining (in an opinion of now questionable validity) why it was not within the judicial function to entertain petitions for writs of habeas corpus from military prisoners held overseas, the Court opined that such hearings “would hamper the war effort and bring aid and comfort to the enemy [and] . . . would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.”¹¹⁹ While the *Eisentrager* Court was obviously concerned with the expenditure of resources (military and other) associated with allowing judicial review, it is unclear what factual or strategic analysis underpinned the Court’s conclusion that such review would, for example, diminish the prestige of command. It is perhaps worth noting that if the Court is willing to be swayed by arguments that judicial review would aid the enemy, it should also logically be prepared to consider arguments that some enemies are most aided by the absence of such

¹¹⁸ See, e.g., *United States v. Nixon*, 418 U.S. 683, 708 (1974) (“A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”). Though *Nixon* may be perhaps more properly thought of as a formalist case—the Court’s opinion was structured according to its interest in identifying, and protecting, the core or essential functions of each branch—the case demonstrates how difficult it is to avoid the intrusion of raw effectiveness functionalism, even in the context of an ostensibly formal analysis. Cf. *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003) (quoting Brief for Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516) (upholding affirmative action policy in part on grounds that “high-ranking retired officers and civilian leaders” of the United States military assert that, “[b]ased on [their] decades of experience, . . . a highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security”).

¹¹⁹ *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2261 (2008) (“The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (“We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts.”); *id.* at 535 (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”) (quoting *Sterling v. Constantin*, 287 U.S. 378, 401 (1932)); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[T]he war power “is a power to wage war successfully . . .”). While the Court’s rejection of the presidentially created military commissions at Guantanamo Bay was in key respects driven by its interpretation of a statutory command, see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2790 (2006) (noting that Uniform Code of Military Justice requires that “the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable”), the extraordinarily detailed attention the Court gave to evaluating the practical need for the commissions’ alternative trial procedures should leave little question that the majority justices had constitutional separation-of-powers concerns in mind, see *Hamdan*, 126 S. Ct. at 2800–01 (Breyer, J., concurring) (“Trial by military commission raises separation-of-powers concerns of the highest order Insofar as the [p]retrial, trial, and post-trial procedures’ for the military commissions at issue deviate from court-martial practice, the deviations must be explained by some such practical need.”) (alteration in original) (citations omitted).

review.¹²⁰ But either way, there can be little doubt that the raw effectiveness of such a scheme—what it would mean for war fighting and ultimate success against a defined enemy—was a factor at some level in the Court’s rejection in that case of a greater judicial role.

Role effectiveness has been a more self-conscious feature of the Court’s separation-of-powers jurisprudence. Often cited as expressing the classic “flexible, pragmatic” version of executive power,¹²¹ Justice Jackson in *Youngstown Sheet & Tube Co.* joined the Court in rejecting President Truman’s seizure of private steel mills on the eve of a major labor strike as beyond the President’s constitutional authority.¹²² Writing an opinion the Court continues to recognize as having established the authoritative framework for reviewing the scope of executive power under the Constitution,¹²³ Jackson was acutely attuned to the need for judges to understand the separation of powers as, at least, a partial function of pragmatic effectiveness:

Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.¹²⁴

Accordingly, Jackson believed presidential powers should be understood not as fixed, but as “*fluctuat[ing]*,” depending on the activities of the other

¹²⁰ See, e.g., Gerard P. Fogarty, *Is Guantanamo Bay Undermining the Global War on Terror?*, PARAMETERS, Autumn 2005, at 54, 68, available at <http://www.carlisle.army.mil/USAWC/parameters/05autumn/fogarty.pdf> (“In addition to undermining the rule of law, there have been other harmful unintended consequences of the Administration’s policy in Guantanamo Bay: providing fuel to a rising global anti-Americanism that weakens US influence and effectiveness . . . and denying the United States the moral high ground it needs to promote international human rights in the future. It seems clear that these costs have far outweighed the operational benefits that the detainee operations have generated.”); Jessica Stern, *Al Qaeda, American Style*, N.Y. TIMES, July 15, 2006, at A15, available at LEXIS, News Library, NYT File (detailing Al Qaeda efforts to utilize the detainments at Guantanamo as propaganda and recruitment tools); Matthew Waxman, *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4, available at LEXIS, New Library, WPOST File (arguing that “[o]n balance, [the use of the prison at Guantanamo Bay]—and the widespread perception that it exists simply to keep detainees forever beyond the reach of the law—has become a drag on America’s moral credibility and, more to the point, its global counterterrorism efforts,” and further proposing that detentions “should include periodic reviews by an independent judge of the factual bases for a detention, under clearly legislated standards, and meaningful chances to challenge those premises with the assistance of lawyers”). This point is addressed further in Part IV, *infra*.

¹²¹ See Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87, 106–09 (2002) (describing ways in which Court has invoked *Youngstown*).

¹²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

¹²³ See *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring) (“The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.”).

¹²⁴ *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

branches.¹²⁵

Jackson's account is useful for present purposes in several respects, beginning with his illumination of role effectiveness, as distinct from raw effectiveness, concerns. Even as Jackson purported to reject pure formalist separation-of-powers analysis, he also rejected the idea that raw effectiveness against a particular enemy alone comprises the functional inquiry.¹²⁶ Thus in interpreting the scope of the Commander-in-Chief Clause, Jackson did not squarely engage the government's argument that the seizure of property was "essential" to military objectives; his counter was indirect, to the effect that *even if* such seizure were essential, formal limitations on executive power—including the Constitution's structural certainty that the civilian power shall be superior to the military—precluded the kind of broad reading required to find the seizure validated by inherent authority alone.¹²⁷

What "fluctuations" there were in the scope of executive power depended on factors internal to U.S. constitutional democracy; presidential power changed not depending solely upon some assessment of the security imperatives presented by a particular external threat, but rather as a matter of the activities of the other branches. The experience of other nations might be helpful in evaluating "the wisdom of lodging emergency powers somewhere in a modern government," Jackson argued.¹²⁸ But there was no clear reason—beyond convenience—why such powers had to be the executive's alone.

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. . . . In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute.¹²⁹

¹²⁵ *Id.* at 635 (emphasis added).

¹²⁶ Compare *id.* at 634–35 (noting that "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context"), with *id.* at 635, 646 (rejecting notion that "power to deal with a crisis or an emergency according to the necessities of the case [includes] the unarticulated assumption . . . that necessity knows no law," and cautioning that "[t]he opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote" and that "[t]he tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic").

¹²⁷ *Id.* at 646.

¹²⁸ *Id.* at 652.

¹²⁹ *Id.* at 652–53.

As a matter of interpretive approach, Jackson's lesson was that the legitimacy of power depends not as much on the competence of any one branch, as on the comparison between a single branch's competence and the branches' cumulative effectiveness.¹³⁰

Finally, Jackson's opinion also highlights another feature of effectiveness functionalism that the new functionalists are too ready to underestimate: that independent or unimpeded exercise of a disputed power must be *necessary* to the achievement of an otherwise constitutional goal.¹³¹ Thus, although Jackson essentially ceded the President's argument that maintaining steel supplies was essential to military operations, Jackson directly considered (and rejected) the idea that exclusive presidential power was the necessary structure for accomplishing that goal.¹³² Indeed, judicial evaluation of whether a structure is necessary for the achievement of asserted policy aims is at the heart of much of the Court's separation-of-powers jurisprudence.¹³³ In the security law realm, this principle is central

¹³⁰ *Id.* at 635 (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”).

¹³¹ In separation-of-powers and non-delegation jurisprudence, the Court has emphasized that while separation principles do not preclude one branch from “obtaining the assistance of its coordinate Branches” for the fulfillment of its responsibilities, that assistance is limited to what “*the inherent necessities* of the government co-ordination” require. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)) (emphasis added). In the non-delegation context, this principle appears as the justification for requiring that Congress provide an “intelligible principle” by which an agency may carry out congressional direction. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (“The Constitution has never been regarded as denying to the Congress the *necessary* resources of flexibility and practicality, which will enable it to perform its function”) (emphasis added). In the separation-of-powers case law, the notion flows from the Madisonian command of flexibility amongst the branches. *See Mistretta*, 488 U.S. at 380–82 (discussing respective interdependence and independence of three branches of American government); *see also id.* at 381 (“[T]he greatest security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the *necessary* constitutional means, and personal motives, to resist encroachments of others.”) (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961)) (emphasis added); *Nixon v. Adm’r of General Servs.*, 433 U.S. 425, 443 (1977) (“[T]he proper inquiry focuses on the extent to which [the Act in question] prevents the Executive Branch from accomplishing its constitutionally assigned functions.”); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (upholding congressional delegation of investigative powers to Federal Election Commission on grounds that such power has long been “regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it”).

¹³² *Youngstown*, 343 U.S. at 645–46.

¹³³ *See, e.g., Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 855–56 (1986) (finding “demonstrated need” for delegation of associated adjudicative powers to agency court and cautioning that “the CFTC’s assertion of counterclaim jurisdiction is limited to that which is necessary to make the reparations procedure workable”); *see also Morrison v. Olson*, 487 U.S. 654, 691–92 (1988) (finding that Court “simply [did] not see how the President’s need to control the exercise of [the independent counsel’s] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President”); *Schor*, 478 U.S. at 856 (“It was only to ensure the effectiveness of this [otherwise constitutional reparations] scheme that Congress authorized the CFTC to assert jurisdiction over common law counterclaims. Indeed, . . . absent the CFTC’s exercise of that authority, the purposes of the reparations procedure would have been confounded.”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (“Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper

in decisions such as *Ex Parte Milligan* and *Duncan v. Kahanamoku*, in which the Court evaluated and rejected claims of military necessity for the suspension of civilian judicial processes.¹³⁴ Thus, contrary to the new functionalist notion that government powers must be understood to permit that “everything plausible” be done to prevent another attack,¹³⁵ functionalist analysis would require (only) that the structural arrangement be able to accomplish everything necessary for government to be effective.

* * *

The new functionalists make an important contribution by insisting upon the constitutional relevance of the purpose and effect of distributing power. But while functionalist concerns were indeed engrained in the constitutional idea, so were the limits of this idea. The first limit is that formal commitments matter. Accordingly, even legitimate functional concerns must fail if they are demonstrably inconsistent with the Constitution’s text. A second limit is the range of relevant functional concerns—a defined set of interests in which the protection of liberty sits at the top of a hierarchy, political accountability sits beneath, and the raw and role effectiveness of single-branch action matter in defining the margins of allocations of power among the branches. Finally, while effectiveness in its various forms is an appropriate consideration in separation-of-powers questions, nothing in the Hamiltonian vision *per se* supports the new functionalist premise that the best response to any given national security threat requires secrecy and dispatch, much less the notion that particular initiatives like security detention are worthwhile. In the end, history and precedent have helped define the scope of purposive functionalism. But for the effectiveness inquiries, something more is required.

III. REASSESSING EFFECTIVENESS

In the terms just described, there is nothing inherent in the nature of functional analysis that should point in one direction or another in resolving a separation-of-powers dispute, even in the national security

inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.”) (citation omitted); *United States v. Nixon*, 418 U.S. 683, 712–13 (1974) (rejecting President’s separation-of-powers argument that judiciary lacks power to subpoena tapes on grounds that such a restriction would “gravely impair” courts’ ability to do their jobs).

¹³⁴ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (“It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.”) (emphasis omitted); see also *Duncan v. Kahanamoku*, 327 U.S. 304, 328–35 (1946) (Murphy, J., concurring) (reiterating assertions of Court that military trials are constitutionally inappropriate under circumstances where civilian courts remain intact and open).

¹³⁵ ACKERMAN, *supra* note 2, at 3.

context. The protection of individual liberty is and has ever been at the core of the judicial role. Ensuring the government remains adequately accountable to the electorate is of course an important job of the political branches, but has likewise long been thought of as a proper subject of judicial policing and concern. Furthermore, while the Court might at times demur about its interest in policy or institutional effectiveness, its occasional bouts of modesty on such questions belie a long track record of caring deeply. What Hamilton wanted—and what the Supreme Court’s jurisprudence bears out—was a government whose cumulative skill set makes effective governing possible. Yet while balancing purposive interests, like protecting liberty and promoting political accountability, is familiar terrain for legal scholars, it is perhaps less clear how government should work to ensure that the division of power promotes good policy (raw effectiveness), and carries out whatever policy it chooses effectively (role effectiveness). How, then, can we determine what structural arrangement is most effective for a particular security policy goal?

Here it becomes necessary to return the theoretical discussion back to the present context. The new functionalists believe that the threat of terrorism is best addressed by various measures geared toward expanding executive power to exploit essential executive competencies of secrecy, unity, speed, information and expertise in pursuing programs from security detention to the use of military force. In particular, while it is now clear that the modern threat of terrorism can take many forms—from car bombs to airline hijackings to whatever imagination can conjure—the concern that terrorists might successfully deploy a “weapon of mass destruction” (WMD) on U.S. soil appears to be the new functionalists’ greatest concern.¹³⁶ While the new functionalist project has plain implications for constitutional structures—and indeed would apply their constitutional analysis—in a wide swath of “national security”-related matters arising in circumstances far removed from (for example) the days surrounding a successful nuclear attack, the new functionalists at times suggest they are interested only in such immediate pre- and post-attack circumstances.¹³⁷ As Ackerman contemplates: “Terrorist attacks may kill a hundred thousand

¹³⁶ ACKERMAN, *supra* note 2, at 61; POSNER & VERMEULE, *supra* note 2, at 42–43; Nzelibe & Yoo, *supra* note 42, at 2535; *see also* Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 700, 707 (2006) (concluding that coercive interrogation techniques, although morally reprehensible, are justified by their potential benefits in preventing catastrophic terrorist attacks which are no longer trivial post-September 11th); A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1230–31 (2006) (“Time [is] of the essence when weapons of mass destruction have proliferated beyond the control of national governments.”).

¹³⁷ *Compare* ACKERMAN, *supra* note 2, at 1–6, 86–87 (focusing on structural demands in immediate aftermath of terrorist attack), *with* POSNER & VERMEULE, *supra* note 2, at 42 (suggesting entire “war on terror”—a term they do not define—is an emergency situation). Nzelibe and Yoo suggest no such “emergency” limitation. Nzelibe & Yoo, *supra* note 42, at 2516–19.

at a single blow, generating overwhelming grief and rippling panic”¹³⁸
 What kind of structure for, say, security detention would we want then?

Posing the question so specifically is not to say that these authors necessarily exclude from their analysis the danger of more conventional terrorist attacks. But there is some logical basis for treating the WMD “emergency” threat separately (and not only to make the analytic task more manageable).¹³⁹ There is a relevant substantive distinction between government responses to, for example, the threat of car bombings, and responses geared toward preventing an attack that actually threatens destruction on the scale Ackerman has in mind. Conventional car bombings, while devastating for those involved, pose no existential threat to American society. On the contrary, it would take a truly radical escalation of the use of such devices—far beyond the numbers in Israel or Northern Ireland at the height of those states’ bouts of high-level terrorist activity—for their domestic use to begin to reach the number of annual deaths domestically caused by, for example, alcohol-related car accidents.¹⁴⁰ But there is no serious discussion, for example, of

¹³⁸ ACKERMAN, *supra* note 2, at 4; *see also* POSNER & VERMEULE, *supra* note 2, at 64 (positing that “[a]fter the terrorist attack or military intervention, [government officials’] complacency is replaced by fear,” but that “fear-inspired decisions” are not necessarily bad); Nzelibe & Yoo, *supra* note 42, at 2532–35 (suggesting that “new threats to American national security change the way we think about the relationship between the process and substance of the warmaking system”).

¹³⁹ Security scholars have been right to point out that the phrase “weapons of mass destruction” is obfusatory at best. *E.g.*, Christopher F Chyba, *Toward Biological Security*, 81 FOREIGN AFF. 122, 123 (May–June 2002). Nuclear, radiological, chemical, and biological weapons—the major categories typically included as among “WMDs”—are all, of course, dangerous. But each such weapon poses a very different kind of threat from the others—including differences in raw destructive capacity—differences that can matter significantly in crafting effective defenses. Where policy priorities might be sensibly set according to some calculation of risk—a function of destructive capacity and the probability of a successful attack—lumping these diverse weapons together as WMDs can badly skew the security priority setting. Thus, the security concerns surrounding a nuclear-armed Iraq, for example, might be reasonably understood as of a different order than the security concerns posed by an Iraq armed with chemical weapons alone. *See* JOSEPH CIRINCIONE ET AL., DEADLY ARSENALS: NUCLEAR, BIOLOGICAL, AND CHEMICAL THREATS 3 (2d ed. 2005) (“Chemical weapons are easy to manufacture, but they inflict relatively limited damage over small areas and dissipate fairly quickly.”). More to the point, lumping these threats together pretends that each demands more or less the same kind of defense. This Article’s focus on the nuclear threat—certainly *one* of the truly “mass” threats among WMD’s—avoids this complication. The “mass” destructive capacity inherent in a successful nuclear detonation not only threatens a great loss of life, it may also pose a more existential threat to society itself. The U.S. government will continue to function at some level if a car bomb goes off outside the White House. Without significant advance planning, it is not clear that basic functions can be maintained if the city of Washington, D.C., is lost. If ever a government were to be justified in seeking extraordinary powers, it would be preventing just such destruction.

¹⁴⁰ In Northern Ireland, approximately 61 people were killed as a result of car bombs at the height of the conflict there in 1972. MALCOLM SUTTON, BEAR IN MIND THESE DEAD: AN INDEX OF DEATHS FROM THE CONFLICT IN IRELAND 1969–1993 (1994). In Israel, approximately 249 people were injured and 43 killed as a result of 22 car bomb incidents between 2001 and 2004. If one adds all suicide attacks in Israel during that period (including attacks on buses, etc.), the numbers rise to 4551. ISRAELI MINISTRY OF FOREIGN AFFAIRS, SUICIDE AND OTHER BOMBING ATTACKS IN ISRAEL SINCE THE 1993 DECLARATION OF PRINCIPLES, <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm>. By comparison, in the United States in 2006, there were an estimated 17,602 alcohol-related traffic deaths, approximately

indefinitely detaining “known” alcoholics or drug addicts who refuse to seek treatment because of the high likelihood that they will kill innocents once behind the wheel of a car. Indeed, such an approach would seem unthinkably inconsistent with the idea of a free society. It is at least somewhat more difficult to identify a rational distinction between preventive detention geared toward suspected alcoholics, and a regime for suspected car-bomb terrorists.

There are certainly disadvantages in considering such a specialized case in the hope of better understanding structural effectiveness. Government decision-making structures must obviously be able to operate regularly and effectively against a range of threats, and a structure that may offer significant benefits against a certain kind of threat may carry significant burdens in response to another kind of threat. But that reality should make the nuclear terrorism case a particularly tough and instructive example. If the nuclear case doesn’t require more separation-of-powers challenging structures than detention schemes designed for other kinds of threats, then one might legitimately question what would.

The inquiry thus framed, this Part proceeds as follows. The first section considers the new functionalists’ empirical effectiveness questions, holding up new functionalist conclusions about raw and role effectiveness against the empirical literature to test the plausibility of their assumptions about the terrorist nuclear threat, and the government response necessary to address it. In this way, we might take another cut at evaluating whether their interpretive approach to effectiveness functionality has succeeded. The second section then sketches a different approach to assessing what structures might be best suited to govern detention operations in this context. This section explores what there is to be learned from the work of organization theorists, who have studied a range of government approaches to the management of chronic and acute security threats, identifying both organizational pathologies and strengths in such approaches that bear directly on the kind of security detention operations often contemplated in current debates. From these lessons, this Article proposes a set of characteristics that a decision-making structure in this context would ideally possess.

A. *New Functionalist Effectiveness*

Despite the authors’ self-effacing assertions of modest knowledge in matters of security, raw effectiveness claims feature centrally in the new functionalists’ constitutional analysis. For example: the threat of mass

forty-one percent of the 42,642 total traffic fatalities. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., 2006 TRAFFIC SAFETY ANNUAL ASSESSMENT: A PREVIEW (2007), <http://www-nrd.nhtsa.dot.gov/Pubs/810791.PDF>.

casualty terrorism is best understood as an emergency or war; one can expect that in the event of a major attack, the public will panic and need to be reassured through visibly different security measures (such as widespread detention); an initial terrorist strike greatly increases the probability of a second, and inadequate detention (or excessive review) gives “aid and comfort” to the enemy or more directly, allows a second strike to happen; and the uncertainty created by review imposes a burden on security efforts that necessarily exceeds any security benefit.¹⁴¹

Yet grounds for suspicion of such conclusions become apparent when these core claims of “how things are” are held up against even a modest review of the open security literature. In the first instance, for example, it is not at all obvious that government decision makers should conceive of the challenge of preventing nuclear terrorism as exclusively or even primarily a subject of “emergency” powers or emergency decision-making. National security scholars and policymakers have been occupied with the possibility that non-state actors, including international terrorist organizations, would seek to acquire and use a nuclear weapon against the United States for more than thirty years. A 1977 report by the U.S. Office of Technology Assessment commissioned by Congress on questions of how “non-state groups [could] obtain nuclear weapons and the routes they could follow in doing so” concluded that “there is a clear possibility that a clever and competent group could design and construct a device which would give a significant nuclear yield.”¹⁴² While the unclassified study unearthed no evidence at the time that a non-state group had attempted to acquire a nuclear weapon, analysts cautioned that “[t]he expansion of nuclear power, the advent of plutonium recycle, and trends towards increased violence could lead non-state adversaries to attempt large-scale nuclear threats or violence.”¹⁴³ Based on the growing prevalence of such analyses in the mid-1970s, the United States established the federal Nuclear Emergency Search Team—a professionally diverse body that still exists today within the Department of Energy—to support the FBI in any effort to locate and disable a terrorist nuclear device in the United States.¹⁴⁴

¹⁴¹ ACKERMAN, *supra* note 2, at 46; POSNER & VERMEULE, *supra* note 2, at 254–56; JOHN YOO, *WAR BY OTHER MEANS* 128–29 (2006).

¹⁴² U.S. OFFICE OF TECH. ASSESSMENT, *NUCLEAR PROLIFERATION AND SAFEGUARDS*, at iii, 30 (1977), available at <http://www.princeton.edu/~ota/disk3/1977/7705/770501.PDF> [hereinafter OTA REPORT]; see also JOHN MCPHEE, *THE CURVE OF BINDING ENERGY* (1974) (detailing threat of nuclear terrorism); Jeffrey T. Richelson, *Defusing Nuclear Terror*, BULL. ATOM. SCIENTISTS, Mar.–Apr. 2002, at 38, 39–43 (citing 1963 national intelligence estimate called *The Clandestine Introduction of Weapons of Mass Destruction into the U.S.* and describing series of meetings in 1972 hosted by then Chair of U.S. Atomic Energy Commission regarding prospect of terrorist attempts to steal weapons-grade material to make bomb for use against United States).

¹⁴³ OTA REPORT, *supra* note 142, at 26; see also *id.* at 30 (describing methods terrorist group could use to acquire fissile material, including theft and black market economy).

¹⁴⁴ NAT'L NUCLEAR SEC. ADMIN., U.S. DEP'T OF ENERGY, *NUCLEAR EMERGENCY SUPPORT TEAM*, available at <http://www.nv.doe.gov/library/FactSheets/NEST.pdf>. The Atomic Energy Act

Such agencies have now existed with confirmation for more than a decade that at least one terrorist group is interested in making just such an attempt.¹⁴⁵

There have indeed been developments that make some aspects of these threats today arguably even easier to realize—the proliferation of weapons-grade materials perhaps is first among them—but the danger of nuclear terrorism is unquestionably a threat for which we have substantial strategic warning. Given the amount of warning we have had to develop prevention and crisis management plans, and the number of points in the process of weapon acquisition and deployment at which intervention is possible,¹⁴⁶ we may fairly expect prevention efforts to be ongoing and indefinite. If a nuclear bomb is delivered to the Port of Los Angeles, it may be preceded, if we are fortunate in a way few security experts anticipate, by a short-lived tactical crisis. But it will not be a strategic “surprise” (an aspect of most new functionalists’ definitions of emergencies).¹⁴⁷

In any case, disaster experience provides important reason to pause before embracing the raw effectiveness expectation that a nuclear “emergency”—the event of a successful terrorist attack—will produce the public consequences they anticipate. There can be no question that such an attack on an American city would be devastating in many ways and put special strains on government abilities at every level. But contrary to Ackerman’s central claim that an “emergency constitution” is necessary because terrorist strikes generate “mass panic,” undermining “effective sovereignty,”¹⁴⁸ the social science literature provides substantial evidence

charges the FBI with investigating illegal nuclear activities within the United States, 42 U.S.C. §§ 2011, 2271(b) (2000), and recent Presidential Decision Directives designate the FBI as the lead federal agency in charge of terrorist response inside the United States. See NAT’L NUCLEAR SEC. ADMIN., *supra* (“Under this national policy, the FBI is the Lead Federal Agency (LFA) for terrorism response within the United States . . .”).

¹⁴⁵ Both the 9/11 COMMISSION REPORT, and the later, officially sponsored report of the special COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION (the bipartisan Silberman–Robb Commission), describe in some detail U.S. knowledge of Al Qaeda’s efforts to obtain a nuclear weapon. Osama bin Laden has called the pursuit of a nuclear weapon a “religious obligation;” surveillance of Al Qaeda communications has revealed references to bringing about a “Hiroshima” in the United States; and materials found on computers in Al-Qaeda camps in Afghanistan have contained extensive materials on nuclear weapons, including rough sketches of bomb designs. 9/11 COMMISSION REPORT, *supra* note 78, at 380; Matthew Bunn & Anthony Weir, *The Seven Myths of Nuclear Terrorism*, 104 CURRENT HIST. 153, 154 (2005) available at <http://belfercenter.ksg.harvard.edu/files/bunnwier.pdf>. Today, there seems little dispute that Al Qaeda has the motive to acquire such a weapon, and would deploy it if acquired. The latter conclusion, however, leads most to believe that Al Qaeda and associated groups have not yet successfully acquired a single nuclear weapon. COMMISSION ON INTELLIGENCE CAPABILITIES OF UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT 272 (2005), available at http://www.wmd.gov/report/wmd_report.pdf [hereinafter WMD COMMISSION REPORT].

¹⁴⁶ See *infra* text accompanying note 162.

¹⁴⁷ See, e.g., POSNER & VERMEULE, *supra* note 2, at 42 (defining “full-blown” emergency as typified by “[n]ovel threats, heightened public concern, and deaths arising from hostile attacks”) (emphasis added).

¹⁴⁸ ACKERMAN, *supra* note 2, at 41–45, 89.

to support the opposite expectation: “widespread panic is not the pattern following any type of disaster.”¹⁴⁹ Moreover, as discussed below, to the extent public uncertainty is a risk, the public may well be most reassured by a visible government commitment, not to new and uncommon emergency powers, but to familiar modes of operation (or as close to familiar as possible) already widely accepted as legitimate.¹⁵⁰ More simply put, the impression and reality of control and normalcy may well be helpful in mitigating the risk of panic.

An analogous set of real-world examples undermines a second core aspect of the new functionalist effectiveness analysis: the “tradeoff thesis”—so named by Posner and Vermeule, and assumed by other new functionalists. This approach posits as the central concern of government institutions engaged in counterterrorism the functional necessity of making quick, zero-sum trade-offs between security and liberty.¹⁵¹ But it is not hard to find an identifiable set of circumstances in which the performance of this function is at best irrelevant and at worst, counterproductive, in counterterrorism operations. For example, the principle recommendations of the vast majority of reports in the security literature about how to prevent or cope with a nuclear terrorist attack are uniform in proposing a range of rights-neutral measures. There are many recommendations in which executive-branch-only secrecy is not an option (for example, because of the necessary cooperation of foreign civilian research reactor personnel), and in which expertise beyond mere political judgment is required (for instance, to evaluate the efficacy of fissile security measures).¹⁵² Why such a broad area of rights-neutral consensus?

¹⁴⁹ LEE CLARKE, MISSION IMPROBABLE 179 n.54 (1999) (“The pattern, in fact, is one of terror, accompanied by a moment of stunned reflection, or even anomie, followed by fairly orderly response. Even in the horrors chronicled by the [U.S.] Strategic Bombing Survey [established in 1944 to study the effects on cities in World War II devastated by firestorms and, later, nuclear attacks], cities burn, bodies explode, houses fall down and still people do not panic.”) (citations omitted); see also Lee Clarke, *Panic: Myth or Reality?*, CONTEXTS, Fall 2002, at 21, 22 (“After five decades studying scores of disasters . . . one of the strongest findings is that people rarely lose control.”); E.L. Quarantelli, *Sociology of Panic*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 11020, 11021 (Neil J. Smelser & Paul B. Baltes eds., 2001) (some researchers believe that panic behavior “is very meaningful and far from most conceptions of irrationality”); Kathleen Tierney, *Disaster Beliefs and Institutional Interests: Recycling Disaster Myths in the Aftermath of 9/11*, in TERRORISM AND DISASTER: NEW THREATS, NEW IDEAS, RESEARCH IN SOCIAL PROBLEMS AND PUBLIC POLICY 33, 34 (Lee Clarke ed., 2003) (suggesting that notion of widespread panic after disaster is a “myth”); see generally WEAPONS OF MASS DESTRUCTION AND TERRORISM (Alan O’Day ed., 2004).

¹⁵⁰ See Caron Chess, *Organizational Theory and the Stages of Risk Communication*, 21 RISK ANALYSIS, 179, 183 (2001) (discussing how social actors function better in predictable situations).

¹⁵¹ ACKERMAN, *supra* note 2, at 114–15 (assuming that emergency measures will curtail fundamental rights); POSNER & VERMEULE, *supra* note 2, at 26–27 (presenting supply-demand graph of “security-liberty frontier,” on which “any increase in security will require a decrease in liberty, and vice versa”); see also *id.* at 21 & n.7 (labeling this concept “The Tradeoff Thesis”); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 218 (2006) (“In wartime the government may reduce the individual liberties of even citizens in order to more effectively fight the war . . .”).

¹⁵² See, e.g., 9/11 COMMISSION REPORT, *supra* note 78, at 380–81 (recommending cooperative

Here the analysis is usefully informed by a brief detour through some highly public facts. The nuclear physics required to understand how to build a crude nuclear bomb has been in the public sphere for decades.¹⁵³ Experts thus agree that it is less the technical challenge of basic design and more the mechanical task of obtaining enough nuclear material to fuel a nuclear explosion that remains a critical hurdle for terrorist groups.¹⁵⁴ The simplest available bomb designs use “highly enriched uranium” (HEU) as nuclear fuel.¹⁵⁵ HEU is not generally available.¹⁵⁶ Rather, there are three commonly understood ways to get it: (1) subject naturally occurring uranium to an industrial “enrichment” process that makes it suitable for weapons use; (2) steal it from an existing warhead; or (3) obtain it by theft or black market sale from an existing HEU stockpile (stockpiled either for not-yet-built or decommissioned nuclear weapons, or to fuel research nuclear reactors, or ship or submarine reactors).¹⁵⁷ For various reasons, terrorist groups seem rationally far less likely to pursue or succeed in

international measures); WMD COMMISSION REPORT, *supra* note 145, at 527–32 (recommending measures for several branches of government); GRAHAM ALLISON, *NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE* 143–56 (2004) (recommending measures to prevent availability of nuclear material to terrorists worldwide); MATTHEW BUNN & ANTHONY WEIR, *SECURING THE BOMB* 2006, at 121–37 (2006), *available at* www.nti.org/securingthebomb (recommending a collaborative global response to combat nuclear proliferation); Linton F. Brooks, *Toward an Integrative Approach to Preventing Nuclear Terrorism*, in *ATOMS FOR PEACE: A FUTURE AFTER FIFTY YEARS?* 104, 105–06 (Joseph F. Pilat ed., 2007) (emphasizing the importance of securing nuclear materials against theft and sabotage, and enhancing export controls and treaty regimes); Richard A. Falkenrath, *Confronting Nuclear, Biological and Chemical Terrorism*, *SURVIVAL*, Autumn 1998, *reprinted in* *WEAPONS OF MASS DESTRUCTION AND TERRORISM* 91, 106–09 (Alan O’Day ed., 2004) (“[T]he single best possible insurance policy against the risk of nuclear terrorism is to ensure that all stockpiles of fissile (especially HEU) and nuclear weapons themselves are properly accounted for and guarded.”); Laura S.H. Holgate, *Preventing Nuclear Terrorism*, in *ATOMS FOR PEACE: A FUTURE AFTER FIFTY YEARS?* 111, 111–12 (Joseph F. Pilat ed., 2007) (advocating a “global cooperative effort”).

¹⁵³ For instance, *The Los Alamos Primer: The First Lectures on How to Build an Atomic Bomb*, based on the original lectures given by a chief U.S. nuclear weapons scientist to a team of U.S. scientists working in top secret at Los Alamos National Laboratories during World War II, was declassified in the 1960s. ROBERT SERBER, *THE LOS ALAMOS PRIMER: THE FIRST LECTURES ON HOW TO BUILD AN ATOMIC BOMB* 25–28 (1992) (addressing, *inter alia*, how big bomb would need to be in order to achieve critical mass); *see also* Andrew O’Neil, *Terrorist Use of Weapons of Mass Destruction: How Serious Is the Threat?*, 57 *AUSTL. J. INT’L AFF.* 99 (2003), *reprinted in* *WEAPONS OF MASS DESTRUCTION AND TERRORISM* 1, 3 (Alan O’Day ed., 2004) (“Those who maintain that nuclear weapons are accessible for terrorist groups point out that knowledge on ‘how to build a bomb’ is now freely available to anyone who has Internet access.”).

¹⁵⁴ *See, e.g.*, WMD COMMISSION REPORT, *supra* note 145, at 517 (“The single greatest hurdle to a terrorist’s fabrication of a nuclear device is the acquisition of weapons-usable nuclear material.”).

¹⁵⁵ *See* RICHARD L. GARWIN & GEORGES CHARPAK, *MEGAWATTS & MEGATONS: THE FUTURE OF NUCLEAR POWER AND NUCLEAR WEAPONS* 313 (2001).

¹⁵⁶ *See id.* at 313–14 (discussing challenges of HEU production).

¹⁵⁷ *See, e.g.*, ALLISON, *supra* note 152, 61–86 (2004) (discussing pathways for terrorists to acquire nuclear weapons or fissile material); BUNN & WEIR, *supra* note 152, at 3–5 (discussing paths by which terrorists might acquire and use a nuclear weapon). These three pathways, still the predominant understanding today, are essentially identical to those identified by OTA researchers in 1977. OTA REPORT, *supra* note 142, at 30.

options one or two.¹⁵⁸ On the other hand, the theft or illicit trafficking of material from HEU stockpiles is a substantial risk. HEU (or weapons-usable plutonium) is known to exist in at least forty different countries worldwide, in both government and civilian facilities with widely varying security protocols to guard against both outside attack and insider threats.¹⁵⁹ Indeed, state-owned sites in the former Soviet Union have in the past fifteen years experienced thefts of limited amounts of HEU from nuclear weapons labs and reactor facilities; some of the thefts or planned thefts have resulted in prosecutions, largely of weapons lab or military insiders motivated by the prospect of profiting from the subsequent sale.¹⁶⁰ Nuclear research reactors (roughly 135 locations worldwide—a number at universities) are also thought to be prime targets, as many of these have existed with little security for decades.¹⁶¹

In short, the threat of nuclear terrorism is in the first instance the threat of illicit trafficking or theft from one of the known facilities capable of producing such material, or stockpiles of such material. For this reason, the wide assortment of official and expert recommendations regarding the prevention of nuclear proliferation (unrelated to bureaucratic organization) place top priority on urging greater international cooperative efforts to inventory, secure, deter, and track the disposition of these materials.¹⁶²

¹⁵⁸ The facilities needed to manufacture HEU are large, expensive, technically challenging to build, and harder to hide from existing means of state and international surveillance. Chyba, *supra* note 139, at 124–25. Likewise, state-owned nuclear weapons tend to be protected by more or less sophisticated layers of defense. U.S. nuclear weapons, for example, cannot be detonated without codes to so-called “permissive action links”—electronic locks requiring the correct entry of complex codes, substantially inhibiting unauthorized use of the weapon. *See, e.g.*, BUNN & WEIR, *supra* note 152, at 47 (describing various U.S. security measures); SCOTT D. SAGAN, *THE LIMITS OF SAFETY: ORGANIZATIONS, ACCIDENTS, AND NUCLEAR WEAPONS* 106 & n.149 (1993). While the other nuclear weapons states may have less effective methods of protecting existing warheads, less is known about the scope of these security systems. BUNN & WEIR, *supra* note 152, at 47. Despite this, as of 2005, the best publicly available analysis found that there were “no credible reports” of weapons having been stolen from “vulnerable” countries. WMD COMMISSION REPORT, *supra* note 145, at 272. The availability of such protections does not guarantee that terrorists will not attempt weapon theft, but they do make this pathway less attractive than option three—theft or illicit purchase of HEU alone.

¹⁵⁹ BUNN & WEIR, *supra* note 152, at 19. Various governmental and non-governmental organizations track worldwide inventories of HEU. *See, e.g., id.* at 19–20 nn.42–43.

¹⁶⁰ *Id.* at 10.

¹⁶¹ *Id.* at 19–20 & n.43.

¹⁶² *See* 9/11 COMMISSION REPORT, *supra* note 78, at 380–81 (making three recommendations to guard against WMD proliferation: “work with the international community to develop laws and an international legal regime with universal jurisdiction to enable the capture, interdiction, and prosecution” of nuclear smugglers; expand U.S. engagement with international partnerships using military, economic and diplomatic tools to interdict shipments of concern, including expanding partners to include Russia and China; expand 1991 Cooperative Threat Reduction Program and related efforts in partnership with Russia to secure fissile and related materials in former Soviet Union); WMD COMMISSION REPORT, *supra* note 145, at 527 (recommending, *inter alia*, that United States pursue “additional bilateral ship-boarding agreements” to help tag, track and locate vessels of proliferation concern); *see also, e.g.*, ALLISON, *supra* note 152, at 143 (emphasizing the importance of persuading every nuclear weapons state to improve security of nuclear weapons and material); Linton F. Brooks, *supra* note 152, at 104–07 (describing cooperation with Russia, *inter alia*, as a “first-order priority”);

There may be many policy trade-offs associated with such an approach. But a trade-off between individual *rights* and security is not one of them.

Consider another core raw effectiveness assertion: too much independent review of executive detention will give aid and comfort to the enemy, or otherwise increase security risk. The assumption that it would is far from obvious. At least some case studies of law enforcement and intelligence efforts in emergency settings tend to support the greater effectiveness of retail, rather than wholesale (or dragnet-type) efforts, in part *because* ordinary resources are so taxed already.¹⁶³ And while review of any given detention decision (at any stage) no doubt consumes some resources, it has also become clear, for example, that the absence of judicial review for terrorist suspects (in the individual case and in the aggregate) may badly undermine the international support recognized as essential to identify and track the source of a nuclear bomb.¹⁶⁴ In this

BUNN & WEIR, *supra* note 152, at 121–37 (recommending various U.S. security measures). Congress recently authorized substantial new expenditures for this purpose. 50 U.S.C. § 2921 (2008) (“It shall be the policy of the United States . . . to eliminate any obstacles to timely obligating and executing the full amount of any appropriated funds for threat reduction and nonproliferation programs in order to accelerate and strengthen progress on preventing weapons of mass destruction (WMD) proliferation and terrorism. Such policy shall be implemented with concrete measures, such as those described in this title As a result, Congress intends that any funds authorized to be appropriated to programs for preventing WMD proliferation and terrorism under this subtitle will be executed in a timely manner.”).

¹⁶³ See Arie Perliger & Ami Pedahzur, *Coping with Suicide Attacks: Lessons from Israel*, 26 PUB. MONEY & MGMT. 281, 282 (2006) (emphasizing importance of “selective” prevention procedures). Indeed, history provides at least several examples of wholesale emergency dragnets that create more problems than they solve. See, e.g., David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1755 (2004) (describing why “there are no mass preventive detention success stories in our history”). Notably, publicly available descriptions of the FBI’s role in TOPOFF3—one in the U.S. Government’s series of comprehensive terrorism attack simulations—suggest that the FBI had at least some (and perhaps complete) success in converting pre-attack intelligence into individual arrests, carried out by standard search warrants. See STATE OF CONNECTICUT TOPOFF 3 AFTER-ACTION REPORT 8, available at http://www.ct.gov/demhs/lib/demhs/publicinfo/cttopoff3_pub_after_action_report_summ.pdf.pdf (“Over a period of several weeks, the FBI, as well as the State and Local Police Departments, were given some intelligence prior to TOPOFF 3, in an effort to test intelligence sharing. It was clear that the information received by the respective agencies was shared and notionally successful search warrants and arrests were made prior to TOPOFF 3.”); Department of Homeland Security, Transcript of Background Briefing with Senior DHS Officials on TOPOFF 3, at 8–9 (April 8, 2005), available at http://www.dhs.gov/xnews/releases/press_release_0656.shtm (“[W]e had lots of information that kind of highlighted the fact that we had some numerous individuals of concern operating in different locations throughout the northeast United States, and FBI, working in partnership with state and local law enforcement, were able to follow some investigation—investigative leads where we were actually able to make some arrests of some individuals that had information dealing with other plotlines So we were able to prevent, or able to grab some people, able to grab some weapons, able to grab some information that we believe allowed us to successfully thwart a couple of events during the week or two prior to the actual full-scale events on Monday, and some actors that, of course, did not come up in the information surge associated with those activities, so that we had to deliberately build those in so we could get first responder play during the full-scale event In terms of activities in the United States, we believe that all individuals that were associated with the plotlines that were able to follow through the buildup phase and then into the boots on the ground phase of the exercise, we policed up the individuals, the sprayer devices, the suspect vehicles in question. We were able to do that”).

¹⁶⁴ A remarkable study by the Intelligence and Security Committee of the British Parliament found widely reported U.S. practices of kidnapping and secretly imprisoning and torturing terrorist

regard, ensuring one's decision-making structure can evaluate, for example, strategic/tactical trade-offs may be at least as important as ensuring that the structure can evaluate liberty-security trade-offs.

None of this is to say that a trade-off between rights and security may never be required. On the contrary, there remain examples of where just such a trade-off may be necessary—in the bioterror context, for instance, with the need for quarantine following the release of an identified contagious pathogen.¹⁶⁵ The foregoing is intended instead to illustrate three points. First, even a modest engagement with the empirical literature demonstrates that it is a raw effectiveness mistake to assume an absolute correlation between rights and security, or that effectiveness in the task of quickly balancing rights and security should take priority in structural design. Any raw effectiveness approach then, at least at the level of theory, would seem to require a more forthright engagement in what can be known about the real-world effects on policy of a given distribution of power. It may be that raw effectiveness in any given case is not salient for purposes of judicial review because there is no generalizable answer, or because other formal or functional interests are dispositive. But publicly knowable facts may make it possible to conclude that some security judgments with liberty implications are likely ineffective, or even irrational.¹⁶⁶ If confronted with factual uncertainty about whether a particular decision-making structure will aid the enemy, it would be a peculiar constitutional disservice to assume, purely on raw effectiveness grounds, a singular conclusion nonetheless.

Second, as should be evident by, for example, the active debate surrounding the Model State Emergency Health Powers Act (and its peacetime passage by more than two dozen states),¹⁶⁷ where security needs can be anticipated even in broad contours, there is nothing inherent in the

suspects, which led the British to withdraw from previously planned covert operations with the CIA after the United States failed to offer adequate assurances against inhumane treatment and rendition. See Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007, at A6, available at LEXIS, News Library, NYT File (“Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment, the report said.”). The full report of the Committee is available at <http://www.statewatch.org/news/2007/jul/uk-intel-sec-cttee-rendition-gov-resp.pdf>.

¹⁶⁵ See Thomas May, *Political Authority in a Bioterror Emergency*, 32 J.L. MED. & ETHICS 159, 159 (2004) (discussing Model State Emergency Health Powers Act, designed to grant state officials expansive authority to coordinate biological terror attack response).

¹⁶⁶ Consider, for example, the First Amendment burden of a hypothetical law banning the sale of Los Alamos physicists' notes regarding the physics behind nuclear weapons design—notes published long ago in Robert Serber's *The Los Alamos Primer: The First Lectures on How to Build an Atomic Bomb*.

¹⁶⁷ See, e.g., Daniel S. Reich, *Modernizing Local Responses to Public Health Emergencies: Bioterrorism, Epidemics and the Model State Emergency Health Powers Act*, 19 J. CONTEMP. HEALTH L. & POL'Y 379, 382 n.11 (2003) (discussing Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, Model State Emergency Health Powers Act, Dec. 21, 2001).

nature of making policy choices involving security-liberty trade-offs that necessitate the general alteration of the structures of government power. Even where the need for speed may eliminate the feasibility of certain kinds of decision-making structures—including those involving multiple layers of executive branch operations review—anticipatable categories of operations (of which detention is surely one) leaves open the possibility of designing *ex ante* controls and/or *ex post* checks that address interests of legality and efficiency. Such decisions may indeed involve trade-offs between interests. But given strategic warning, which we no doubt have with respect to the threat of nuclear terrorism, it may be possible to decide on and implement those trade-offs in advance of an attack and within the structure of normal government processes.

Finally, while the raw effectiveness argument about the strategic costs of scant judicial review in this context does not necessarily suggest that there is always one right choice between tactical and strategic goals, it does suggest that the most we might say about the raw effectiveness impact of no-review detention is that it depends on the enemy. It also suggests that a decision-making structure that *invariably* favors tactics over strategy (or security over liberty), or *systematically* forecloses the consideration of either tactical or strategic consequences, will fail to rationally evaluate such trade-offs. As discussed below, an insistence on viewing all operations connected with “WMDs” as tantamount to a constitutional “emergency” seems liable to ensure against the regular evaluation of strategic versus tactical responses to threats.

This brings us to the new functionalists’ role effectiveness approach. For whatever one researcher (especially, the new functionalists would suggest, legal researchers) might find in the empirical literature informing the nature of security threats and emergency responses, the new functionalists’ more forthright argument is that institutional competences make the executive better positioned to consider this information and make decisions accordingly. Indeed, in a linear comparison of institutional competences, the differences among the branches that flow from institutional structure are of course real. The judiciary, for example, can only act in the event of a case or controversy. The administrative agency and national security apparatus may put information, in the first instance, in the hands of the executive rather than Congress or the courts. Moreover, the new functionalists add, the judiciary lacks the expertise and the procedural and evidentiary resources to make good judgments in an emergency; judicial resources are too scarce to require individualized determinations as to many hundreds or thousands of detainees it is assumed, as a matter of raw effectiveness, it will be necessary to detain. And given its own resource constraints and motives, the executive is

unlikely to exaggerate the danger posed by an individual, or detain too many people.¹⁶⁸ Accordingly, the new functionalists tend to favor a decision-making structure with loose (if any), emergency-driven congressional engagement and deferential (if any) judicial review.

But such comparative competence accounts are misleading in several ways. They ignore the complexity of current government decision-making structures. The vast executive branch decision-making apparatus means decisions rarely come down to the speed possible with one man acting alone, and Congress and the courts have at their institutional disposal multiple means to enable the sharing of information among the branches. Such accounts also critically ignore the possibility of collective organizational capacity, a notion Justice Jackson's *Youngstown* concurrence seemed squarely to contemplate.¹⁶⁹ The executive acting alone may be better than the courts acting alone in some circumstances, but the executive plus the courts (or Congress) may be more effective than the executive alone.

Perhaps most important, the new functionalist role effectiveness view ignores the structural reality that national security policy (indeed all government decision-making) is channeled through a set of existing organizations, each with its own highly elaborated set of professional norms and responsibilities, standard procedures and routines, identities and culture, all of which constrain and guide behavior—often in ways that centrally affect the organization's ability to perform its functions. Considering how such pathologies affect decision-making, one may find a far more sophisticated—and more meaningful—set of comparisons between decision-making structures than asking, for example, whether the executive can make decisions faster than courts. The next section explores a role effectiveness approach that could take this reality into account.

B. *An Organizational Effectiveness Approach: Managing High Consequence Risk*

Our understanding of organizational decision-making has developed substantially since Hamilton, with a diverse range of disciplines engaging questions of how organizations act and why.¹⁷⁰ In the context of

¹⁶⁸ YOO, *supra* note 141, at 129–30 (“Imagine the chaos if lawyers descended en masse, demanding that evidence against enemy detainees be preserved under a rigorous chain of custody and that officers and soldiers be cross-examined about their battlefield decisions.”); *see also* POSNER & VERMEULE, *supra* note 2, at 256 (“There is no reason to think that the executive would benefit from an excessive detention or conviction rate, or that political constraints would permit the executive to implement such a preference in any event.”).

¹⁶⁹ *See supra* text accompanying note 124 (suggesting that presidential power should fluctuate in response to other branches).

¹⁷⁰ *See generally* CHARLES PERROW, *COMPLEX ORGANIZATIONS* (3d ed. 1986) (discussing growth and evolution of organizational analysis over past twenty-five years).

government decision-making, scholars have asked what capabilities and constraints an agency has that produce the information from which decisions are made, create options from which decisions are chosen, and select actions the organization takes.¹⁷¹ In evaluating whether and to what extent there should be multiple actors involved in a given decision, the organization theorist can evaluate, for example, whether formal constraints help or hinder decision-making;¹⁷² whether group decision-making is better served by competitive or cooperative debate;¹⁷³ or whether outcomes are better or worse with independent or redundant checks.¹⁷⁴ Particularly in understanding organizations that manage complex and intrinsically hazardous duties (like deciding whom to detain and for how long) that pose a potentially high risk to public safety—from operating nuclear power plants to aircraft carriers to the space shuttle—organization experts have tested their theoretical predictions against real-world examples of government decision-making performance.¹⁷⁵

While a fully realized empirical study of detention structures is beyond the scope of this Article, the raw effectiveness discussion above (arguing that the threat of nuclear terrorism is both strategically predictable and

¹⁷¹ See, e.g., GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 390–92 (2d ed. 1999) (listing model questions that include: “[w]hat capabilities and constraints do these organizations’ existing SOPs create in generating the menu of options for action?”).

¹⁷² See *id.* at 147–58 (outlining organizational model of government behavior); see also PATRICK J. HANEY, *ORGANIZING FOR FOREIGN POLICY CRISES: PRESIDENTS, ADVISERS, AND THE MANAGEMENT OF DECISION MAKING* (1997) (comparing presidential advising structures in managing foreign policy crises from Truman to Bush I administrations); cf. ARTHUR L. STINCHCOMBE, *WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS* 126–33 (2001) (discussing how “[o]rganizational flexibility” depends on a “structure of rigidities” in budgeting processes and the like).

¹⁷³ See, e.g., IRVING L. JANIS, *GROUPTHINK* 142–58 (2d ed. 1982) (contrasting Cuban Missile Crisis executive decisionmaking process with “groupthink” dynamics in which individual decisionmakers conform to group norms, often compromising critical analysis); AMY B. ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11*, at 67–69 (2007) (reviewing cultural pathologies undermining necessary cooperation in pre-September 11 counterterrorism efforts).

¹⁷⁴ See, e.g., JONATHAN B. BENDOR, *PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT* (1985) (reviewing theories of bureaucratic competition).

¹⁷⁵ See, e.g., SAGAN, *supra* note 158 (using organization theory to study decisions regarding nuclear weapons safety); DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION* 79–91 (1996) (discussing organizational failures leading to Space Shuttle explosion); Todd R. LaPorte, *High Reliability Organizations: Unlikely, Demanding and At Risk*, 4 J. CONTINGENCIES & CRISIS MGMT., 60, 60 (1996) (reviewing literature on crisis management and “high reliability organizations,” where operating failures can produce catastrophic consequences); Karl E. Weick, *Organizational Culture as a Source of High Reliability*, CAL. MGMT. REV., Winter 1987, at 112–27. Perhaps foremost in this literature is Charles Perrow’s 1984 book, *Normal Accidents: Living with High-Risk Technologies*, studying decision-making performance in organizations from nuclear power and petrochemical plants, to air and spacecraft operation, to military performance, to the management of natural and biological hazards. CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES* 304–06 (1984). Since then, a range of scholars have sought systematically to identify what common characteristics might be visible in organizations that are broadly effective in operating complex systems and performing high-risk tasks with a significant degree of success. See, e.g., Gene I. Rochlin, *Reliable Organizations*, 4 J. CONTINGENCIES & CRISIS MGMT. 55 (1996) (surveying evolution of scholarship).

chronically present) suggests that in evaluating what structural arrangement is most functionally effective for a detention regime to prevent the realization of a nuclear terrorist attack, it may be helpful to consider the existing literature analyzing similarly high-risk government decision-making.¹⁷⁶ First, what organizational structures have performed reliably well “in the face of persistent high risks and fluctuating conditions”?¹⁷⁷ Political scientist Scott Sagan, for example, has explored in depth how the military and related security organizations have functioned in protecting existing nuclear weapons from accidental or unauthorized detonation.¹⁷⁸ While there are, of course, some important differences between this task and the task of designing a detention regime geared toward preventing a terrorist nuclear attack, there are also some important similarities. In both cases, critical operations in an organization’s prevention apparatus are carried out by relatively low-level officials.¹⁷⁹ In both cases, an error by any one lower-level official can lead to a strategically significant bad outcome—whether the risk is accidental detonation, failure to detain or question an individual setting out to cause imminent harm, or, in a different way, the wrongful treatment of an innocent suspect that can lead to generations-long strategic obstacles in gaining the trust of allies and winning the “hearts” of enemies. And while the terrorism case necessarily involves individuals with malevolent intent

¹⁷⁶ This Article’s focus principally on political science literature is not to suggest other organization studies approaches are irrelevant. On the contrary, cognitive psychology and sociology, among others, offer valuable insights into challenges of organizational decision-making. *See generally*, Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045 (2005) (studying affect of emotions on political leaders’ decision-making); Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS L. REV. 559 (2006) (discussing how emotional responses generate bias in counterterrorism policy); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002) (discussing applicability of cognitive psychological theory of human decision-making to government decision-making); Cass Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121 (2003) (analyzing affect of public fear on citizens’ expectations of government).

¹⁷⁷ KARL E. WEICK & KATHLEEN M. SUTCLIFFE, *MANAGING THE UNEXPECTED: ASSURING HIGH PERFORMANCE IN AN AGE OF COMPLEXITY* 53 (2001).

¹⁷⁸ SAGAN, *supra* note 158, at 8–9.

¹⁷⁹ In the nuclear safety context: “Most of the critical decisions influencing the risk of accidental war were made by lower-ranking officials, without the involvement or full awareness of political authorities in Washington.” SAGAN, *supra* note 158, at 256. The same has been more than evident as the United States has carried out the tasks of detaining and interrogating terrorist suspects—tasks performed in the first instance by troops including a range of individuals, from highly trained law enforcement officers to often far less skilled young troops in the field. *See, e.g.*, INSPECTOR GEN., DEP’T OF THE ARMY, *DETAINEE OPERATIONS INSPECTION 36* (2004) [hereinafter DAIG REPORT], available at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf>; Major General George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, in *INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB 34*, 49–52 (2004) [hereinafter Fay Report], available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>; FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 55 (2004) [hereinafter DOD DETENTION OPERATIONS REPORT], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

(whereas a nuclear weapons or other major disaster might occur without anyone *meaning* to do harm), the tactical uncertainties about when, where, and how a terrorist may exercise that intent leaves an organization seeking to manage the risk each threat poses in a similar position. The causes of a bad outcome may be multifarious and unknown, but the worst-case foreseeable consequences of a bad outcome may be identified in advance with some specificity.¹⁸⁰

A second potentially relevant set of examples surrounds crisis decision-making *per se*, based on the possibility that we may acquire pre-attack tactical information or need to maintain functional detention operations in the immediate aftermath of a successful nuclear attack. Real-world examples like the 1995 sarin gas attack by terrorists in the Tokyo subway system,¹⁸¹ responses to September 11th itself, and increasingly elaborate government simulations of multi-city terrorist incidents involving nuclear, chemical, and/or biological weapons—all have helped to test theorists' expectations against the actual performance of the organizations likely to be involved in any detention scheme (the military, law enforcement, civilian agencies and national security policy structures in the executive branch – and the incentives that drive them).¹⁸² From these examples, one might begin to test new functionalist preferences for characteristics like flexibility, unity, secrecy, and dispatch. And one might hope to extract a set of characteristics that detention decision-making organizations in this context would ideally possess.

1. *Flexibility and Formality*

The new functionalists' instinctive attraction to flexibility in decision-making rules or structures—and its corresponding possibilities of secrecy

¹⁸⁰ While different response activities are of course contemplated depending on the nature of the incident, there are important, recognized functional similarities between accidental and deliberate incidents in structuring a coherent organizational response. Indeed, the U.S. National Response Framework—the federal planning document setting forth how the government is expected to function in significant emergency response situations—groups in a single annex the discussion of responses to the accidental or terrorist-driven release of radioactive material that poses a threat to national security, public health and safety. See NUCLEAR/RADIOLOGICAL INCIDENT ANNEX (2008), available at <http://www.fema.gov/pdf/about/divisions/thd/IncidentNucRad.pdf>.

¹⁸¹ Robyn L. Pangl, *Consequence Management in the 1995 Sarin Attacks on the Japanese Subway System*, in COUNTERING TERRORISM: DIMENSIONS OF PREPAREDNESS 371–410 (Arnold M. Howitt & Robyn L. Pangl eds., 2003).

¹⁸² See, e.g., OFF. OF COUNTERTERRORISM, U.S. DEP'T OF STATE, TOPOFF (TOP OFFICIALS) (2002), <http://www.state.gov/s/ct/rls/fs/2002/12129.htm> (last visited Aug. 28, 2008) (explaining TOPOFF, “a national-level domestic and international exercise series designed to produce a more effective, coordinated, global response to WMD terrorism”); DEP'T OF HOMELAND SEC., THE TOPOFF 3 FULL-SCALE EXERCISE, http://www.dhs.gov/xprepresp/training/editorial_0594.shtm (last visited Aug. 28, 2008) (explaining TOPOFF 3 which “offered agencies and jurisdictions a way to exercise a coordinated national and international response to a large-scale, multipoint terrorist attack”); Thomas V. Inglesby et al., *A Plague on Your City: Observations from TOPOFF*, 32 CLINICAL INFECTIOUS DISEASES 436 (2001) (noting “a number of medical and public health observations and lessons discovered during the bioterrorism component of the [TOPOFF] exercise”).

and dispatch—is not without foundation in organization theory.¹⁸³ Flexibility ideally can make it possible for organizations to adapt and respond quickly in circumstances of substantial strain or uncertainty, as conditions change or knowledge improves, and to respond to events that cannot be predicted in advance.¹⁸⁴ In a crisis or emergency setting in particular, one can of course imagine circumstances in which taking the time to follow a series of structurally required decision-making steps would vitiate the need for action altogether.¹⁸⁵

What the new functionalists fail to engage, however, are flexibility's substantial costs, especially in grappling with an emergency. For example, organizations that depend on decentralized decision-making but leave subordinates too much flexibility can face substantial principal-agent problems, resulting in effectively arbitrary decisions. The problem of differences in motivation or understanding between organizational leaders and frontline agents is a familiar one, a disjunction that can leave agents poorly equipped to translate organizational priorities into priority-consistent operational goals. As Sagan found in the context of U.S. nuclear weapons safety, whatever level of importance organizational leadership placed on safety, leaders and operatives would invariably have conflicting priorities, making it likely that leaders would pay “only arbitrary attention to the critical details of deciding among trade-offs” faced by operatives in real time.¹⁸⁶ One way of describing this phenomenon is as “goal displacement”—a narrow interpretation of operational goals by agents that obscures focus on overarching priorities.¹⁸⁷ In the military context, units in the field may have different interests than commanders in secure headquarters;¹⁸⁸ prison guards have different

¹⁸³ See *supra* text accompanying notes 41–46 (citing John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 812–22 (2004); John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1200 (2004); John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1642–43, 1676–77 (2002)).

¹⁸⁴ SAGAN, *supra* note 158, at 120; see also STINCHCOMBE, *supra* note 172 (developing theory of formalization, its anticipated effects and its pathologies); WEICK & SUTCLIFFE, *supra* note 177, at 68–69 (examining strategies for management); ZEGART, *supra* note 173, at 15–42 (discussing U.S. intelligence agencies' failure to adapt to post-Cold War terrorist threat).

¹⁸⁵ This is of course precisely the basis of exigent circumstances exceptions of many constitutional mandates, such as the Fourth Amendment warrant requirement. See, e.g., *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) (fight a fire and investigate its cause); *United States v. Santana*, 427 U.S. 38, 42–43 (1976) (“hot pursuit” of fleeing suspect); *Ker v. California*, 374 U.S. 23, 40–41 (1963) (prevent imminent destruction of evidence); see also sources cited *infra* note 247.

¹⁸⁶ SAGAN, *supra* note 158, at 255.

¹⁸⁷ SCOTT D. SAGAN AND KENNETH N. WALTZ, *THE SPREAD OF NUCLEAR WEAPONS: A DEBATE RENEWED* 51 (2003).

¹⁸⁸ See Donna Winslow, *Misplaced Loyalties: The Role of Military Culture in the Breakdown of Discipline in Two Peace Operations*, J. MIL. & STRATEGIC STUD., Jan. 1999, at 3 (“Exaggerated loyalty to the group can lead members to work at counter purposes to the overall goals of a mission or even of the army”); Leonard Wong, *Combat Motivation in Today's Soldiers*, 32 ARMED FORCES & SOCIETY 659, 662 (2006) (discussing soldier motivation in combat).

interests from prison administrators.¹⁸⁹ Emergencies exacerbate the risk of such effectively arbitrary decisions. Critical information may be unavailable or inaccessible.¹⁹⁰ Short-term interests may seek to exploit opportunities that run counter to desired long-term (or even near-term) outcomes.¹⁹¹ The distance between what a leader wants and what an agent knows and does is thus likely even greater.

The Cuban Missile Crisis affords striking examples of such a problem. When informed by the Joint Chiefs of Staff of the growing tensions with the Soviet Union in late October 1962, NATO's Supreme Allied Commander in Europe, American General Lauris Norstad, ordered subordinate commanders in Europe not to take any actions that the Soviets might consider provocative.¹⁹² Putting forces on heightened alert status was just the kind of potentially provocative move Norstad sought to forestall. Indeed, when the Joint Chiefs of Staff ordered U.S. forces globally to increase alert status in a directive leaving room for Norstad to exercise his discretion in complying with the order, Norstad initially decided not to put European-stationed forces on alert.¹⁹³ Yet despite Norstad's no-provocation instruction, his subordinate General Truman Landon, then Commander of U.S. Air Forces in Europe, increased the alert level of nuclear-armed NATO aircraft in the region.¹⁹⁴ In Sagan's account, General Landon's first organizational priority—to maximize combat potential—led him to undermine higher priority political interests in avoiding potential provocations of the Soviets.¹⁹⁵

It is in part for such reasons that studies of organizational performance in crisis management have regularly found that “planning and effective

¹⁸⁹ See, e.g., JOHN J. DIJULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* (1987) (examining prison culture and management).

¹⁹⁰ See U.S. HOUSE OF REPRESENTATIVES, *A FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA* 163 (2006), http://katrina.house.gov/full_katrina_report.htm (last visited Aug. 28, 2008) [hereinafter *KATRINA REPORT*] (describing how massive communications failures hindered governmental response after Hurricane Katrina); see also Rinaldo Campana, *Responding to an Incident Involving Weapons of Mass Destruction—An Overview*, 9 *WIDENER L. SYMP. J.* 249, 254 (2003) (“In this nuclear exercise scenario, the On-Scene-Commander received three dissimilar plume assessments from EPA, DOE and the U.S. Army. The disparity in the plume assessment delayed the decision-making process, which in an actual incident could mean the loss of many lives. Sometimes too much information becomes an impediment to rapid response decision.”); Michael May et al., *Preparing for the Worst*, 443 *NATURE* 907, 908 (2006) (describing difficulty of tracing origin of stolen weapons grade material used in nuclear device—information critical to mounting effective preventive and responsive measures—and concluding that under ideal circumstances, nuclear forensics process is likely to take one to two weeks).

¹⁹¹ See PERROW, *supra* note 78, at 44 (“Short-term interests seize on disasters as opportunities to be exploited.”).

¹⁹² SAGAN, *supra* note 158, at 102.

¹⁹³ *Id.* at 103.

¹⁹⁴ *Id.* at 104–05.

¹⁹⁵ *Id.* at 256; see also SAGAN, *supra* note 158, at 102–14 (detailing management of alert activities in Europe surrounding Cuban Missile Crisis).

response are causally connected.”¹⁹⁶ Clear, well-understood rules, formalized training and planning can function to match cultural and individual instincts that emerge in a crisis with commitments that flow from standard operating procedures and professional norms.¹⁹⁷ Indeed, “the less an organization has to change its pre-disaster functions and roles to perform in a disaster, the more effective is its disaster [sic] response.”¹⁹⁸ In this sense, a decisionmaker with absolute flexibility in an emergency—unconstrained by protocols or plans—may be systematically more prone to error than a decision-maker who is in some way compelled to follow procedures and guidelines, which have incorporated professional expertise, and which are set as effective constraints in advance.

Examples of excessive flexibility producing adverse consequences are ample. Following Hurricane Katrina, one of the most important lessons independent analysis drew from the government response was the extent to which the disaster was made worse as a result of the lack of experience and knowledge of crisis procedures among key officials, the absence of expert advisors available to key officials (including the President), and the failure to follow existing response plans or to draw from lessons learned from simulations conducted before the fact.¹⁹⁹ Among the many consequences,

¹⁹⁶ CLARKE, *supra* note 149, at 56; *see, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, CATASTROPHIC DISASTERS: ENHANCED LEADERSHIP, CAPABILITIES, AND ACCOUNTABILITY CONTROLS WILL IMPROVE THE EFFECTIVENESS OF THE NATION'S PREPAREDNESS, RESPONSE, AND RECOVERY SYSTEM, GAO-06-618, at 99–100 (2006) [hereinafter CATASTROPHIC DISASTER REPORT] (reporting to Congressional Committees and making recommendations in the wake of Hurricane Katrina for executive action in regards to nation's preparedness, response and recovery system); Dennis S. Mileti & John H. Sorensen, *Determinants of Organizational Effectiveness in Responding to Low Probability Catastrophic Events*, 22 COLUM. J. WORLD BUS. 13, 13–19 (1987) (synthesizing findings of studies of effectiveness of organizations in coping with disasters and developing a theory of organizational effectiveness in responding to low probability catastrophic events); *see also* U.S. ARMED FORCES, JOINT PUBLICATION 3-40: JOINT DOCTRINE FOR COMBATING WEAPONS OF MASS DESTRUCTION, at IV-9 (2004), available at http://www.fas.org/irp/doddir/dod/jp3_40.pdf (“The overall success of the response to a WMD attack is directly proportional to the prior planning. If the response is properly planned, rehearsed, and executed, the actions will serve as a deterrent to future attacks.”).

¹⁹⁷ *See, e.g.*, SAGAN, *supra*, note 158, at 46 (noting positive effects of “[r]igorous exercises, continual training, and realistic simulations”); BENDOR, *supra* note 174, at 24–60 (examining theory of bureaucratic competition and redundancy); *see also* KATRINA REPORT, *supra* note 190, at 131–46 (concluding “senior [Department of Homeland Security] officials were “ill prepared due to their lack of experience and knowledge of the required roles and responsibilities prescribed by [National Response Plan]”); Caron Chess & Lee Clarke, *Facilitation of Risk Communication During the Anthrax Attacks of 2001: The Organizational Backstory*, 97 AM. J. PUB. HEALTH 1578, 1578 (2007) (concluding that pre-existing organizational and professional networks facilitated trust among decisionmakers, which improved communication among agencies and risk communication with public); Pangi, *supra* note 181, at 408–09 (emphasizing development of interagency and intergovernmental disaster management relationships, training and routines “before a disaster occurs,” as “essential to planning for and responding to a WMD attack”). Accord PERROW, *supra* note 78, at 51–52 (describing deleterious effects of political cronyism at FEMA).

¹⁹⁸ Mileti & Sorensen, *supra* note 196, at 14.

¹⁹⁹ KATRINA REPORT, *supra* note 190, at 131–46.

Within the emergency management community, there are a handful of potential catastrophes that keep disaster professionals awake at night. Perhaps the most troubling of these has been a category 3 or larger storm striking New Orleans

basic items like food, water, and medicines were in such short supply that local law enforcement (instead of focusing on security issues) were occupied, in part, with breaking into businesses and taking what residents needed.²⁰⁰

Or consider the widespread abuse of prisoners at U.S. detention facilities such as Abu Ghraib. Whatever the theoretical merits of applying coercive interrogation in a carefully selected way against key intelligence targets,²⁰¹ the systemic torture and abuse of scores of detainees was an outcome no one purported to seek. There is substantial agreement among security analysts of both parties that the prisoner abuse scandals have produced predominantly negative consequences for U.S. national security.²⁰² While there remain important questions about the extent to which some of the abuses at Abu Ghraib were the result of civilian or senior military command actions or omissions, one of the too often overlooked findings of the government investigations of the incidents is the unanimous agreement that the abuse was (at least in part) the result of structural organization failures²⁰³—failures that one might expect to

because of its high likelihood of occurrence, the extreme vulnerability of the city to long term flooding, and the difficulty of evacuating a large urban population over limited evacuation routes. As a result, this scenario has been studied, planned, and exercised perhaps more than any other potential catastrophic disaster in the country. A senior disaster professional would be well aware of the consequences of such a storm, recognize the challenges of responding to such a disaster, and appreciate the need for timely and proactive federal assistance. Comments such as those the President made about not expecting the levees to breach do not appear to be consistent with the advice and counsel one would expect to have been provided by a senior disaster professional.

Id. at 133.

²⁰⁰ *Id.* at 241.

²⁰¹ POSNER & VERMEULE, *supra* note 2, at 184–86.

²⁰² See, e.g., *Guantanamo's Shadow*, ATLANTIC, Oct. 2007, at 40 (polling a bipartisan group of leading foreign policy experts and finding eighty-seven percent believed U.S. detention system had hurt more than helped in fight against Al Qaeda).

Nothing has hurt America's image and standing in the world—and nothing has undermined the global effort to combat nihilistic terrorism—[more] than the brutal torture and dehumanizing actions of Americans in Abu Ghraib and in other prisons (secret or otherwise). America can win the fight against terrorism only if it acts in ways consistent with the values for which it stands.

Id. (quoting an anonymous poll respondent). A separate concern stems from the severe strain these practices have put on relationships with key counterterrorism allies. See INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, REPORT, 2007, Cm. 7171, at 64–69, available at <http://www.official-documents.gov.uk/document/cm71/7171/7171.pdf> (discussing “serious implications for the working of the relationship between the U.S. and UK intelligence and security agencies” of U.S. decisions regarding prisoner treatment). Still other concerns are more immediately instrumental. As one U.S. Army intelligence officer who served in Afghanistan put it in his subsequent book: “The more a prisoner hates America, the harder he will be to break. The more a population hates America, the less likely its citizens will be to lead us to a suspect.” CHRIS MACKAY & GREG MILLER, THE INTERROGATORS: TASK FORCE 500 AND AMERICA'S SECRET WAR AGAINST AL QAEDA, at xxix (2004).

²⁰³ See, e.g., Fay Report, *supra* note 179, at 109–19 (finding lack of clear command and control of detainee operations, inadequate training, non-observance of established procedures, lapses in accountability, and similar failures surrounding intelligence operations at Abu Ghraib); DEP'T OF DEF., REVIEW OF DEPARTMENT OF DEFENSE INTERROGATION OPERATIONS 3 (2006), available at

produce errors either to the benefit or detriment of security.

In particular, military investigators looking at the causes of Abu Ghraib cited vague guidance, as well as inadequate training and planning for detention and interrogation operations, as key factors leading to the abuse. Remarkably, “pre-war planning [did] not include[] planning for detainee operations” in Iraq.²⁰⁴ Moreover, investigators cited failures at the policy level—decisions to lift existing detention and interrogation strictures without replacing those rules with more than the most general guidance about custodial intelligence collection.²⁰⁵ As one Army General later investigating the abuses noted: “By October 2003, interrogation policy in Iraq had changed three times in less than thirty days and it became very confusing as to what techniques could be employed and at what level non-doctrinal approaches had to be approved.”²⁰⁶ It was thus unsurprising that detention and interrogation operations were assigned to troops with grossly inadequate training in any rules that were still recognized.²⁰⁷ The uncertain effect of broad, general guidance, coupled

<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2282> (follow “executive summary of the results” hyperlink) [hereinafter DOD REVIEW] (finding, inter alia, “no evidence that specific detention or interrogation lessons learned from previous conflicts . . . were incorporated into planning for operations in support of the Global War on Terror, and no “evidence [of] any specific awareness of the risk of detainee abuse - or any awareness that U.S. forces had confronted this problem before); Lieutenant General Anthony R. Jones, AR 15-6 Investigation of the Abu Ghraib Prison and the 205th Military Intelligence Brigade, in INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB 4–15 (2004), available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> [hereinafter Jones Report] (discussing how structural decisions, inter alia, “created conditions which allowed the abuses at Abu Ghraib to occur”); DAIG REPORT, *supra* note 179; MAJOR GENERAL GEOFFREY D. MILLER, ASSESSMENT OF DOD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ 2 (2003), available at <http://www1.umn.edu/humanrts/OathBetrayed/Taguba%20Annex%202020.pdf> (observing “that the Task Force did not have authorities and procedures in place to affect a unified strategy to detain, interrogate, and report information from detainees/internees in Iraq”); ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 36-44 (2004) [hereinafter TAGUBA REPORT], available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf (describing inadequate training and oversight, inappropriate superior-subordinate relationships); DOD DETENTION OPERATIONS REPORT, *supra* note 179 (reviewing causes of detainee abuse in Department of Defense detention operations).

²⁰⁴ Fay Report, *supra* note 179, at 57. Among the consequences of inadequate planning, the ratio of detainees to military police at facilities like Abu Ghraib in June 2004 (during height of abuse) rose to 75:1 (about 7,000 prisoners to about 92 military police). DOD DETENTION OPERATIONS REPORT, *supra* note 179, at 54, 60.

²⁰⁵ See Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention and Torture*, 81 IND. L.J. 1255, 1257–67 (2006) (reviewing Pentagon investigations into causes of abuses at U.S. detention facilities).

²⁰⁶ Fay Report, *supra* note 179, at 61. It was during this period, as later became clear, that some of the worst torture and abuse occurred.

²⁰⁷ The 372nd Military Police Company—the unit in charge of military police operations at Abu Ghraib during the period when the worst abuses were taking place—was a combat support unit, with no training in detainee operations. Summary of Interview by Taguba Panel with Sgt. First Class, 372nd Military Police Company, in Abu Ghraib, Iraq (Feb. 9, 2004), available at <http://www.aclu.org/torturefoia/released/a85.pdf>. A post–Abu Ghraib survey conducted by the Army Inspector General found non-commissioned officers reporting that they had received little detention operations training, and that training exercises had not involved instruction in how to process or assign a legal status to detainees. DAIG REPORT, *supra* note 179, at 81; see also DOD REVIEW, *supra* note

with the competing imperatives of guidelines that differed among theaters of operation, agencies, and military units, caused serious confusion among troops and led to decisionmaking that it is overly kind to call arbitrary.²⁰⁸

Would the new functionalists disagree with the importance of government planning for detention operations in an emergency surrounding a terrorist nuclear attack? Not necessarily. Can an organization anticipate and plan for everything? Certainly not. But such findings should at least call into question the inclination to simply maximize flexibility and discretion in an emergency, without, for example, structural incentives that might ensure the engagement of professional expertise.²⁰⁹ Particularly if one embraces the view that the most potentially damaging terrorist threats are nuclear and biological terrorism, involving highly technical information about weapons acquisition and deployment, a security policy structure based on nothing more than general popular mandate and political instincts is unlikely to suffice; a structure that systematically excludes knowledge of and training in emergency response will almost certainly result in mismanagement.²¹⁰ In this light, a general take on role effectiveness might suggest favoring a structure in which the engagement of relevant expertise in crisis management is required, leaders have incentives to anticipate and plan in advance for trade-offs, and

203, at 19 (noting that few U.S. personnel “had received specific training relevant to detainee screening and medical treatment”). Reservists in particular (many of whom did not know they would be engaging in detention operations until after they were deployed) cited the confusing difference between what training they had received on the Geneva Conventions, and the guidance they were receiving in the field. DAIG REPORT, *supra* note 179, at 81, 83–84. At more senior levels, eighty-seven percent of the units stationed in Afghanistan and Iraq inspected by the Army Inspector General post–Abu Ghraib responded that the basic professional military education they had received lacked instruction on conducting detainee operations. *Id.* The problem was particularly acute with inspected reservist units, many members of which reported that they were not notified that they would be involved in detainee operations until after their deployment overseas. *Id.* at 83.

²⁰⁸ See Fay Report, *supra* note 179, at 112–13, 118–19 (finding, inter alia, that “DoD’s development of multiple policies on interrogation operations for use in different theaters or operations confused Army and civilian Interrogators at Abu Ghraib”); Jones Report, *supra* note 203, at 5 (“Confusion about what interrogation techniques were authorized resulted from the proliferation of guidance and information from other theaters of operation; individual interrogator experiences in other theaters; and, the failure to distinguish between interrogation operations in other theaters and Iraq. This confusion contributed to the occurrence of some of the non-violent and non-sexual abuses.”); DOD DETENTION OPERATIONS REPORT, *supra* note 179, at 14, 33–38, 80–81 (finding “details of the current [detainee] policy vague and lacking”); *Frontline: The Torture Question* (PBS television broadcast Oct. 18, 2005) (quoting Gen. Paul Kern) (“There was [also] some degree of confusion about how dogs could be used. Dogs are a good thing to control detainees, they’re not a good thing to do interrogations. And so people were using very liberal interpretations of what was on a piece of paper, inaccurately and illegally.”), available at <http://www.pbs.org/wgbh/pages/frontline/torture/etc/script.html>.

²⁰⁹ *Contra* ACKERMAN, *supra* note 2, at 109 (“Serious deliberation is simply incompatible with the speedy response required in the aftermath of an attack.”); POSNER & VERMEULE, *supra* note 2, at 256 (arguing against due process-based constraints on executive detention decisions on the grounds that there is no basis for doubting that the executive is best positioned to strike any relevant liberty-security balance on its own).

²¹⁰ See KATRINA REPORT, *supra* note 190 at 2 (“It does not appear the President received adequate advice and counsel from a senior disaster professional.”).

organizations are able to train subordinates to ensure that plans are adhered to in emergencies. Such structural constraints could help increase the likelihood that something more than arbitrary attention has been paid before transcendent priorities are overridden.

2. *Unity and Insularity*

As the new functionalists correctly anticipate, organization theorists have also recognized that strict bureaucratic control, intense socialization, and a highly developed sense of organizational culture can not only make rapid action possible, but also ensure adherence to an identified, overarching priority.²¹¹ Indeed, it follows from the prior section that if formal rules and training are important, some significant level of control is absolutely necessary lest one risk effective top-down compliance.

At the same time, however, institutions such as the military (and arguably aspects of the intelligence community) that are defined by such insular organizational cultures have some important disadvantages.²¹² The exceptional degree of control such organizations exercise over their members has been used both to advance an organization's official goals, and to pursue the more self-serving or alternative goals of its leaders. Members' intense organizational loyalty can foster excessive secrecy and disdain for outside expertise, inhibiting the flow of information both within and from outside the institution, and skewing attention to organizational priorities.²¹³ Especially when coupled with political incentives that impact governmental organizations, such features can limit the institution's ability to take corrective action or learn from past organizational mistakes.²¹⁴

The post-9/11 context is rife with examples of such pathologies in organizations responsible for counterterrorism operations. Consider the U.S. response to the anthrax mailings of late 2001, which came at a time of already heightened vigilance against terrorist attack. After federal

²¹¹ See, e.g., John J. Dilulio Jr., *Recovering the Public Management Variable: Lessons from Schools, Prisons, and Armies*, 49 PUB. ADMIN. REV. 127, 129–31 (1989) (surveying research on organizational characteristics of effective prison management and combat units).

²¹² The military is particularly vulnerable to this phenomenon, as it is often considered a “total institution” in the sense sociologists (among others) use the expression to capture organizations in effectively complete control of the planning, management, and fulfillment of the needs of individuals within it—control geared toward advancing the interests and goals of the institution. See ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 4–6 (1961).

²¹³ See, e.g., SAGAN, *supra* note 158, at 252–54 (discussing how desire to protect institutional image may create incentive to cover up mistakes).

²¹⁴ *Id.* at 257; ZEGART, *supra* note 173, at 112–13. Outside the military context, Diane Vaughan, author of a much celebrated work on the organizational failings that led to the 1985 space shuttle Challenger disaster, has described such organizational cultures as fostering the “normalization of deviance”—a phenomenon that enables organizational agents to “carry on as if nothing was wrong” despite being continually confronted with evidence that “something was wrong.” VAUGHAN, *supra* note 175, at 62 (attributing phenomenon to “the production of a work group culture, the culture of production, and structural secrecy”).

investigators concluded that the anthrax attacks were most likely launched by “U.S. nationals, almost certainly ones with experience in and access to the U.S. biodefense program and its facilities,” and after they discovered that major U.S. biodefense facilities had been working with anthrax (including weapons-grade powder) for decades, military and intelligence agencies continued to withhold critical information from other federal agencies about the facilities and employees involved in such programs. This hamstrung post-attack efforts to identify the likely source of the attack, and therefore the likelihood of subsequent additional attacks from the same source.²¹⁵

Such behavior echoes that described by the 9/11 Commission investigators studying the September 11th attacks themselves.²¹⁶ Among other things, investigators concluded that one of the key problems leading to the failure to avert the attacks (despite increasingly alarming warnings) was the dearth of information sharing inside the intelligence and security communities.²¹⁷ Information was overly compartmentalized, “stove-piped” to too few decisionmakers, hidden by one executive agency from another and by one branch of government from another, and limited in its relevance and accuracy from an absence of oversight and competing analysis.²¹⁸ Such findings also emerge from studies of the generally effective Japanese response to the sarin gas attacks on the Tokyo subway system. Essential to the Japanese government’s response was “a willingness to prioritize cooperation over interagency or intergovernment competition.”²¹⁹ In all of these cases, it may well be that such behavior could be addressed by different incentive structures. But in the absence of such guidance, it was the organizations instinctive (and structural) insularity that prevailed.

The counterproductive effect of such pathologies can infect more than just real-time responsiveness; it inhibits error correction over time—a

²¹⁵ Milton Leitenberg, *Biological Weapons and Bioterrorism in the First Years of the Twenty-First Century*, POL. & LIFE SCI., September 2002, at 3, 20.

²¹⁶ 9/11 COMMISSION REPORT, *supra* note 78, at 353.

²¹⁷ *Id.* at 353–58.

²¹⁸ *Id.* at 353–58, 403.

²¹⁹ Pangi, *supra* note 181, at 371, 408–09. The sarin attacks were the work of Japanese doomsday cult Aum Shinrikyo, which placed small containers of the chemical nerve agent sarin on trains running on three major lines of the Tokyo subway system at the height of rush hour on March 20, 1995. Thanks to several technical mistakes in disseminating the gas, the effects were not as bad as they might have been. Nonetheless, twelve people died and fifty-five hundred were injured as commuters and subway workers suffered severe fits of coughing, choking and vomiting. Senate Government Affairs Permanent Subcommittee on Investigations, Staff Statement Global Proliferation of Weapons of Mass Destruction: A Case Study on the Aum Shinrikyo (October 31, 1995), *available at* http://www.fas.org/irp/congress/1995_rpt/aum/index.html. See 1996 Police White Paper 29 (National Police Agency ed., Emiko Amaki & Robert Mauksch trans., 2002), (1996) *available at* <http://cns.mis.edu/pubs/eap/wpap.pdf> (praising modifications to police law that gave prefectural police authority to work on their own outside of their jurisdictions to deal with “extensive organized crime”).

feature that theorists identify as central in explaining the success of those organizations that have operated effectively in chronically unpredictable environments.²²⁰ In the nuclear safety context, for example, Scott Sagan showed that Americans had been at greater risk than once thought from accidents involving the U.S. nuclear weapons arsenal—threats ranging from pilot error, malfunctioning computer warnings, the miscalculation of an individual officer, and a host of other seemingly inconceivable mistakes²²¹—in part because actors at every organizational level had incentives to cover up safety problems, “in order to protect the reputation of the institution.”²²² While it was perhaps “not surprising that the military commands that are responsible for controlling nuclear forces would create a veil of safety to manage their image in front of the [P]resident, the Congress, and the public,” Sagan found that concern for the effect of revealing mistakes skewed assessments at all levels, “influenc[ing] the reporting of near-accidents by operators, the beliefs of organizational historians about what is acceptable to record, and the public interpretation of events by senior authorities.”²²³ Particularly in operations where failure, when it does occur, can come at an extraordinarily high price, there is a premium on gaining (and implementing) as much insight as possible from those failures that do occur.²²⁴

One finds a strikingly similar pattern in the conduct of organizations responsible for the detentions at Abu Ghraib, where organizational loyalty and a cultural disinclination to share negative information conspired to prevent the correction of systemic error.²²⁵ In some cases, soldiers reported direct pressure to withhold unfavorable information.²²⁶ More generally, investigators found agreement among commanders and enlisted personnel at Abu Ghraib that the early reports by outside monitors of

²²⁰ See, e.g., WEICK & SUTCLIFFE, *supra* note 177, at 54–59.

²²¹ The prospect of such accidents was only recently confirmed with the inadvertent air transport of a set of armed nuclear warheads across the continental United States. See Joby Warrick & Walter Pincus, *Mistakes in the Bunker*, WASH. POST, Sept. 23, 2007, at A1, available at LEXIS, News Library, WPOST File (“A former Air Force senior master sergeant wrote separately that ‘mistakes were made at the lowest level of supervision and this snowballed into the [sic] one of the biggest mistakes in USAF history. I am still scratching my head wondering how this could [have] happened.’”).

²²² SAGAN, *supra* note 158, at 254.

²²³ *Id.* at 257; see also ELIOT A. COHEN & JOHN GOOCH, *MILITARY MISFORTUNES: THE ANATOMY OF FAILURE IN WAR 44* (1990) (“[B]ureaucratic self-protection by means of the creation of spurious or misleading documents can be overwhelming.”).

²²⁴ See WEICK & SUTCLIFFE, *supra* note 177, at 56.

²²⁵ *National Security Whistleblowers in the Post-September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation: Hearing Before the H. Subcomm. On National Security, Emerging Threats, and International Relations of the Comm. on Government Reform*, 109th Cong. 108–13 (2006) (prepared statement of Sgt. Samuel J. Provance).

²²⁶ *Id.* at 108 (“When I made clear to my superiors that I was troubled about what had happened, I was told that the honor of my unit and the Army depended on either withholding the truth or outright lies.”); see also Rick Scavetta, *GI Flagged for Public Comments About His Abu Ghraib Experience*, STARS & STRIPES, May 28, 2004, <http://www.estripes.com/article.asp?section=104&article=21598&archive=true>.

serious abuses by soldiers at the facility were simply impossible to believe.²²⁷ As General Fay's later investigation found:

Within this investigation's timeframe, . . . the [independent International Committee of the Red Cross (ICRC)] visited Abu Ghraib three times, notifying [the joint task force in charge] twice of their visit results, describing serious violations of international Humanitarian Law and of the Geneva Conventions. In spite of the ICRC's role as independent observers, there seemed to be a consensus among personnel at Abu Ghraib that the allegations were not true. Neither the leadership, nor [the joint task force in charge] made any attempt to verify the allegations.²²⁸

What if anything do such examples teach us about whether inter-branch engagement is necessary to control such organizational tendencies? After all, there is a host of organizations within the executive branch, many with cultures significantly different from one another. If organizational insularity is the problem, why is the solution not simply to redesign internal incentive structures, as noted above, or open the insular organization to review or monitoring by a culturally diverse agency *within* the executive branch? Part IV below considers whether and to what extent such a system might suffice in the detention context. For present purposes, however, we might at least conclude that the detention system we want would include some institutional mechanism designed to correct such known organizational pathologies, a mechanism that (in keeping with the conclusions of the previous section) would need to be modified only modestly to function well in emergencies.

3. Redundancy and Review

The organization literature is rich in debates over the benefits and burdens of redundant systems. In the commercial manufacturing and safety contexts, it is easy to see how a simple argument plays out: a plane with an extra engine weighs more, thus requiring more fuel (and more money) to fly. But an airline may save significant costs (not to mention glean other benefits over the long term) if the extra engine is occasionally available as a backup if the main engine malfunctions in flight.²²⁹ Redundant equipment could, the argument goes, render the whole

²²⁷ Fay Report, *supra* note 179, at 99–100.

²²⁸ *Id.* at 152; *see also* ART. 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 38 (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf (“[B]ecause of past associations and familiarity of Soldiers within the Brigade, it appears that friendship often took precedence over appropriate leader and subordinate relationships.”).

²²⁹ Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1683 (2006).

apparatus effectively more reliable than its components.²³⁰ In the context of national security decision-making, theorists have offered parallel assessments of the costs and benefits of redundancy.²³¹ Redundant decision-making systems not only increase serious costs of all sorts—money, time, the risk (depending on the particular redundant design) that certain kinds of errors will occur—they may create counterproductive competition between groups, prompting a “race to the bottom” in production, preventing cooperation essential to organizational effectiveness, and compromising values, like accountability, by making it harder for outsiders to determine which one individual or organizational group is responsible when things go wrong.²³²

The new functionalists’ concerns about judicial review broadly import the cost side of redundancy. Redundant decision-making structures are not only prohibitively resource intensive (especially, it is assumed, in a heavy-volume business like detention), they slow down decision-making to the point of ineffectiveness. And these costs inhere, it is said, even though courts have no expertise in such matters of their own, and their inclusion increases the risk that information important to keep secret might be revealed.²³³

But in addition to glossing over the potential benefits of multiple system checks (which is revisited below), such arguments mistakenly imagine that a *redundant* system is effectively the same as a system of *review*. In a redundant system, functions are simply duplicated. A system including *review* works in series, with each structure performing different functions to improve decision-making quality overall. Where redundant structures create duplication that might produce, for example, counterproductive competition between groups, review structures can serve not simply to replicate first-order decision-making, but to apply a different process altogether, including different sets of methodological tools and decision-making criteria. Thus, in addition to preserving the possibility of ‘mere’ error correction, monitoring or review can “prevent organizational blind spots from developing, . . . and reduce the temptation for organizations to be guided by narrow conceptions of self-interest.”²³⁴ It

²³⁰ See BENDOR, *supra* note 174, at 24–28.

²³¹ See, e.g., O’Connell, *supra* note 229, at 1675–76.

²³² See *id.* at 1765–84 (summarizing arguments from redundancy literature). Indeed, in analyses of the intelligence failures surrounding 9/11, structural duplication (and fragmentation) that could ideally have helped avoid error in fact burdened intelligence collection and analysis pre-9/11: “[T]rails would go cold, information would not be shared, and dots would not get connected because everyone assumed that the responsibility for specific tasks rested, at least in part, someplace else.” ZEGART, *supra* note 173, at 113.

²³³ See *supra* text accompanying notes 39–42 (recounting new functionalist arguments).

²³⁴ SAGAN, *supra* note 158, at 269; see also Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature*, in COURTS, CORRECTIONS, AND THE CONSTITUTION 12, 25–28 (DiIulio, ed. 1990) (describing role of court intervention and new regulatory framework in driving corrections

can police incentive structures that promote accuracy-enhancing attention to process and professionalism. It is for such reasons that theorists like Sagan suggest that independent monitoring could help combat the disadvantages that flow from the “unitary” institutional cultures discussed above.²³⁵

The relevance of this distinction becomes apparent when held up against the new functionalist arguments. For example, if a key function of review is to police a professionalism-enhancing incentive structure, it is possible to obtain the benefits of review without the potentially substantial time burden of insisting upon real-time continuous monitoring of operations, whether or not the situation at hand is an “emergency.” Likewise, where the reviewer is not meant to replicate first-order decision-making but rather to apply a different metric and/or methodology to the same problem, it may be necessary for the reviewing agent to have access to the same decision-making *information* as the first-order actor, but not necessarily the same type of decision-making *expertise*.²³⁶

Critical to the distinction between redundancy and review—and thus central to the ability of any review mechanism to function usefully—are several features that must be emphasized here. First, a review mechanism must avoid the aptly named “problem of redundancy problem.” This is one of the problems described as plaguing the intelligence community leading up to the 9/11 attacks—“awareness of other redundant units can *decrease* system reliability if it leads an individual or subunit to shirk off unpleasant duties because it is assumed that someone else will take care of the problem.”²³⁷ All actors in a redundant system may make decisions less carefully because of their awareness of other actors working on the same problem. The first actor assumes the second actor will catch any mistakes he overlooks, and the second actor defers to the first actor on the assumption that someone else has already thought about the problem carefully.

professionalization, auditing, and other practices geared toward improved organizational performance); KATRINA REPORT, *supra* note 190, at 131–46; Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 258–66 (2006) (discussing advantages of agency audits).

²³⁵ SAGAN, *supra* note 158, at 269; see also Todd R. La Porte, *Challenges of Assuring High Reliability When Facing Suicidal Terrorism*, in SEEDS OF DISASTER, ROOTS OF RESPONSE: HOW PRIVATE ACTION CAN REDUCE PUBLIC VULNERABILITY 99, 108–10 (Philip E. Auerswald et al. eds., 2006) (noting that “external watchers” can increase attentiveness and reliability).

²³⁶ See Cuéllar, *supra* note 234, at 262 (“External review may elucidate things that people inside the organization fail to appreciate. Outsiders may see things not despite, but precisely because of, the absence of expertise.”); Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 754–56 (2006) (discussing rationale for hard look review).

²³⁷ Scott D. Sagan, *The Problem of Redundancy Problem: Why More Nuclear Security Forces May Produce Less Nuclear Security*, 24 RISK ANALYSIS 935, 939 (emphasis added). In psychology, the phenomenon has been called a state of “pluralistic ignorance.” See, e.g., John M. Darley et al., *Do Groups Always Inhibit Individuals’ Responses to Potential Emergencies*, 26 J. PERSONALITY & SOC. PSYCHOL. 395, 395–99 (“An individual who witnesses a potential emergency alone is more likely to intervene than one who witnesses it as a member of a group.”).

An independent review system can, at least in theory, avoid this problem. To return to the airplane engine metaphor, the reviewer does not take the same tools, instruction manual, and personnel and try to build a duplicate engine; it looks at the engine and applies a different set of tools, instructions, and personnel to evaluate its performance. Provided the reviewer has access to the entire engine, and can force corrective action if, for example, manufacturing flaws are evident, there should be little reason to fear that the initial manufacturer will pass on engines missing key component parts and expect the reviewer to install them. That said, a review system that is given only a two-dimensional picture of the engine and not the engine itself, and that fills in for any missing information by assuming it can defer to the initial manufacturer, may be worse than no review at all. The initial manufacturer may be slightly less careful in light of his knowledge that someone else is checking his work, and the reviewer will not in fact be able to determine whether or not all component parts were actually included.

Second, in order to effectively transcend (and therefore have a chance to correct for) the pathologies of a particular organization, a review mechanism must be meaningfully independent. In the engineering context, it is received wisdom that reliability increases only if systems do not rely on shared components, teams that share information analysis capabilities, and so forth.²³⁸ Insurance industry risk managers adopt a similar approach, giving control over loss prevention strategies to independent inspectors or third-party chaperones—that is, by separating the industry functions of production and “risk management,” and by ensuring that risk management inspectors have some meaningful power to enforce their conclusions.²³⁹ The logic holds in the policy-making context. One decisionmaker who takes the same information, applies the same decision-making criteria, and is in thrall of the same cultural organizational biases, is not like a back-up engine; he is more like a separate cog in the same engine. The functional effectiveness of both cogs is equally dependent on the overall health of the single engine. If a single-engine plane loses its entire engine (or experiences some other catastrophic, systemic failure), it will not matter how well any one cog performs.²⁴⁰

These lessons are visible again in the example of Abu Ghraib. A professionally diverse set of groups—uniformed military, intelligence

²³⁸ See BENDOR, *supra* note 174, at 44–45.

²³⁹ CAROL A. HEIMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS 206 (1985).

²⁴⁰ SAGAN, *supra* note 158, at 273 (“The final advice, following the logic of high reliability theory, would recommend adding redundant safety devices and warning systems to those that already exist in order to create a more reliable system out of unreliable parts.”). One of the reasons redundant systems can produce a misleading sense of confidence is because systems are not independent enough—and an error in one can precipitate an error in the next. *Id.* at 39.

agency personnel, private contractors—all worked together under a unified prison command organization to perform the same or overlapping tasks involved with detaining and interrogating inmates.²⁴¹ But rather than improving accuracy and performance through constructive competition, error correction or otherwise, there is evidence that the groups' overlapping mandates created least-common-denominator competition and across-the-board confusion, serving to lower performance and increase the problem of shirking. In a number of instances, the bad behavior of one group effectively convinced other groups to behave in similar ways. As one Army investigation concluded: "The lack of [CIA] adherence to the practices and procedures established for accounting for detainees eroded the necessity in the minds of Soldiers and civilians for them to follow Army rules."²⁴² While some soldiers tried to report misconduct they observed by other actors, others believed it was not their place to report misconduct to their own supervisors. One military intelligence soldier described one abuse incident: "it was [a military police] matter and would be handled by them."²⁴³ Critically, such conditions were able to prevail in an environment where, as the military's later investigations concluded, command exercised no regular oversight, routine inspections and monitoring were absent, and no JAG officers (military lawyers charged with monitoring operational legal compliance) appeared to have been dedicated to interrogation operations per se—a set of circumstances investigators described as a "contributing factor" to the many performance problems observed.²⁴⁴

In contrast, consider the existing process of judicial review of police applications for search warrants. The high rate at which search warrant applications are approved has led many to criticize the review process as too relaxed, not a meaningful check, and by extension unlikely to increase the accuracy of search decisions.²⁴⁵ But, because statistics have shown that warranted searches are almost always right—that is, the searches ultimately reveal criminal evidence of the kind the warrant application anticipated—a number of scholars have now embraced the view that the high approval rate suggests, rather, that the application is almost always

²⁴¹ Fay Report, *supra* note 179, at 77–78.

²⁴² *Id.* Vaughan's "normalization of deviance," *supra* note 175, seems to capture this phenomenon to a tee.

²⁴³ Fay Report, *supra* note 179, at 106 (emphasis added).

²⁴⁴ DAIG REPORT, *supra* note 179, at 15, 19; Fay Report, *supra* note 179, at 85. While independent ICRC monitors were allowed into the facility, they were denied access to information about all detainees. In any case, repeated failures to respond to ICRC recommendations carried no necessary consequence for those being monitored. *See, e.g., id.* at 118–19 (describing inadequate oversight of CIA interrogations in particular, unclear responsibility for follow up after ICRC visits, and lax accountability for troops engaged in abuse).

²⁴⁵ *See, e.g.,* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1254 (2002) (arguing that many perceive the warrant requirement as useless).

rightly sought.²⁴⁶ Their argument is based on studies showing that police officers view the process of preparing a warrant application as a significant cost (in time, effort, research required, etc.). Given the weight of this burden, officers have a significant incentive not to pursue a warrant unless they are fairly certain to prevail.²⁴⁷

These data alone may not suffice to establish whether the current review burden on search warrants is ideal (that is, whether it does not discourage officers from seeking warrants when they otherwise should). But, they do help demonstrate how a monitoring or review structure can avoid the problems associated with redundant structures discussed above. They are also consistent with the notion that the effective functioning of a review scheme need not necessarily depend on the reviewer having the same degree of expertise (including professional experience and judgment) as the officer making the application. Rather, the review system works because it is not functionally duplicative (the warrant judge herself is not on the street doing the investigation) and avoids destructive competition; it is organizationally independent (from the police department) and also avoids replicating cultural pathologies that might have infected first-order decision-making; and it wields a set of incentives that are capable of altering first-order behavior in a measurable, and thus predictable, way.

What, then, might we conclude about the new functionalists' suspicion of extra-executive branch monitoring or review? After all, if as we saw above, the raw effectiveness of a detention scheme in any given crisis depends on a set of calculations about the likelihood of public panic, the reaction of an enemy, the needs of sensitive international relationships, the availability of a certain kind of evidence, and so forth—how could one dispute that the executive is best positioned to make such an assessment? The first answer is that for purposes of assessing the scope and propriety of, say, judicial review, one need not dispute that whoever detains a suspect is in the first instance best positioned to decide on at least a temporary disposition. Judicial review, especially in crisis circumstances, is by definition about the second instance; it comes after a reviewer has an opportunity to receive information presented to it by outside parties.²⁴⁸

²⁴⁶ Donald Dripps, *Living With Leon*, 95 *YALE L.J.* 906, 925 (1986) (summarizing a major study that measured the frequency with which warrant searches resulted in the seizure of evidence described in the warrant, based on the number of returns filed, and noting that in six of seven cities studied, 74% to 89% of searches resulted in the discovery of at least some of the evidence described in the warrant); see also Stephenson, *supra* note 236, at 800 & n. 139 (noting arguments that high success rate for search warrants may be explained by officers' incentives to seek warrants only where they are likely to prevail).

²⁴⁷ See Dripps, *supra* note 246, at 925 ("If the police view obtaining a warrant as a costly proposition, a proposed search would have to promise very likely returns to justify the expenditure of law-enforcement resources.").

²⁴⁸ Much of existing constitutional and relevant national security law is filled with exceptions to usual rules where exigent circumstances demand. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (holding that a death caused by a police officer driving recklessly in a high-speed car chase

But those who favor limited judicial review of executive detention must argue something more than the executive is most competent *in the first instance*. Instead, they must argue that because the executive needs flexibility to make detention decisions quickly, quietly, and with specialized competence, second-instance examination (especially if *less than deferential*) is always problematic.²⁴⁹ An organizational analysis calls this conclusion into question. Beyond simple error correction, some form of independent review or monitoring with full information and incentive-creating capacity could function to check an organization's tendencies to exclude relevant information in decision-making, help decisionmakers avoid capture by narrow conceptions of self-interest, correct decision-making tendencies to miss the strategic forest for the tactical trees, and afford opportunities for organizational learning over time. While redundant decision-making structures may slow down initial real-time decision-making, review structures need not. And while secrecy may be important in a given case, there is no *structural* reason why review or monitoring cannot properly protect secret information through procedural rules or other sub-structural, 'soft' forms of regulation.²⁵⁰

Finally, it is true that review structures (like redundant structures) are

does not violation the due process clause of the Fourteenth Amendment); *United States v. Santana*, 427 U.S. 38, 41–43 (1976) (recognizing that police officer does not need search warrant during hot pursuit); *see also* U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”); 50 U.S.C. § 1805(f) (2000) (“Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that—(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and (2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists; he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than twenty-four hours after the Attorney General authorizes such surveillance.”); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 6–12 (2004) (noting uniform agreement on executive's constitutional power to “repel sudden attacks” without congressional authorization).

²⁴⁹ As Posner and Vermeule put it: “[T]here is no general reason to think that judges can do better than [the executive branch] at balancing security and liberty during emergencies.” POSNER & VERMEULE, *supra* note 2, at 31; *see also id.* at 256–57 (concluding that “judges can do no better than the [executive] on average, and will probably do worse from lack of information and expertise”); ACKERMAN, *supra* note 2, at 101–02 (positing that any judicial effort to “second guess” political claims to declare a state of emergency in the aftermath of an attack will “inevitably parody the judicial ideal” and that “[t]here simply won't be enough time for the dispassionate consideration of evidence and reasoned elaboration of judgment”). *But see* ACKERMAN, *supra* note 2, at 106–08 (contemplating “microadjudication” of individual rights claims six weeks following an attack).

²⁵⁰ Indeed, unless one is willing to claim that review is always more harm than help—a claim our raw effectiveness analysis should call into doubt. *See supra* text accompanying notes 163–67. It remains at least possible that role effectiveness is served less well generally by a rule of no review, and better by a rule of, for example, traditional review so long as “the courts are open and their process unobstructed.” *Ex Parte Milligan*, 71 U.S. 2, 121 (1866).

inescapably more resource intensive. But, there are at least two reasons why this calculation is more complex than the new functionalists credit. One is the concern discussed above—that there may be strategic burdens associated with erroneous decision-making that the new functionalists do not take into account.²⁵¹ Second, if one takes seriously the conclusion above favoring the use of existing institutions, modified as little as possible in times of extraordinary demand, it becomes clear that the vast bulk of the costs associated with a review scheme are already sunk. There are two other branches of government already doing a high-volume business evaluating a host of executive branch behaviors. The marginal additional resource cost of evaluating any one additional program is likely to be low in proportion, and lower still the more one relies on systems whose rules and structures are already in place.

IV. REVISITING THE HAMILTONIAN VIRTUES: FUNCTIONAL SECURITY DETENTION

Before finally applying these lessons more directly to designing an anti-terrorist detention scheme, it may be helpful to summarize what the foregoing discussion concluded about the kind of organizational structure likely to be most effective. First, the system we want would encourage decisionmakers to anticipate and plan for trade-offs likely to be involved in terrorism-related decisions, particularly ensuring that any emergency decision-making takes into account relevant expertise, relying on personnel trained to carry out as many possible functions that exist whether or not conditions constitute an “emergency.” Second, the system would include some mechanism to correct for the known pathologies of executive organizations engaged in security functions, a mechanism that would again need to be modified only modestly to function effectively in emergencies. Finally, the system would include some form of monitoring or review not only to create incentives that correct for existing organizational pathologies, but also to enhance opportunities for organizational learning over time. The review structure should do something more than simply duplicate the decision-making process that went before. Instead, it should be structurally and culturally independent of the organization it aims to check, and it should include incentives likely to predictably impact first-decider behavior.

These broad criteria offer a template against which one might begin to test the effectiveness of various security detention systems—the topic of much high-level federal engagement across branches in the post-September

²⁵¹ See *supra* text accompanying notes 39–43.

11th United States,²⁵² including the Court's 2008 decision in *Boumediene v. Bush*.²⁵³ Beginning with habeas litigation surrounding the military detention of U.S. citizen Jose Padilla in 2002, the courts have repeatedly confronted separation-of-powers questions in this context, including the questions whether the executive has the inherent authority to engage in military detention,²⁵⁴ and whether it is within the authority of the courts to consider the legality of executive military detention in a broadly conceived "war on terror."²⁵⁵ To date, the Supreme Court has managed to avoid definitive resolution of the former question, ruling on venue grounds in its 2004 hearing of the case of Jose Padilla,²⁵⁶ and finding adequate authority from congressional delegation in its 2004 ruling in the case of Yaser Hamdi.²⁵⁷ On the latter question, *Boumediene* answered in the affirmative, at least with respect to those currently held at Guantanamo Bay.²⁵⁸ Nonetheless, it remains unresolved whether the courts' authority to consider the legality of executive military detention extends to all detainees held in U.S. custody overseas.²⁵⁹ It is in part for this reason that the latter question of the courts' role remains a central preoccupation of the new functionalists (among others).²⁶⁰

²⁵² See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (considering the "legality of the Government's detention of a United States citizen on United States soil as an 'enemy combatant'"); *Rasul v. Bush*, 542 U.S. 466 (2004) (addressing whether United States courts have jurisdiction to consider the legality of detentions at Guantanamo Bay); see also Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2636-37 (2006) (attempting to clarify procedures for review of detention decisions); Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, 2739-44 (2005) (outlining prisoner treatment and detention protocol).

²⁵³ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

²⁵⁴ Compare, e.g., *Hamdi*, 542 U.S. at 509 (finding statutory authority for detention in ongoing military operations in Afghanistan), and *Padilla v. Rumsfeld*, 256 F. Supp. 2d 218, 221 (S.D.N.Y. 2003) (holding that the President has constitutional authority to detain U.S. citizen in military custody), with *Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2d Cir. 2003) (concluding that "the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat."), *rev'd and remanded*, 542 U.S. 426, 429 (2004), and *Padilla v. Hanft*, 389 F. Supp. 2d 678, 691 (D.S.C. 2005) (finding that the President lacks authority to detain U.S. citizen in military custody).

²⁵⁵ See, e.g., *Rasul*, 542 U.S. at 484 (finding that the District Court has jurisdiction to consider habeas challenges under 28 U.S.C. § 2241); *Boumediene*, 128 S. Ct. at 2262 ("Petitioners . . . are entitled to the privilege of habeas corpus to challenge the legality of their detention.").

²⁵⁶ *Rumsfeld*, 542 U.S. at 430.

²⁵⁷ *Hamdi*, 542 U.S. at 509.

²⁵⁸ *Boumediene*, 128 S. Ct. at 2262 (holding Guantanamo detainees have constitutional right to seek writ of habeas corpus); see also *Rasul*, 542 U.S. at 484 (recognizing statutory availability of habeas writs for detainees held at Guantanamo Bay).

²⁵⁹ *Boumediene*, 128 S. Ct. at 2259-60 (holding extraterritorial reach of Suspension Clause depends on functional analysis of circumstances of detention).

²⁶⁰ See Kenneth Anderson, U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms, Remarks to the New York University Law School International Human Rights Colloquium (March 5, 2007), in 30 *FORDHAM INT'L L.J.* 455, 476-81 (2007) (discussing challenges posed by contemporary counterterrorism and the potential role for judicial decision-making); Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *STAN. L. REV.* 1079 (2008) (evaluating challenges of security-related detention programs); A. John Radsan, *A Better Model for Interrogating High-Level*

This Part takes a first cut at applying the foregoing organizational criteria to three of the detention schemes most often discussed by the new functionalists and in current debates: (1) a unitary executive regime, in which detention authority flows from Article II alone and decisional review, if any, is also within Article II; (2) a statutorily authorized detention scheme, in which broad congressional authority to engage in detention is subject to rigorous reporting and oversight requirements by key committees; and (3) a statutorily authorized detention scheme with ex post, *de novo* review of detention decisions by an independent tribunal.

A. Unitary Executive Detention

In theory, a detention scheme involving only the executive branch in set-up and function might be able to operate quickly and in secret.²⁶¹ But it raises a range of concerns against the functional effectiveness criteria proposed here. For example, it is theoretically possible that the executive would design and operate a detention scheme to function principally in non-war or emergency settings and that could remain functional with minimal adjustments during emergencies. Indeed, the well-developed military justice system does just that. But the military justice system that exists is of course the product of an elaborate *statutory* scheme, designed to perform a chronic function of military governance. It is hard to conceive of an organizational or political incentive that would drive an individual, term-limited executive to bear the political burden of setting up and running a new detention scheme, with no certainty or expectation that it would continue beyond that administration, *other* than an acute short-term need.²⁶² Likewise, an executive-driven detention initiative need not (and for similar reasons is unlikely to) incorporate planning incentives or

Terrorists, 79 TEMP. L. REV. 1227, 1242–52 (2006) (proposing a novel approach to including judicial oversight in terrorist interrogation and detention).

²⁶¹ It is at least noteworthy, however, that the post-9/11 CIA prison scheme, for example, has done neither. See Neil A. Lewis & Mark Mazzetti, *Lawyers Weighing Suits Over C.I.A.'s Secret Jails*, N.Y. TIMES, July 13, 2006, at A1, available at LEXIS, News Library, NYT File (reporting on “secret” CIA detention program); Mark Mazzetti, *Questions Raised About Bush's Primary Claims in Defense of Secret Detention System*, N.Y. TIMES, September 8, 2008, at A1, available at LEXIS, News Library, NYT File (noting reports of detainee and prisoner treatment despite clandestine nature of operations); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, November 2, 2005, at A1, available at LEXIS, News Library, WPOST File (reporting disclosure of detainee treatment procedures by Congressional and Public Interest sources).

²⁶² See ZEGART, *supra* note 173, at 57 (“[P]residents are especially reluctant to push for agency reforms in the absence of a crisis or in the presence of anticipated resistance. . . . Although dozens of investigations, commissions, and experts identified shortcomings in the U.S. Intelligence Community between 1947, when the CIA was created, and the September 11, 2001, terrorist attacks, no president attempted major intelligence reform. Rational self-interest explains why.”). Zegart offers a useful account based on organization theory and political science (rational choice theory) as to why the President and executive agencies find it so difficult to engage in adaptation or reform absent a crisis or other external force. See ZEGART, *supra* note 173, at 50–60.

other mechanisms that help to mitigate errors associated with “emergency” decision-making.

Is an executive-only system capable of correcting for the decision-making pathologies of involved decision-making organizations? After all, some executive agency internal review systems have functioned well.²⁶³ Here, however, there is reason to be skeptical that a review process internal to the executive branch could exercise enough independence to overcome organizational barriers. The concern is particularly acute for review fully within the military, where the habit of secrecy is readily accommodated, and organizational loyalties may create incentives for decisionmakers to cover mistakes, incentives at times compounded by public political demands.²⁶⁴ Given the likelihood that a non-statutory military detention system has been created in and for a special circumstance, there is a heightened risk that the system will lack standard operating procedures, professionally developed norms, or other features that can combat the organizational tendencies of concern.²⁶⁵ Would an executive-only detention system fair better if operated by a civilian organization like the CIA or the FBI (setting aside for the moment other likely constitutional concerns with such programs)? It is unclear. Both organizations have shown themselves in the past to have fierce inter- and intra-organizational loyalties that have restricted information sharing, arbitrarily limited the information and expertise available to aid intra-agency decision-making, and inhibited organizational learning.²⁶⁶ In the detention context specifically, the problem of a lack of standard operating procedures or professionally developed norms has seemed worse for the CIA, which had no formal tradition or practice of detention operations,²⁶⁷ than for the military, which at least has a strong tradition of certain kinds of adjudicatory functions.²⁶⁸

²⁶³ See Mariano-Florentino Cuellar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 253–54 (2006) (elaborating on efficiency of internal auditing programs).

²⁶⁴ See MARK DENBEAUX & JOSHUA W. DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006), available at <http://ssrn.com/abstract=885659> (reviewing accuracy of detention decisions); SAGAN, *supra* note 158, at 252–59; see also *supra* text accompanying notes 212–14.

²⁶⁵ This was certainly the case with the specially created Guantanamo Bay military commissions, created by presidential order in November 2001. See, e.g., Human Rights First, *Observations of Military Commission Trial Monitors (2004-07)*, available at http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm (describing inadequacies of initial military review of detention issues in Guantanamo).

²⁶⁶ See 9/11 COMMISSION REPORT, *supra* note 77, at 407–19 (2004) (discussing communication inadequacies in the intelligence community and the need for enhanced agency collaboration); ZEGART, *supra* note 173, at 38, 52 (detailing results of eighteen major classified and unclassified reports, prepared between 1991–2001, on U.S. government intelligence reform).

²⁶⁷ For more information, see interviews on record with author.

²⁶⁸ See David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 31–56 (2005) (detailing the evolution of military commissions throughout early American history). One might here fairly ask about the effectiveness of an existing, quasi-judicial

Finally, contrary to the new functionalist claims that the executive is unlikely to exaggerate the danger posed by an individual or detain too many people,²⁶⁹ organization analysis suggests a host of reasons why an organization (especially an effectively insular one) acting alone will not be effective in evaluating just the kind of cost-benefit trade-offs an individual detention decision requires. Even beyond concerns about organizational loyalty and agency problems, the incentives of a political branch actor alone in any given case seems likely to guarantee a skewed evaluation of trade-offs; the potential short-term tactical advantage of detaining an individual will seemingly always outweigh strategic goals (particularly goals whose realization may be beyond the political event horizon).²⁷⁰ Whatever executive branch actors may enjoy in the way of expert judgment, and whether or not the engagement of other branches could overcome this problem, it is difficult to imagine any executive agency wholly immune from such an imperative.

B. *Administrative Detention*

Next, consider a version of a statutorily authorized security detention scheme, with some form of executive agency review of individual cases and congressional supervision of the entire apparatus. Given the flexibility of legislative design, one could imagine, in theory, a detention structure designed to function in normal and in emergency circumstances that incorporated requirements or incentives to help ensure that emergency functions, when deployed, would function smoothly and swiftly in the face of a variety of exigencies or contingencies. Procedural safeguards could likewise be constructed to ensure secrecy where necessary. With a statutory requirement of an adversarial (or even inquisitorial) information-gathering process that insists upon the disgorgement of all relevant

organ of the executive branch, like the Foreign Intelligence Surveillance Court (the "FISC"). As the FISC is staffed with Article III judges, surely such actors are free or could be free from the "total institution" pathologies of concern. Yet while the FISC is aided significantly by its Article III composition (indeed, it is doubtful one can appropriately consider the FISC an "executive" court), the FISC by design forecloses information and expertise critical to detention decision-making by conducting only *ex parte* proceedings. In this regard, the information on which it can base its decision is unlikely able to overcome whatever information failings the executive organizations that appear before it suffer.

²⁶⁹ See POSNER & VERMEULE, *supra* note 2, at 164 (discussing arguments regarding the potential for executive overreaching in the context of counterterrorism strategy).

²⁷⁰ See ZEGART, *supra* note 173, at 103–04 (attributing CIA's failure in 2000 to track known Al Qaeda operatives from Malaysia to Thailand in part to short-term needs crowding out even slightly longer term requirements) ("Without strong incentives to reward analysts for peering over the horizon, following cases over time, and developing strategic intelligence, the urgent crowded out the important."); see also WMD COMMISSION REPORT, *supra* note 145, at 4–5 ("Across the board, the Intelligence Community knows disturbingly little about the nuclear programs of many of the world's most dangerous actors. In some cases, it knows less now than it did five or ten years ago The Intelligence Community we have today is buried beneath an avalanche for demands for 'current intelligence').

information from all available sources for individual cases, as well as system-wide oversight by Congress to assess global trade-offs (like tactical/strategic) not always discernable in a single case, such a system could theoretically avoid some of the important disadvantages of an executive-only system.

Nonetheless, such a system would still encounter a cluster of organizational hurdles. First, as with the executive branch, Congress is structured to respond first and foremost to political incentives—incidences that provide modest reason to act in the absence of an immediate crisis. While emergency decision-making pitfalls *could* be avoided, they may not be.²⁷¹ Second, even a legislatively crafted system of executive review is unlikely to avoid all of the “total institution” problems that plagued the unitary executive review processes discussed above. Even if it avoids the difficulties of emergency-exclusive design and operating procedures, the same organizational and political loyalties (if not lack of professional commitments) that created incentives for decisionmakers to cover mistakes in the executive-only system are likely to be at play here. Both the initial agency decisionmaker and the agency reviewer respond to the same political imperatives of the executive administration.²⁷² Further, a system of ostensibly, but not actually, independent agency reviewers, chosen presumably because of an expectation of their particular expertise, exposes decision-making from the beginning to a serious “problem of redundancy”—everyone may be less careful because of their belief that someone at some other point in the line will correct any mistakes.

Finally, while the prospect of some level of congressional monitoring may help to avoid some of the arbitrary evaluation of trade-offs found in an executive-only decision-making regime, congressional oversight itself has significant limitations. The relevant committee staffs are structurally overwhelmed, stymied by secrecy requirements,²⁷³ engaged by political loyalties, and may be incapable during a period of single-party government control of overcoming executive stonewalling in accessing necessary information.²⁷⁴ The efficacy of congressional monitoring may also be

²⁷¹ See ZEGART, *supra* note 173, at 57–58, 154–55 (contending that fragmented committee oversight system and electoral incentives compromised congressional success in intelligence reform).

²⁷² See Kagan, *supra* note 104, at 2331–32 (discussing the accountability advantages of executive administration decision-making).

²⁷³ See 9/11 COMMISSION REPORT, *supra* note 78, at 420 (2004) (finding that House and Senate intelligence committees “lack the power, influence, and sustained capability” to meet the challenges facing the nation’s intelligence agencies); see also FREDERICK M. KAISER, A JOINT COMMITTEE ON INTELLIGENCE: PROPOSALS AND OPTIONS FROM THE 9/11 COMMISSION AND OTHERS (2004), available at <http://www.fas.org/irp/crs/RL32525.pdf> (reviewing proposals to revise congressional oversight structures to solve current failings); Suzanne E. Spaulding, *Power Play: Did Bush Roll Past the Legal Stop Signs?*, WASH. POST, Dec. 25, 2005, at B1, available at LEXIS, News Library, WPOST File (arguing that secret briefings to intelligence committee leaders alone—without staff input or possibility for analysis—leaves little chance for meaningful congressional oversight).

²⁷⁴ See Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1195–97 (2006)

hamstrung by duplicative or competing jurisdictions among relevant oversight committees, duplication that may make agency reporting demands more burdensome than necessary.²⁷⁵ Moreover, while general congressional oversight may be especially effective at evaluating systemic trade-offs (whether the system inflames more than incapacitates our enemies, for example), Congress is not designed to make—indeed, is generally constitutionally foreclosed from making—decisions about individual cases. So while congressional engagement and oversight can certainly improve in some respects over an executive-only regime, it seems unable to overcome all organizational deficits.

C. *Standard Detention*

Finally, consider a federal regime featuring general *ex ante* statutory authorization of detention, coupled with non-deferential *ex post* judicial review. There can be little question that a standard, habeas-like review of federal detention functions today primarily in non-emergency settings. Constitutional rules have also arguably anticipated and answered the question of how review operates in an emergency: when Congress wants to suspend it, it can;²⁷⁶ and when it absolutely cannot operate, it does not until it can again.²⁷⁷ Such extant rules, aided by the highly decentralized nature of the federal judiciary (when one court is incapacitated, others can and do still function) and life-tenure protection of federal judges, arguably overcome concerns about speed (when review allows detention first, questions only after the fact, and only as soon as practicable) and political skewing.

Structurally speaking, the prospect of genuinely independent, non-deferential review of individual detention decisions could also create incentives for executive detaining authorities to plan for detention operations for a variety of emergency contingencies. This could include standard emergency operating procedures and training for agents to ensure appropriate consideration of key trade-offs.²⁷⁸ Additionally, rule-based

(noting Congress' inability to engage in meaningful oversight of executive detention programs after September 11).

²⁷⁵ See Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 704–07 (2006) (discussing this and related problems associated with congressional oversight structures).

²⁷⁶ U.S. CONST. art. I, § 9, cl. 2.

²⁷⁷ *Ex Parte Milligan*, 71 U.S. 2, 121 (1866); see also *Duncan v. Kahanamoku*, 327 U.S. 304, 323–24 (1946) (interpreting Hawaiian Organic Act to permit military trials of civilians only in event of “actual or threatened rebellion or invasion”).

²⁷⁸ Cf. Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1030–51 (1987) (describing the beneficial impact of the exclusionary rule in deterring police corruption); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 123–32 (1992) (outlining the deterrent effect of the exclusionary rule on police perjury).

evaluations—what a court does when it applies a statutory standard to an individual case—can also be effective in enforcing attention to pre-established emergency priorities, potentially correcting or deterring goal displacement by organizational agents. Indeed, a record of regular individualized review, accompanied by reasons, might provide an excellent method of recording the information necessary to enable organizational learning over time.

How would judicial review serve to address the tendency of key executive agencies to disdain outside expertise, or even to foreclose competing views within the organization? Unlike a reviewing body internal to the executive branch, even an expert judge cannot properly bring his own independent knowledge to bear on an evaluation. Even if a court can force the disgorgement of relevant information from the detaining agency, we tend to think of expertise as comprising something more than just information; it carries some implication of experience and fluency in a professionally recognized methodology as well.²⁷⁹ A generalist court arguably has neither when it comes to security detainees. But just as with “hard look” review in the standard administrative law context—reviewing not the substance of the agency decision *per se*, but whether the agency had rational factual and logical reasons for deciding as it did—there is reason to doubt that expertise in the reviewer is necessary for the purpose of policing the cultural and arbitrariness concerns highlighted by organization analysis. If the problem is that decisionmakers did not consider outside information or expertise, then that omission is likely to manifest itself in evident ways other than in decisions the rational expert would find “bad.” Binding review by an independent body can drive an incentive structure that forces the anticipation of and planning for key threats that, whenever possible, favors the internal consideration of competing information and expertise.²⁸⁰

Even with those advantages, however, at least some concerns remain. For instance, while a court may be well positioned to consider trade-offs at stake in an individual case (particularly when such trade-offs are addressed in a well-formed statutory scheme), it is less clear that individualized review could address overarching trade-offs of a detention system (again, for example, whether the detention approach to detention alienates more enemies than it deters). Here, it seems something additional is required, such as a body based in the legislative branch insulated from the structural

²⁷⁹ See *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579, 593–95 (1993) (noting the essential factors to be considered when determining the sufficiency of proffered expert testimony).

²⁸⁰ This is precisely what happened as police agencies developed internal mechanisms for preparing search warrant applications, mechanisms that appear to serve as an additional check against erroneous applications. See Dripps, *supra* note 246, at 930 (describing internal review process in law enforcement bureaucracy in which line officer must present warrant application first to organizational superior).

and political weaknesses of the committee process, but free of the institutional loyalties of executive branch agencies, and capable of evaluating bigger picture trade-offs of any detention scheme. Finally, of course, there are arguments of institutional habit. Will courts ever treat security cases the way they treat, say, securities cases? It is uncertain. But we will certainly not be able to answer such empirical questions without conducting the experiment in practice.

V. CONCLUSION

This Article began by posing two questions raised by new functionalist claims in favor of broad executive authority in matters of national security: (1) Should functional interests matter in resolving constitutional separation-of-powers disputes? (2) If so, how should a decisionmaker evaluate whether a particular distribution of power among the branches is functionally effective? The answer to the first question is an unmodified yes; while formal dictates must always play a central role in constitutional decision-making, history, logic, and the reality of constitutional governance insist that at least some identified functional interests factor into our understanding of the separation of powers. The answer to the second question is a more cautious blend of interpretive do's and don'ts. Courts and policy-makers must recognize and distinguish raw effectiveness claims when they see them, and avoid the temptation to accept such arguments at face value especially when they claim to resolve the role of decision-making structures. We should not assume national security-related questions are any less susceptible of rational evaluation than any other category of decision. And we should avoid easy reliance on historical assumptions of "institutional competence," in favor of more realistic considerations of organizational character.

The separation-of-powers issues presented by various security detention schemes remain especially useful examples to test, not only because of their continued salience as a policy matter, but also because formal analysis has proven frustratingly unable to resolve the question to what extent the courts have the authority to conduct, for example, "[a]ny evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant."²⁸¹ At the highest level of generality, the Constitution's text provides no reason for doubting that it falls within the judiciary's general federal question jurisdiction to determine whether an individual's detention is in violation of the Constitution.²⁸² Nor is there textual basis for doubting that war-related detention falls within this power. On the contrary, the federal courts are given jurisdiction over criminal

²⁸¹ *Hamdi v. Rumsfeld*, 316 F.3d 450, 474 (4th Cir. 2003), *rev'd* 542 U.S. 507 (2004).

²⁸² U.S. CONST., art. III, § 2, cl. 1.

treason cases, defined as “levying war” against the United States.²⁸³ It is difficult to imagine how such cases would arise except following the detention of an individual accused by the executive of just such conduct. It is likewise difficult to imagine that the courts would not then be expected to determine whether the alleged conduct amounted to the levying of war.²⁸⁴ While the act of detention may be executive in nature, one could equally say, as a formal matter, that *grants of authority to detain* are legislative in nature,²⁸⁵ and that *determining the propriety* of a deprivation of liberty is judicial in nature.²⁸⁶ To the extent one accepts that judicial review is a core function of the judiciary at all, formal analysis gives one every reason to think review of executive detention is within the courts’ authority here.²⁸⁷ And if one accepts that the exercise of habeas corpus jurisdiction in particular is at the core of judicial power, then the exercise of full judicial review of executive detention is not only permissible but required.²⁸⁸

Despite all this, both the prisoner-of-war scheme contemplated by modern international humanitarian law²⁸⁹ and some of the Court’s own case law²⁹⁰ seem satisfied, at least in the first instance, with nothing more than internal executive branch review of the propriety of executive

²⁸³ U.S. CONST., art. III, § 3, cl. 1.

²⁸⁴ Indeed, the federal courts have been faced with treason-related cases more than once in the past two centuries of jurisprudence. See *Hamdi*, 542 U.S. at 559–61 (2004) (Scalia, J., dissenting) (citing cases).

²⁸⁵ Understood as an issue of whether the detention power is one that has “the purpose and effect of altering the legal rights, duties, and relations of persons,” the argument becomes strong that detention *authority* is legislative by its nature. *INS v. Chadha*, 462 U.S. 919, 952 (1983); cf. also *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (limiting a judge’s ability to impose a prison sentence greater than the maximum determined by the legislature).

²⁸⁶ *United States v. Nixon*, 418 U.S. 683, 706–07 (1974) (rejecting President’s separation-of-powers argument that judiciary lacks power to subpoena tapes on the grounds that such a restriction would “gravely impair” the courts’ ability to do justice in criminal prosecutions).

²⁸⁷ *Id.*

²⁸⁸ See James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking that Article III and the Supremacy Clause Demand of the Federal Courts*, 98 COLUM. L. REV. 696, 884 (1998) (concluding that Article III “judicial power” must include, inter alia, the capacity of a federal court to conduct an independent determination of “every—and the entire—question affecting the normative scope of supreme law,” and the capacity “to effectuate the court’s judgment in the case and in precedentially controlled cases”).

²⁸⁹ See Geneva Convention [III] Relative to the Treatment of Prisoners of War of August 12, 1949, available at <http://www.unhcr.ch/html/menu3/b/91.htm> (outlining international mandates that pertain to POW treatment and detention); Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, available at <http://www.unhcr.ch/html/menu3/b/92.htm> (detailing international expectations of enemy conduct when detaining civilian populations); DEP’T OF THE ARMY, ARMY REGULATION 190-8 ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1997), available at <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf> (outlining proper administration and operation of enemy prisoner of war detention facilities).

²⁹⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (leaving open possibility that executive agency review of military detention could satisfy due process standards); *Johnson v. Eisentrager*, 339 U.S. 763, 774–75 (1950) (“Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.”).

detention. The reasons invariably given in support of less-than-normal judicial review relate centrally to raw and role effectiveness concerns. As Justice O'Connor put it in *Hamdi v. Rumsfeld*: "[T]he full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting."²⁹¹ It has proven necessary to consider the purposive separation-of-powers interests of liberty and political accountability, as well as the more complex effectiveness interests just discussed.

As a matter of purposive impact, it should come as little surprise that separation-of-powers liberty interests favor some independent review.²⁹² At the same time, one could reasonably argue that political accountability is best served, in contrast, by leaving such judgments in the hands of the elected leaders. Even assuming a context in which Congress has not addressed the propriety of security detention, if the executive repeatedly fails to take relevant information into account in detention decisions, the "consequences" he faces are, properly, electoral, not legal. But in addition to obvious concerns about how the rights of insular minorities would fare in such a scheme, the key problem with this argument is that it proves far too much. Judicial review raises counter-majoritarian concerns in every setting, not just in matters of security. Unless there is some reason for

²⁹¹ *Hamdi*, 542 U.S. at 535. Indeed Justice O'Connor's analysis is an efficient blend of purposive, role, and raw effectiveness functionalism:

Without doubt, our Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them. The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

Id. at 531–32 (internal citations omitted); see also *Johnson v. Eisentrager*, 339 U.S. 763, 778–79 (1950) ("To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.").

²⁹² See, e.g., *Hamdi*, 542 U.S. at 540–41 (Souter, J., concurring in part and dissenting in part) ("At the argument of this case, in fact, the Government . . . suggested that as long as a prisoner could challenge his enemy combatant designation when responding to interrogation during incommunicado detention he was accorded sufficient process to support his designation as an enemy combatant. See Tr. of Oral Arg. 40; *id.* at 42 ("[H]e has an opportunity to explain it in his own words" "[d]uring interrogation"). Since on either view judicial enquiry so limited would be virtually worthless as a way to contest detention, the Government's concession of jurisdiction to hear Hamdi's habeas claim is more theoretical than practical, leaving the assertion of Executive authority close to unconditional.").

assuming the counter-majoritarian problem is *greater* in the security setting—or that security decisions are some how more appropriately political than, say, health policy decisions—the accountability claim seems no more salient here than in any situation involving *ex post* judicial review. Moreover, if our functional effectiveness discussion above suggests anything, it is that key aspects of security decision-making (at the very least in the nuclear terrorism context) are intensely fact-based, aided more by professional expertise than by popular judgment. Given that some security risks may attend both under-detention and under-review,²⁹³ political accountability concerns are at best a wash, and at worst counterproductive (if responsive to irrational pressures) when it comes to crisis-driven detention.²⁹⁴

The new functionalists thus do a service by considering effectiveness arguments here. But their raw effectiveness claims flounder on the facts, and a more thorough review of policy empirics may lead at best to different answers depending on the circumstances. For policy-makers and policy evaluators, the question of how one assesses role effectiveness interests thus weighs heavily. The insights of organization analysis paint a complex but striking picture of how our national security organizations may be expected to handle a security detention regime—a picture, this Article suggests, that reveals a more competent security detention scheme as one that engages all three branches of government in design, review and monitoring functions. There is no doubt more to be done in exploring this application. In the meantime, there remains a clear lesson for constitutional interpretation: Hamilton only begins the conversation about functional constitutional power.

²⁹³ See *supra* text accompanying notes 163–64 regarding the risks of under-review.

²⁹⁴ See Cohen et al., *supra* note 275, at 702–14 (discussing arguments supporting questionable accountability gains).