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I. INTRODUCTION

Much of the current debate in national security law scholarship focuses on institutional design issues related to the balancing of values such as legitimacy, effectiveness, fairness and efficiency. A part of that debate centers around the legitimacy of tribunals established to try alleged terrorists. Critics of those tribunals assert they are an illegitimate form of justice and require reform or replacement by a new national security court.[1] These scholars are principally engaged in a debate over institutional design. This article seeks to contribute to that debate, and also to the larger institutional design literature by providing a theoretical framework for understanding and evaluating legitimacy considerations in the institutional design process. While adding legitimacy as an analytical component may further complicate an already complex legal and policy debate, I contend that the benefits to be derived from maximizing legitimacy are too important to neglect. I begin the article by providing a theoretical template for analyzing insti-

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1. *See, e.g.*, BENJAMIN WITTES, LAW AND THE LONG WAR 165–66 (2008); Amos Guiora & John T. Parry, Debate, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356, 361 (2008), http://www.pennumbra.com/debates/pdfs/terrorcourts.pdf; Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1, 5 (2003); Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19; ANDREW C. MCCARTHY & ALYKHAN VELSHI, AM. ENTER. INST., WE NEED A NATIONAL SECURITY COURT 2 (2007), http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf; *cf.* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008) (discussing how the military detention model and the civilian criminal model cannot meet the central legal challenge of modern terrorism).

tutional innovations such as national security courts. Using the sociological theory of institutional isomorphism, I detail how organizations driven by the need for legitimacy and its associated benefits ultimately evolve to resemble one another.

The analytical framework I outline in this first section is not intended to provide an all encompassing institutional design template, nor is it intended to provide a singular metric for evaluating national security courts or any other institution *en toto*. Rather, the analytical framework I propose is useful for sensitizing institutional designers and legal scholars to a specific form of legitimacy derived from the pressure for conformity placed on institutions by external observers. That conformity pressure may force institutional innovations such as military commissions and national security courts to comply with formal and informal external mandates (in this case imposed by law or prompted by public opinion), overcome uncertainty by copying existing and legitimate forms (in this case judicial institutions), and conform with the norms which are dominant in a field (in this case the legal profession).

Importantly, this analytical framework, with its focus on legitimacy, sensitizes scholars to the fact that while an institution may achieve an optimal level of legitimacy, it may do so by adopting an inefficient form. The discussion thus highlights an underlying and as yet unspoken tension in the scholarly debate: that is, an institutional innovation such as a national security court, which may be extremely *effective* at achieving certain counterterrorism goals, may also be unable to simultaneously achieve conformity-based *legitimacy*. This may be an outcome that policymakers are willing to accept, much as some did with the military commissions. However, scholars should explicitly acknowledge this reality.

Building upon this theoretical framework, the article next demonstrates the tension between effectiveness and legitimacy by highlighting key historical lessons for institutional designers. I trace the history of post-September 11th military commissions and detail how they failed to achieve an optimal level of legitimacy due to their imperfect conformity with existing courts. This part of the article explains how the designers of the military commissions focused their attention primarily on effectiveness, not legitimacy. These designers copied a potentially illegitimate trial system, shielded themselves from normative pressures, and

disregarded the value which an institution can derive from conformity.

The article, after explaining the pitfalls of imperfect conformity, next explains the consequences of selective or incomplete conformity. I begin by analyzing elements of the *Hamdan*[2] opinion which I contend represents a coercive mandate for conformity. I explain how Congress, when faced with this coercive mandate from the Court, selectively mimicked the Uniform Code of Military Justice ("UCMJ") in the Military Commissions Act of 2006 ("MCA"). I further detail how the institutional design process followed by Congress was largely shielded from the mechanisms of conformity, which resulted in legislation that was only slightly modified in the face of informal coercive pressure (from public opinion) and normative pressure (exerted by the then-Chief Prosecutor of the military commissions). The result was a military trial system which only selectively conformed and thereby failed to achieve optimal legitimacy.

The implications of these theories for institutional designers and national security court proponents are explained in the final portion of the article. I contend that for an institution to achieve optimal legitimacy, it must conform its practices with those that exist in its organizational field. For judicial institutions, this means that the values of fairness, effectiveness, and efficiency must be considered along with legitimacy. Ultimately, the article suggests that because a national security court will by its nature depart from the structure and practice of an Article III court, national security court proponents must sensitize themselves to the challenge of balancing legitimacy (derived from conformity) with effectiveness and efficiency. Therefore, the best approach for the institutional design process may be to assess the legitimate Article III court framework and determine where those courts are insufficient to meet the objectives of a robust counterterrorism program. Designers should then narrowly and selectively modify the existing legitimate institutional form rather than taking a bottom-up approach, which creates new institutions from scratch.

2. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

II. INSTITUTIONAL ISOMORPHISM AND THE QUEST FOR LEGITIMACY

Institutional theory provides important insights into the concept of legitimacy which can frame the debate regarding national security court proposals. Mark Suchman defines legitimacy as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."[3] This definition, which employs notions like "generalized perception" or "socially constructed system," emphasizes the dependence of legitimacy on collective observers.[4] Stated differently, the legitimacy of an institution is dependent upon external "legitimacy providers."[5] If this definition offered by institutional theorists is correct, then a natural question for those seeking to design new national security courts should be: "How can a new institution earn the approval of these 'legitimacy providers'?" The following section contends that one key aspect of legitimacy is conformity with existing institutional forms.[6]

A. *Institutional Isomorphism*

Institutional isomorphism is a sociological theory that posits that once an organization is structured and constituted, powerful environmental forces emerge which cause the organization to evolve, eventually becoming more similar to others in its field; organizations pursue such similarity regardless of whether it leads to greater efficiency.[7] Through this conformity process, organiza-

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3. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches* 20 ACAD. MGMT. REV. 571, 574 (1995) (noting that "over the years, social scientists have offered a number of definitions of legitimacy, with varying degrees of specificity," some with evaluative and cognitive components).

4. Ilídio Barreto & Charles Baden-Fuller, *To Conform or To Perform? Mimetic Behaviour, Legitimacy-Based Groups and Performance Consequences*, 43 J. MGMT. STUD. 1559, 1561 (2006).

5. *Id.*

6. Importantly, there are other aspects of legitimacy that this article will not address. For a more detailed overview of those aspects, see Suchman, *supra* note 3, at 577–85.

7. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 148–49 (1983) (discussing their central research question, which asks why "there is such startling homogeneity of organizational forms and practices" across bureaucratic structures). DiMaggio and Powell attribute such homogeneity to the activities of a diverse set of

tions within a population resemble others which face the same set of environmental conditions.[8] The phenomenon draws the attention of the institutional designer to the fact that "[t]he major factors that organizations must take account of in their environments are other organizations."[9] As a consequence, by reference to other organizations, officials are informed of how to structure their own organization.[10] According to the theory, organizations must concern themselves with "political power and institutional legitimacy"—because these are two intangible resources required for institutional success.[11] As such, national security court proponents must sensitize themselves to the dominant practices of other tribunals and attempt to resemble those other institutions if they expect to garner the benefits of political support which flow from institutional legitimacy. Furthermore, it is important to note that legitimacy, according to the theory of institutional isomorphism, is almost completely derived from conformity. That is to say that actions which conform to the common view are legitimate and need not be effective to be legitimate—they simply must conform.[12]

B. *Mechanisms of Conformity in Institutional Isomorphism*

Institutional isomorphism is premised upon conformity resulting from the influence of environmental forces on organizations. That conformity is produced through three mechanisms, briefly summarized as follows: "[C]oercive isomorphism (which stems from political influence), mimetic isomorphism (which results from responses to uncertainty), and normative isomorphism (which results from the professionalization of managers and specialists). Each of these mechanisms describes a process by which

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organizations which structure an organizational field through a process of institutional definition or structuration. *Id.* at 148. Once organizations are structured, DiMaggio and Powell contend that homogenization results from rational decisions constructed within an organizational environment which features pressures that result in conformity and homogenization. *Id.*

8. Amos Hawley, HUMAN ECOLOGY, *in* 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 334 (David L. Sills ed., 1968).

9. HOWARD ALDRICH, ORGANIZATIONS AND ENVIRONMENTS 265 (2008).

10. DEREK S. PUGH & DAVID J. HICKSON, WRITERS ON ORGANIZATIONS 166 (6th ed. 2007).

11. DiMaggio & Powell, *supra* note 7, at 150. The authors cited to additional scholars who "clearly recognize this and include political and institutional legitimacy as a major resource." *Id.* at 150 n.6.

12. *See* PUGH & HICKSON, *supra* note 10, at 166.

ideas from institutions in the organization's environment become legitimated and adopted."[13]

As their generally worded definitions suggest, these mechanisms are not always empirically distinct or capable of singular characterization;[14] they should instead be viewed as components within an analytic typology or framework. Due to their general definition, aspects of these mechanisms may intermingle even though "they tend to derive from different conditions and may lead to different outcomes."[15] As a consequence, the scope of any one mechanism's influence will depend upon the mix of forces exerted on an organization at any given time. For example, formal coercive mandates such as laws may be ignored or selectively complied with until informal coercive pressure in the form of public opinion forces action or complete compliance; concomitantly, the resulting action will largely depend upon the greater of the two pressures exerted. Below I provide an expanded explanation of each mechanism and illustrate these theories using examples drawn from national security law, international law, and organizational theory.

1. Coercive Institutional Isomorphism

The mechanism of coercive isomorphism results from formal and informal conformity pressures "exerted on organizations by other organizations upon which they are dependent."[16] Examples of formal pressures are obvious to legal scholars—they are pressures felt by organizations in the form of force, such as rules, regulations, laws, and judicial opinions. Informal pressures, on the other hand, are felt as persuasion and may be found in dicta, custom, handbooks, and other non-binding, yet coercive, phenomena. The illustration below further clarifies these concepts.

In *Hamdan v. Rumsfeld*, the Supreme Court declared that military commissions established by Presidential Military Order to try non-citizen "enemy combatants" ("PMO Commissions") were

13. *Id.*

14. *See, e.g.*, DiMaggio and Powell, *supra* note 7, at 150 ("For example, external actors may induce an organization to conform to its peers by requiring it to perform a particular task [coercive] and specifying the profession responsible for its performance [normative]. Or mimetic change may reflect environmentally constructed uncertainties.").

15. *Id.*

16. *Id.*

invalid because they lacked the required explicit congressional authorization or authorization by the laws of war.[17] The Court further explained that Article 36 of the UCMJ[18] required that rules of procedure for courts-martial and military commissions promulgated by the President may not "be 'contrary to or inconsistent with' the UCMJ—however practical it may seem," and that "the rules adopted must be 'uniform insofar as practicable.' That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable."[19]

The Court's requirement that the commissions be authorized by legislation and conform with the UCMJ is a clear example of formal, coercive institutional isomorphism. Stated in the language of institutional theory, the PMO Commissions were invalidated by an organization in their environment on which they depended for their legitimacy. The invalidation carried with it the force of law, and effectively mandated that the legitimacy of any new organization (e.g., new military commissions) would require authorization by Congress.[20] While such a legal command constitutes both formal and coercive pressure, it alone is not enough to establish isomorphism, which requires that such pressure lead to conformity with other organizations in the same field.[21] The theoretical requirements were fulfilled by the Court's conformity mandate reflected in its reference to Article 36 of the UCMJ.[22]

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17. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 602–03 (2006). See *infra* Part III for a more extensive analysis of institutional isomorphism and *Hamdan*.

18. *See* 10 U.S.C. § 836 (2006).

19. *Hamdan*, 548 U.S. at 620; *see also* Douglas W. Kmiec, *The Separation of Powers:* Hamdan v. Rumsfeld*—The Anti-Roberts,* 34 PEPP. L. REV. 573, 579–80 (2007) (questioning why the Court, having found the PMO commissions to be unauthorized, detailed in dicta how they failed to meet UCMJ standards); Jana Singer, Hamdan *as an Assertion of Judicial Power*, 66 MD. L. REV. 759, 761 (2007) (discussing how the *Hamdan* decision is a statement by the Court of its judicial authority).

20. *See Hamdan*, 548 U.S. at 601–02.

21. *See* DiMaggio & Powell, *supra* note 7, at 149–50.

22. See 10 U.S.C. § 836 (2006); *Hamdan*, 548 U.S. at 643–44 (Kennedy, J., concurring) (citing 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 248 (2d series 1894), *available at* http://cdl.library.cornell.edu/cgi-bin/moa/sgml/moa-idx?notisid=ANU4519-0114) (referring to conformity as the "uniformity principle" and stating that "those military commissions generally have adopted the structure and procedure of courts-martial"); *see also* Tung Yin, *Tom and Jerry (and Spike): A Metaphor for* Hamdan v. Rumsfeld, *the President, the Court, and Congress in the War on Terrorism*, 42 TULSA L. REV.. 505, 514–15 (2007) (explaining the "uniformity principle" in Article 36 of the UCMJ and the principle's application by Justice Stevens in *Hamdan*).

At this point in our theoretical explication, two issues arise which can help illustrate the distinctions between the formal and informal coercive mechanisms. The first issue is whether the Court's reference to, and its analysis of, Article 36 of the UCMJ is dicta or part of the holding.[23] If it is dicta, it does not carry with it the force of law, but it may nevertheless be considered coercive institutional isomorphism, albeit the informal type. Stated differently, if the Court's reference to Article 36 is dicta, it is conformity pressure from an external organization felt *not as force*, but as *persuasion*. While the force of law is more coercive because of the sanctions associated with avoiding its dictates, the ensuing discussion should make clear that even mere persuasion can be a powerful force for effectuating conformity.

The second issue reinforces the first, namely the fact that the Court itself makes clear that it is not flatly mandating conformity, or in its words, uniformity.[24] Instead, the Court states that "[t]he uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it."[25] Here, the Court, another organization in the military commission's institutional field, is formally mandating that departures be tailored to exigencies, while informally persuading institutional designers to remain cognizant of the limited flexibility of the uniformity principle.

While formal and informal coercive isomorphism look to other organizations as the source of pressure to conform, another type of coercive pressure—culturally driven coercive isomorphism—instead looks more broadly at society-level pressures that drive an organization to conform or that compel it to appear similar to other organizations in its environment.[26] Stated differently, culturally driven coercive isomorphism results from "cultural expectations in the society within which organizations function."[27] This loosely defined concept is perhaps most susceptible to inadvertent definitional overlap with mimetic and normative forms of isomor-

23. *See* Kmiec, *supra* note 19, at 579–80 (indicating that the Court's analysis of Article 36 was dicta).

24. *See Hamdan*, 548 U.S. at 620.

25. *Id.* (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 835 n.81 (2d ed. 1920)).

26. *See* DiMaggio & Powell, *supra* note 7, at 150.

27. *Id.*

phism.[28] To avoid the potential for definitional overlap, scholars should recognize three distinguishing characteristics. First, culturally driven coercive isomorphism is exogenous. Much like formal and informal coercive isomorphism, it is environmental pressure exerted from outside the organization. Second, culturally driven coercive isomorphism is distinguishable from mimetic isomorphism because its pressure is not grounded in environmental uncertainty, a key characteristic of mimetic mechanisms. Third, culturally driven coercive isomorphism is distinguishable from normative isomorphism because normative mechanisms are endogenous, stemming almost entirely from the professionalization of individuals *within* the organization.[29] Thus, culturally driven coercive isomorphism is distinguishable because it is observable when organizations feel externally derived societal (rather than institutional) pressure to conform their activities with others in their environment. That conformity pressure is driven by a desire to gain support from society or other entities upon which the organization relies for success or legitimacy.[30]

An illustrative counterterrorism-related example of culturally driven coercive isomorphism is the media visitation program implemented by the Department of Defense at Guantánamo Bay in

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28. See *infra* Part II.B.2. for a discussion of mimetic institutional isomorphism and *infra* Part II.B.3. for a discussion of normative isomorphism.

29. See DiMaggio & Powell, *supra* note 7, at 150–54 (discussing coercive, mimetic, and normative isomorphism). It is entirely plausible for normative pressures to cause culturally driven coercive isomorphism. An obvious example is norm-driven pressure from professionalized cultures such as lawyers. Such professionals are oftentimes represented by professional associations like the ABA, which exert pressure in the form of cultural expectations derived from professional norms. For examples of such culturally driven coercive pressure, see generally MODEL RULES OF PROF'L CONDUCT (2008), *available at* http://www.abanet.org/cpr/mrpc/mrpc_toc.html; MODEL CODE OF JUDICIAL CONDUCT (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf; MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. (2004), *available at* http://www.abanet.org/legalservices/paralegals/downloads/modelguidelines.pdf; GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (Am. Bar Ass'n 2003), *available at* http://www.abanet.org/legalservices/downloads/claid/indigentdefense/deathpenaltyguidelines2003.pdf. However, the important distinguishing characteristic is that culturally driven coercive isomorphism comes from external (or environmental) societal pressures, whereas normative pressure is associated with the professionals within an organization. *See* DiMaggio & Powell, *supra* note 7, at 150. For a more complete discussion of normative isomorphism, see *infra* Part II.B.3.

30. *See* DiMaggio and Powell, *supra* note 7, at 151 (providing an example of subtle coercive isomorphism "in which neighborhood organizations in urban communities, many of which are committed to participatory democracy, are driven to developing organizational hierarchies in order to gain support from more hierarchically organized donor organizations.").

Cuba.[31] The program, which allows members of the media to visit the Guantánamo detention facility, was likely implemented by the Department of Defense to address the pressures arising from cultural and societal expectations of openness and transparency regarding prisons and detention facilities.[32]

Culturally driven coercive institutional isomorphism posits that conformity pressure may come about not just from the formal and informal processes discussed above, but also from cultural expectations.[33] Thus, while there is no formal legal requirement forcing the Department of Defense to operate in a more open and transparent manner,[34] significant coercive pressure was brought to bear through cultural expectations. It is important to reemphasize that the general theory of institutional isomorphism suggests that pressure for conformity may run counter to efficiency.[35] In this example, this is especially apparent in light of Guantánamo's status as a facility created primarily to allow for intelligence collection through interrogations.[36] Such a status suggests that the government could operate Guantánamo more efficiently by not creating a public relations structure that allows media

31. *See* U.S. ARMY, CAMP DELTA STANDARD OPERATING PROCEDURES 28.1 (2003), *available at* http://blog.wired.com/27bstroke6/files/gitmo-sop.pdf.

32. *See id.*

33. *See* DiMaggio & Powell, *supra* note 7, at 150.

34. *See, e.g.*, Kathleen T. Rhem, *DoD Releases Names of 759 Current, Former Guantanamo Detainees*, AM. FORCES PRESS SERVICE, May 15, 2006, http://www.defenselink.mil/news/newsarticle.aspx?id=15754 (stating that the Department of Defense released documents and names regarding detainees not because they were ordered to, but because they reached an agreement with the Associated Press.)

35. *See* DiMaggio & Powell, *supra* note 7, at 147.

36. *See* Gregory S. McNeal, *Beyond Guantanamo, Obstacles and Options*, 103 NW. U. L. REV. 29, 43–44 (2008) (discussing how the priority of the executive for detainees at Guantánamo is intelligence gathering rather than obtaining information for criminal prosecution); *see also* Morris D. Davis, *The Influence of* Ex Parte Quirin *and Courts-Martial on Military Commissions*, 103 NW. U. L. REV. 121, 124–25 (2008) (concurring with McNeal's argument that protecting intelligence was a factor in the set-up of Guantánamo). *See generally* John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 100 AM. J. INT'L L. 455, 473 (2006) (discussing President Bush's remarks of the need for Guantánamo to remain open in order to protect the American people); Jonathan H. Marks, *Doctors of Interrogation*, THE HASTINGS CTR. REP., July 1, 2005, at 17 (explaining the use of physicians at Guantánamo in developing interrogations methods to produce intelligence); MARK DENBEAUX ET AL., SETON HALL UNIV. LAW CTR. FOR POLICY & RESEARCH CAPTURED ON TAPE: INTERROGATION AND VIDEOTAPING OF DETAINEES IN GUANTÁNAMO 3–4 (2008), http://law.shu.edu/news/captured_tape_2788_with-appendix.pdf (discussing the videotaped documentation of interrogations at Guantánamo and the destruction of the tapes to protect interrogators).

tours of its facilities; however, such gains in efficiency would come with a potential loss of legitimacy.[37]

The creation of a media-visit program by the Department of Defense, in the absence of a formal requirement that such a program exist, can be attributed to culturally driven pressures tied to two societal expectations. First, the history of public inquiries into the operations of clandestine organizations represents a societal or cultural skepticism of organizations that operate in secret and reflects an expectation of openness regarding the activities of government.[38] Second, the dominant practice of domestic civilian detention facilities is to operate in an open and transparent fashion by frequently allowing media tours.[39] This dominant practice contributes to conformity pressure, borne of societal expectations, regarding these types of facilities. These two phenomena, grounded in cultural expectations, combined to create external pressure on the Department of Defense to conform its media visitation policies to those of other detention facilities. The resulting conformity was likely prompted by a desire to avoid an adverse impact on societal perceptions of Guantánamo's organizational legitimacy and thereby satisfy a need for political support.[40]

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37. *See* DiMaggio & Powell, *supra* note 7, at 147 (explaining that institutional isomorphism posits that organizations do not seek conformity for reasons of efficiency but rather for reasons of legitimacy).

38. *See, e.g.*, LOCH K. JOHNSON, AMERICA'S SECRET POWER: THE CIA IN A DEMOCRATIC SOCIETY 9 (1989) (explaining how cultural expectations regarding secret agencies evolved from an era of discretion and trust, through one of skepticism, to the modern era of distrust which sought greater democratic control, with such pressure for controls demonstrating "a strong public interest in the public disclosures of the functions of governmental agencies . . . [and] also a strong public interest in the effective functioning of an intelligence service"); *see also* Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181, 182 (1999) (discussing how publicity is needed over secrecy when it comes to government policies in order to promote the democratic principle of accountability); Geoffrey R. Stone & William P. Marshall, *Secrecy, the Enemy of Democracy*, CHI. TRIB., Dec. 17, 2006, at C7 (contending that secrets kept by the government and government agencies are enemies of the American people).

39. *See, e.g.*, BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PUB. NO. 1480.05, PROGRAM STATEMENT: NEWS MEDIA CONTACTS 1 (2000), *available at* http://www.bop.gov/policy/progstat/1480_005.pdf; Terry Frieden, *Reporters Get First Look Inside Mysterious Supermax Prison*, CNN.com. Sept. 13, 2007, *available at* http://www.cnn.com/2007/US/09/13/supermax.btsc/index.html.

40. *See* DiMaggio & Powell, *supra* note 7, at 150 (explaining how organizations need political support).

Of course, those potentially adverse cultural expectations and their associated pressure for a culture of openness at Guantánamo were further amplified by lawsuits requesting the same openness,[41] repeated allegations of ill treatment,[42] and allegations of substandard living conditions in detention facilities.[43] In fact, the pressure was so great that the Department of Defense not only created a media-visit program, it even implemented a "Virtual Video Visit" program which allowed members of the public and the media to tour facilities through an internet interface.[44] All of

41. *See, e.g.*, Rhem, *supra* note 34 (explaining how a federal Freedom of Information Act lawsuit brought by the Associated Press forced the release of information about Guantánamo detainees on at least four occasions).

42. *See, e.g.*, Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 90–94 (2007) (describing the interrogation methods used by the armed forces and the CIA that are considered torture and explaining allegations of torture); Ray Murphy, *Prisoner of War Status and the Question of the Guantanamo Bay Detainees*, 3 HUM. RTS. L. REV. 257, 272 (2003) (discussing actions taken against the detainees in order to "break" them in interrogation); Joshua A. Decker, Comment, *Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror* 6 CHI. J. INT'L L. 803, 805–08 (2006) (explaining the allegations of torture of detainees at Guantánamo and the International Committee of the Red Cross Report on torture at Guantánamo).

43. *See, e.g.*, HUMAN RIGHTS WATCH, GUANTANAMO BAY DETAINEES 5–9 (2004), *available at* http://www.hrw.org/backgrounder/usa/gitmo1004/gitmo1004.pdf (describing living conditions at Guantánamo obtained through interviews with detainees); KEN GUDE, CTR. AM. PROGRESS, HOW TO CLOSE GUANTÁNAMO 18 (2008), *available at* http://www.americanprogress.org/issues/2008/06/pdf/guantanamo.pdf (contending that the conditions of confinement affect the competency of detainees and hinder prosecution); INT'L COMM. OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION 11–12 (2004), *available at* http://download.repubblica.it/pdf/rapporto_crocerossa.pdf (reporting serious violations of International Humanitarian Law in regards to conditions and treatment of the detainees); Murphy, *supra* note 42, at 272–73 (discussing the standards for human treatment of prisoners of war and how the conditions at Guantánamo do not meet those standard); Johan Steys, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 7–8 (2004) (discussing the general conditions detainees experience at Guantánamo); Maggie Ardiente, *Everything But the Truth: Allegations of Abuse and Torture at Guantanamo Bay*, THE HUMANIST, Jan.–Feb. 2006, at 16 (summarizing the allegations of abuse, torture, and inhumane living conditions of detainees). *But see* FOREIGN AFFAIRS COMM., VISIT TO GUANTANAMO BAY, 2006–07, H.C. 44-2, at 14e, *available at* http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44.pdf (concluding, after visiting Guantánamo, that the facilities were comparable to British detention facilities); Kathleen T. Rhem, *Officials Decry Use of Outdated Images to Portray Gitmo*, AM. FORCES PRESS SERVICE, Nov. 29, 2005, http://www.defenselink.mil/news/newsarticle.aspx?id=18200.

44. *See* Joint Task Force Guantánamo Virtual Video Visit, http://www.jtfgtmo.southcom.mil/virtualtourintro.html (last visited Feb. 27, 2009). According to the JTTF website,

> [The] Virtual Visit is designed to give you the viewer a feel for what it is like to be a visiting journalist on a media tour. The camps are numbered in the order of their construction, and are ordered for viewing just as you would proceed in person. At the end of your journey, you will see the original Guantá-

these efforts at conformity came despite the fact that the detainees in Guantánamo were deemed "unlawful enemy combatants" and were not convicted prisoners like those held in U.S. prisons.[45] Furthermore, as noted above, the potential inefficiencies which could result from allowing media visits to a facility designed for intelligence gathering were secondary concerns in the face of culturally driven coercive isomorphism which drove the Department of Defense to implement homogeneous organizational policies aimed at improving legitimacy.[46]

As the examples above illustrate, formal, informal, and culturally driven coercive mechanisms can be equally effective in bringing about organizational change and contributing to institutional isomorphism. Organizations generally, and counterterrorism organizations specifically, evolve to conform with their institutional environment under pressures which are felt as force, such as the formal requirements of law; as persuasion, such as dicta; and through expectations established by the culture and society in which the counterterrorism organization operates.

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namo detention facility, Camp X-Ray, which was only in use from January through April 2002, and other highlights of U.S. Naval Station Guantánamo Bay, Cuba.

Id.

45. *See, e.g.*, Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 34 n.3 (2006) (explaining that "[w]hat sets detainees in the war on terror apart from other classes of detainees is that typically they lack the legal protections associated with either military or criminal prisoners. Unlike recognized combatants, they do not enjoy POW status. And unlike criminal defendants or convicts, they enjoy no presumption of innocence, nor may they present a defense of confront their accusers in a court of law"). *But see* Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811, 845–49 (2008) (arguing that international human rights law and international humanitarian law prohibit incommunicado detention for periods lasting more than a few days, that those detained must be given a right to communicate with their consulate for assistance, their family, and their counsel, and that the International Committee of the Red Cross is entitled to visit all places where persons are detained and interview them).

46. *Cf.* Glenn R. Carroll & Jacques Delacroix, *Organizational Mortality in the Newspaper Industries of Argentina and Ireland: An Ecological Approach*, 27 ADMIN. SCI. Q. 169, 187 (1982) (explaining how organizations created "during political crises are likely to be established for an explicit political purpose and, consequently, [ ] become obsolete once the crisis is resolved"); *see also supra* notes 11–12 and accompanying text (discussing "political power and institutional legitimacy" as intangible resources required for institutional success).

2. Mimetic Institutional Isomorphism

The mechanism of mimetic institutional isomorphism is observed when organizations respond to uncertainty and, faced with unclear prescriptions, imitate other organizations within their field. Mimicry helps organizations overcome ambiguity and also provides legitimacy in the face of situations with indeterminate solutions.[47] "The advantages of mimetic behavior in the economy of human action are considerable; when an organization faces a problem with ambiguous causes or unclear solutions, problemistic search may yield a viable solution with little expense."[48] Such mimicry was observed when Japan, in the late nineteenth century, modeled many of its governmental institutions on successful western prototypes by sending officials to study the courts and police in France, and the military and other government agencies in Great Britain and the United States.[49] More recently, the Iraqi High Tribunal adopted rules of procedure modeled upon the rules and procedures used by modern international war crimes tribunals.[50]

Much homogeneity amongst organizational structures can be attributed to mimetic mechanisms, as new organizations are modeled upon old ones in a repeating cycle which results in little variation in institutional fields. Organizations faced with uncertainty and a need for effectiveness and legitimacy tend to look like others, not because of concrete evidence of the effectiveness of other organizations, but instead because adopting existing models is more likely to ensure legitimacy.[51] This quest for legitimacy in the face of uncertainty has been empirically tested by scholars who have interestingly noted that the relationship between mimetic mechanisms and efficiency in a variety of contexts demonstrates that organizations will oftentimes seek conformity

47. *See* RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM 118–20 (1963).

48. DiMaggio & Powell, *supra* note 7, at 151 (citing CYERT & MARCH, *supra* note 44). Problemistic search refers to a "search that is stimulated by a problem . . . and is directed toward finding a solution to that problem." CYERT & MARCH, *supra* note 47, at 121.

49. *See* DiMaggio & Powell, *supra* note 7, at 151.

50. *See* MICHAEL P. SCHARF & GREGORY S. MCNEAL, SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 7–8 (2006).

51. *See* DiMaggio & Powell, *supra* note 7, at 151–52.

through mimicry *despite* information which suggests such copying will undermine efficiency and organizational goals.[52]

Similarly, legal scholars have identified a process of "legal mimicry" which parallels those found in the social science literature.[53] Mark Drumbl, for example, describes a process in international criminal law by which "[d]omestic actors often mimic international trendsetters, whose modern ideas they transplant to national and local contexts."[54] This process, Drumbl concludes, often leads to local justice processes "that may favor the interests of those only morally affected by the violence . . . [such as the international community] over those actually physically afflicted by it."[55] Such a phenomenon may lead to legitimacy for local justice organizations which model themselves after accepted international institutions, but also leads to inefficiency if advancing the interests of victims (e.g., those physically affected by violence) is considered a measure of a local institution's effective performance. Ultimately, Drumbl's conclusions suggest that the mimicry present in international criminal justice may have created local justice which is seemingly legitimate but also woefully inefficient.[56]

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52. *See, e.g.*, Barreto & Baden-Fuller, *supra* note 4, at 1576 (demonstrating how organizations' mimetic behavior is driven by legitimacy based motivations and that organizations will imitate others, even if doing so conflicts with information they possess that demonstrates conformity will negatively affect the organization's profitability); Amer A. Kaissi & James W. Begun, *Fads, Fashions, and Bandwagons in Health Care Strategy*, 33 HEALTH CARE MGMT. REV. 94 (2008) (using interviews and a case study approach, the authors find that imitation strategies largely derive from copying the behavior of rivals in an effort to keep up with exemplar practices, however, such strategies are oftentimes not tied to an organization's unique local conditions or circumstances).

53. *See* Peter H. Sand, *Current Trends in African Legal Geography: The Interfusion of Legal Systems*, 5 AFR. L. STUD. 1, 6 (1971) (describing how legal systems evolve over time to resemble one another, intermingling components from "Anglican" and "Romanesque" systems in a process of "legislative cross-fertilization." Such legal mimicry was first observed in the colonial era as demonstrated by the "spreading of the Australian TORRENS system of land registration in the former French and Belgian territories [and by] certain French legal concepts introduced via Egypt in the former British Sudan"); *cf.* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1115–22 (2000) (discussing how increased citations to foreign court opinions and increased face-to-face contact among constitutional judges from different countries is promoting "legal cross-fertilization" in the areas of human rights and constitutional law). Such cross-fertilization is an indirect form of legal mimicry.

54. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 123 (2007).

55. *Id.* at 124.

56. *See id.* at 10, 124 (describing how dominant procedural and institutional methodologies in international criminal justice "fall short in terms of legitimacy and effectiveness" and critically arguing that the resulting externalization of justice is illegitimate be-

In an analogous context, Anne-Marie Slaughter has identified a process of legal cross-fertilization and transnational legal dialogue which closely parallels the mechanism of mimetic isomorphism. Slaughter describes how courts throughout the world see themselves engaging in a "common enterprise, even if only in the sense of confrontation of common issues or problems."[57] According to Slaughter, these Courts attempt to "transpose each other's decisions to their own circumstances" to solve "generic legal problems such as the balancing of rights and duties, individual and community interests, and the protection of individual expectations."[58] These courts, facing generic legal problems and uncertainty about how to resolve them, provide an insightful analogue to the circumstances organizations face which drive them toward mimicry of successful institutional forms and organizational practices.

In the context of counterterrorism, perhaps the most obvious and relevant example of mimetic processes is the military commission system established by President George W. Bush's November 13, 2001 Presidential Military Order.[59] Faced with the uncertainty associated with the Al-Qaeda threat, administration officials sought a way "independent of and distinct from the criminal process—to detain enemy combatants for the duration of a given armed conflict, including the . . . conflict against al Qaeda."[60] To achieve that aim, the administration modeled the PMO Commissions after military tribunals used during World War II, largely mimicking the procedures and organizational form used nearly sixty years earlier.[61] The history and efficacy of these commissions were viewed as legitimate and an "apt precedent" by

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cause it shows a remarkable democratic deficit, namely "the exclusion of afflicted populations from the design, development, and operation of accountability mechanisms"); *see also* Alette Smeulers, *Punishing the Enemies of All Mankind*, 21 LEIDEN J. INT'L L. 971, 987–89 (2008) (explaining that Drumbl demonstrates how legal mimicry not only exists, but also "'narrow[s] the diversity of national and local accountability modalities'" and favors the perceived legitimate international norms and institutions over otherwise effective national institutions) (citing DRUMBL, *supra* note 54, at 121).

57. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 126–27 (1994).

58. *Id.* at 127

59. *See* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006); *see also infra* Part III.

60. Padilla v. Hanft, 389 F. Supp. 2d 678, 684 (D.S.C. 2005).

61. *See* Davis, *supra* note 36, at 124 n.11 (arguing that the 1942 commissions became the template for the plan to prosecute detainees in the global war on terrorism).

the administration. That view, when combined with what some contend was a particularly expansive theory of inherent executive powers,[62] led the designers of military commissions to believe they had successfully copied a legitimate and effective institutional form which would be accepted in the institutional field of war crimes trials.[63] Of course, recent history has demonstrated that such a belief was misplaced with regard to both the legitimacy and the effectiveness of the PMO Commissions. Nonetheless, the important point is to recognize how the mechanism of mimetic isomorphism can lead institutional designers to respond to uncertainty by copying previously tested organizational forms which they perceive as either legitimate or effective.

3. Normative Isomorphism

Organizations also face normative pressures for isomorphic change. These endogenous pressures stem primarily from professionalization of actors within organizations.[64] Professionalization can cause isomorphism through "the resting of formal education and of legitimation in a cognitive base produced by university specialists," and through "the growth and elaboration of professional networks that span organizations and across which new

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62. *See* David Gray Adler, *George Bush as Commander in Chief: Toward the Nether World of Constitutionalism*, 36 PRESIDENTIAL STUDIES Q. 525, 525 (2006) (describing the Bush Administration's conception of the Commander-in-Chief clause as an expansive one which "has launched presidential power on a trajectory toward the realm of illimitable and unaccountable power"); Louis Fisher, *The Scope of Inherent Powers*, *in* THE POLARIZED PRESIDENCY OF GEORGE W. BUSH 31, 53, 55–56 (George C. Edwards III & Desmond S. King eds., 2007) (arguing that the Bush Administration frequently relied on the theory of "inherent authority in time of war or emergency" to act contrary to law, or at least interpreted acting "within the law" to mean "pursuant to what lawyers within the Administration could argue were within the executive powers under Article II [of the U.S. Constitution]"). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2055, 2131–32 (2005) (offering an analytical framework for interpreting the Authorization for the Use of Military Force ("AUMF") and contending that Congress authorized the use of military commissions to try individuals covered by the AUMF for violations of the laws of war); John O. McGinnies & Ilya Somin, *Should International Law Be Part of Our Law*, 59 STAN. L. REV. 1175, 1228 (2007) (explaining that "[i]nherent authority includes power that Congress may not override, such as the Commander-in-Chief power, and authority that the President can exercise only in the absence of a congressional directive").

63. *See, e.g.*, LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS 172 (2008); *see also* Davis, *supra* note 36, at 124 ("The history of the Nazi saboteurs was to some a precedent that proved that military commissions were swift, secret, and successful, and that the judicial branch would exhibit fawning obeisance to the President on matters of national security.").

64. *See* DiMaggio & Powell, *supra* note 7, at 152.

models diffuse rapidly."[65] The formal education process is an obvious source of normative pressure. For example, law schools are largely responsible for developing norms amongst attorneys, and those norms are quite similar across schools due to coercive pressures such as accreditation requirements[66] and mimetic pressures, such as the need for legitimacy in a competitive rankings-driven environment.[67]

In a related sense, networks of professionals such as bar associations and other groups "create a pool of almost interchangeable individuals who occupy similar positions across a range of organizations and possess a similarity of orientation and disposition that may override variations in tradition and control that might otherwise shape organizational behavior."[68] Taken together, professional norms developed through formal education and professional networks can lead organizations to more closely resemble each other, even in the absence of evidence that such isomorphism increases internal organizational efficiency.[69]

C. *Summary of Institutional Isomorphism*

The preceding discussion explained that institutional isomorphism consists of coercive, mimetic, and normative mechanisms which will compel an organization to reflect the dominant form in its institutional environment; such conformity will have beneficial consequences for the organization's legitimacy and support, par-

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65. *Id.*

66. *See* Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Matters*, 60 STAN. L. REV. 1689, 1698, 1706 (2008) (noting that U.S. legal markets are among the most heavily regulated in the economy, with regulation over almost all aspects of legal production exercised in a fragmented and unclear regime by individual state bar associations and state courts, largely driven by decisions of the American Bar Association).

67. *See* Rachel F. Moran, *Of Rankings and Regulation: Are the* U.S. News & World Report *Rankings Really a Subversive Force in Legal Education?*, 81 IND. L. J. 383 (2006) (contending that "norms of uniformity and standardization have dominated the world of legal education, substantially limiting law schools' ability to compete against one another" and that as a consequence, law schools do not innovate due to the possibility that they might jeopardize their accreditation, reputation, and future).

68. DiMaggio & Powell, *supra* note 5, at 152.

69. *See id.* at 152–53 (explaining that other mechanisms which encourage normative isomorphism are the filtering of personnel whereby individuals hired have similar backgrounds, education, and training and that the exchange of information amongst professionals, personnel flows amongst organizations, and the desire by professionals to further their careers all lead to homogenization).

ticularly support from external organizations. In a counterterrorism context, adoption of the normatively preferable structure may mean tacit approval by human rights organizations and other outspoken groups,[70] positive evaluations by watch-dog groups, professional approval by bar associations, public approval,[71] and even increased support from allies.[72] Conversely, failure to conform to legal requirements formally imposed or informally directed at an organization by other organizations in its field can lead to sanctions, such as the opprobrium of the previously identified groups or the withdrawal of support from allied nations.[73] In this respect, conformity can be seen not only in terms of legitimacy and external support, but also as a means by which an organization may remain free from sanctions and other negative consequences.[74] Thus, either by conscious choice or by differential survival, organizations "can become structured in ways that

70. Human Rights First: Prosecuting Terrorism, http://www.humanrightsfirst.org/blog/pursuit/2009/02/beyond-obamas-order-to-close-guantanamo.html (Feb. 3, 2009, 06:21 EST) (supporting President Obama's executive order directing the closure of the detention facility at Guantánamo Bay and halting the use of military commissions).

71. *All Things Considered: Obama Takes Steps Toward Shutting Guantanamo*, (NPR radio broadcast Jan. 21, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=99681705 (demonstrating the positive indicators of public opinion which resulted from the Obama Administration's decision to close Guantánamo). The broadcast quotes Eugene Fidell of the National Institute of Military Justice stating, "Obviously, the military commissions have been severely discredited everywhere—in our legal system, in the court of public opinion and around the world. So I find it hard to imagine that the Obama administration would exert itself to preserve their viability." *Id. See also All Things Considered: Admiral Applauds Guantanamo Closure Order* (NPR radio broadcast Jan. 24, 2009), *available at* http://www.npr.org/templates/story/story.php?storyID=99844564 (interviewing Retired Rear Adm. John Huston, a former judge advocate general, on President Obama's decision to suspend military commissions at Guantánamo Bay and ultimately close the facility there).

72. David Cole, *Enemy Aliens*, 54 STAN. L. REV 953, 958 (2002) (explaining how legitimacy at the international level is critical for intelligence and law enforcement cooperation and that American credibility is at a low ebb due to military tribunals and Guantánamo); Katharine Q. Seelye, *Criticized, U.S. Brings Visitors to Prison Camp*, N.Y. TIMES, Jan. 26, 2002, at A8.

73. *See* JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 228 (2006) (noting how "British Prime Minister Tony Blair, an ardent supporter of the Administration, described Guantánamo as 'an anomaly that at some point has to be brought to an end'"). Margulies further notes that for allies "whose support is wavering, who find themselves on the knife edge between moderation and extremism, Guantánamo provides powerful 'evidence of how America and the West make[s] the war [against] terrorism synonymous with the war against Islam.' As Guantánamo endures, their support withers and their anger grows." *Id.* (citing Somini Sengupta & Salmon Masood, *Guantanamo Comes to Define U.S. to Muslims*, N.Y. TIMES, May 21, 2005, at A1).

74. Lex Donaldson, *The Conflict Between Contingency and Institutional Theories of Organizational Design*, *in* DESIGNING ORGANIZATIONS: 21ST CENTURY APPROACHES 3, 7 (Richard M. Burton et al. eds., 2008).

make them conform to their institutional environment and so receive beneficial outcomes from their environment."[75]

D. *Elevating Legitimacy over Effectiveness by Structuring for Contingencies*

As discussed above, institutional theory finds that organizations will evolve to garner external legitimacy and support, irrespective of the associated inefficiencies of conformity. In this respect, it is in conflict with structural contingency theory, which directs its attention inward and emphasizes the consequences for efficiency and performance that stem from correct structural choices. Structural contingency theory posits that the correct choices are those which fit a particular set of circumstances.[76] One theorist summarizes the distinction between institutional theory and structural contingency theory, stating "[c]ontingency theory deals in the outcome of structure on internal effectiveness. Institutional theory deals in the outcome of structure on external legitimacy and support."[77]

Structural contingency theory (as its name suggests) maintains that relationships among organizational characteristics are contingent or dependent upon the situation—that is to say, there is no "one best model" of organizing. Instead an organizational designer must look to an organization's context.[78] Thus, structural contingency theory is used in the literature on organizational design to prescribe structures while institutional theory seeks to explain structures rather than offer prescriptions. As the discussion in the prior section makes clear, however, certain prescriptions will naturally flow from a calculated desire to achieve external legitimacy and support.[79]

The two theoretical approaches, given their focus on different outcomes (internal effectiveness versus external legitimacy), are inherently in conflict with regard to their theoretical prescriptions. Structural contingency theory seeks structures which fit

75. *Id.* at 7–8.

76. *Id.* at 3.

77. *Id.* at 4–5.

78. *See* B.J. HODGE ET AL., ORGANIZATION THEORY: A STRATEGIC APPROACH 21 (5th ed. 1996).

79. *See* Donaldson, *supra* note 74, at 5.

the organization's particular circumstances and objectives and will produce greater internal effectiveness, where effectiveness is defined as goal attainment.[80] Therefore, in a counterterrorism context in which organizational designers may see their ultimate responsibility as preventing terrorist attacks, the structure they choose to maximize their effectiveness (e.g., achieving the goal of preventing an attack) may place a lower priority on the structure or practices which might lead to external legitimacy.

In practical terms those structures or practices which might lead to external legitimacy could include the decision to afford individuals the full panoply of protections afforded by the Constitution or the Geneva Conventions, subjecting detention decisions to external judicial review, or complying with existing procedures embodied in customary international law or military manuals. The point here is not to suggest that any one measure of external legitimacy is appropriate or inappropriate, but instead to highlight that there may be a tension between what an organizational designer perceives as *effective* and what the external environment may perceive as *legitimate*.

In the post-September 11th academic literature, a form of this tension between internal effectiveness and external legitimacy is apparent in the work of those who suggest a tension between security and liberty.[81] One iteration of this view is articulated by Eric Posner and Adrian Vermeule, who argue that "[t]here is a straightforward tradeoff between liberty and security" and that "a rational and well-functioning government . . . will adjust its policies" based on contingencies such as emergencies, and will do so in a manner that maximizes the welfare of the whole polity.[82] John Yoo, who was partly responsible for the creation of the PMO Commissions, argued that they were "meant to balance two competing goals: providing a fair trial for enemies who commit war crimes, and protecting the nation's military and intelligence in-

80. *See* Talcott Parsons, *Suggestions for a Sociological Approach to the Theory of Organizations–I*, 1 ADMIN. SCI. Q. 63, 66 (1956) (explaining that in internal matters "the primacy of goal-attainment among the functions of [an organization] gives priority to those processes most directly involved with the success or failure of goal-oriented endeavors").

81. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 5–6 (2007); RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 3–5 (2006).

82. POSNER & VERMEULE, *supra* note 81, at 12.

terests."[83] He bolsters this contingency-based argument with one grounded in the language of legitimacy, stating:

> [T]he tribunals . . . would provide as fair a trial as the world has known in a war context. Their procedures provided more due process than those of the International Criminal Court . . . . The main criticism was that they did not provide for review of any conviction by a civilian court, but neither had the World War II commissions.[84]

Both views exhibit a rational choice-based approach to organizational design which orders preferences in a manner that places effectiveness over legitimacy. Interestingly, the view articulated by Yoo seems to rest on the assumption that achieving both outcomes is possible. However, as will be explained below, while a contingently derived approach may theoretically lead to legitimacy due to its effectiveness, such an outcome is unlikely given the different prescriptions of contingency and institutional-based approaches.

Granted, it is theoretically possible that an organization "might simultaneously adapt its structure to the contingencies, to gain the benefits of high internal effectiveness, while also conforming to the externally approved model structure to gain the benefits of high external support."[85] This can be termed a complementary approach, whereby the structural contingency theory and the institutional theory approach both prescribe an organizational form which simultaneously has a high level of internal effectiveness and high external support.[86] There are two ways in which such compatibility might come about: first, either the best fit structures happen to be identical; or second, portions of the structures can be segmented in a manner which achieves both legitimacy and effectiveness. As Donaldson explains, a segmented organizational structure is possible, for example, where the apex of an organization (such as the Office of the Chief Prosecutor in a legal context or a CEO and board of directors in a business context) is structured in a way that meets the demands of external legitimacy; while the internal operating core (interrogators and investigators, line prosecutors) may be structured to effectively meet con-

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83. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 204 (2006).

84. *Id.* at 209.

85. Donaldson, *supra* note 74, at 10.

86. *Id.*

tingencies (such as the eliciting of coerced evidence) without concern for external legitimacy. Donaldson further explains,

> In this way, adoption of the institutionally approved model for the organizational apex would produce maximum external support, while, simultaneously, adoption of the structure for the operating core that fits its contingencies would produce maximum effectiveness. Hence, by segmented adaptations, both contingency and institutional requirements could be met, maximizing both internal effectiveness and external support.[87]

While complementarity is theoretically possible, it is unlikely, a point which will be made clearer below.[88]

III. EFFECTIVENESS AND LEGITIMACY IN TENSION: LESSONS FROM THE MILITARY COMMISSIONS AND OTHER TRIBUNALS

A. *The Lessons of the PMO Commissions and Other War Crimes Tribunals: Imperfect Isomorphism and Illegitimacy*

On November 13, 2001, President Bush created a system of military commissions modeled after those used during World War II to try Nazi saboteurs who landed on U.S. soil determined to attack American industrial targets.[89] Officials within the Department of Justice advised the President that such a system would allow for the trial of Taliban and Al-Qaeda fighters without the necessity of a jury or other procedural protections found in civilian courts.[90] Those organizational designers believed that the PMO Commissions would enjoy legitimacy because the PMO Commissions mimicked a system they believed had been declared legitimate by a prior President, Congress, and the courts. One lawyer who worked on the commissions amplified this point by stating, "We relied on the same language in FDR's order, the same congressional statute that FDR did, and we had a unanimous Supreme Court decision on point . . . . As a lawyer advising a client, it doesn't get much better than that."[91] Of course, history has demonstrated that the PMO Commissions were almost im-

87. *Id.* at 14–15.

88. *See infra* p.145–46.

89. *See supra* notes 59–61 and accompanying text.

90. *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 108–09 (2007).

91. *Id.* at 109.

mediately subject to criticism on both legitimacy and effectiveness grounds.[92] While reduced procedural protections may have created what was in theory a more effective organizational structure for detaining, interrogating, and trying alleged terrorists, that structure was plagued by a lack of legitimacy and external support.

Importantly, much of the illegitimacy associated with the PMO Commissions can be traced to organizational design process defects which largely foreclosed outside input. That insular design process resulted in misperceptions regarding the PMO Commission's relevant "institutional field" and isolated organizational designers from the mechanisms of isomorphic conformity which could have brought about legitimacy more quickly.

Earlier, this article described how organizations evolve to conform to others in their field through coercive, mimetic, and normative mechanisms.[93] These mechanisms were present during the development of the PMO Commissions. However, I contend they were imperfectly present, crippled from the outset by a mistaken perception of what a legitimate system would look like in the institutional field of tribunals. The debate over the military commissions suggests that what is perceived as legitimate in the organizational field of trials is an Article III court, court martial, or perhaps an international tribunal (though the discussion below regarding the legitimacy of international tribunals may call this assertion into question). My contention here is limited. I do not suggest that any of these institutions are the most *effective* organizations for trying alleged terrorists. Rather, I merely argue that recent history suggests that these are perceived as the most *legitimate*. As I will discuss below, because the PMO Commissions design process was closed off from isomorphic pressures, its de-

92. *See* Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes* 19 CONST. COMMENT. 261, 261 (2002). The authors explain that President Bush's military order establishing military commissions was immediately greeted with "impassioned criticism in the press, the legal academy, and Congress." *Id.* This was in stark contrast to the widespread praise sixty years earlier when President Roosevelt established a military commission to try Nazi saboteurs. *Id.* The authors attribute the different reactions to the public's view that the 2001 threat was not as significant as the 1942 threat and a post 1960's shift in the public's attitudes toward government which caused a decrease in trust of executive and military authority. *Id.* at 262. On effectiveness grounds, the authors contend that the public viewed "past civil liberty intrusions [as] unnecessary or excessive." *Id.*

93. *See supra* Part II.

velopment and evolution toward a more legitimate form was stunted.

As noted, a key premise of institutional theory is that organizations seeking legitimacy will evolve to resemble other organizations in their field. There are three presumptions inherent in the theory: first, that the organization (or its organizational design team) is in fact concerned with legitimacy and the benefits to be derived from it; second, and related to the first, that the organization will allow the mechanisms of isomorphism to effect organizational structure and processes; and finally, that the organization views the mechanisms of isomorphism as reflective of the dominant practices in its institutional field.

The process followed by the designers of the PMO Commissions suggests that they were not outwardly concerned with the benefits of legitimacy and external support and may even have exhibited hostility to mechanisms of conformity which would lead to greater legitimacy. Many of the problems associated with the PMO Commissions can be traced to the process by which they were created. I am not the first scholar to argue that a more transparent and open process than the one used to create the PMO Commissions could have led to a better outcome,[94] and the Supreme Court's 2006 *Hamdan* opinion makes the argument even less profound from a constitutional standpoint.[95] However, my aim in this section is not to break new ground in suggestions about policy development. Rather, it is to demonstrate how the lessons of institutional theories of organizational design can inform future legal scholars and policymakers regarding the components of legitimacy and its frequent conflicts with effectiveness.

Consider first the administration's long-standing refusal to "acknowledge any affirmatively binding legal restrictions on Guantanamo" despite the arguments of State Department officials that Common Article 3 of the Geneva Conventions should be treated as customary international law.[96] The Common Article 3

94. *See, e.g.*, WITTES, *supra* note 1, at 54–58; Kenneth Anderson, *It's Congress's War Too*, N.Y. TIMES, Sept. 3, 2006, § 6 (Magazine), at 20 (arguing for Congress to take a more proactive role in creating U.S. counterterrorism policy).

95. *See infra* Part III.B.1.

96. GOLDSMITH, *supra* note 90, at 119 ("Will Taft in the State Department had argued in the 2002 Geneva debate that the United States should acknowledge that 'Common Article 3' of Geneva—which contains minimal wartime protections originally designed for civil wars—governed GTMO as a matter of customary international law.").

argument advanced by State Department officials—who were steeped in a deep understanding of international law and diplomacy—represented both a normative form of isomorphic pressure (due to the professionalization of international lawyers within the State Department) and informal coercive isomorphic pressure because it suggested that compliance with Common Article 3 was not formally binding, but should be followed nonetheless because it would demonstrate the United States was conforming with the practice of other nations. The advice, if followed, may have blunted the dominant critique of the international community that the United Sates had contempt for international law.[97] Following the advice of those State Department officials may have garnered greater legitimacy for the PMO Commissions and perhaps avoided their invalidation by the Supreme Court in *Hamdan*.[98]

A culture of resistance to normative pressures also played a role in the (il)legitimacy of the PMO Commissions. Jack Goldsmith describes how David Addington, legal counsel to Vice President Cheney, repeatedly dismissed any advice which sought to garner the support of Congress or might placate allies.[99] Addington believed that the President's power would diminish if Congress declined to support him.[100] Thus, if a policy could be justified "on the President's sole authority," and going to Congress might limit that authority, outside support or legitimation was not sought by the administration.[101] As a result of this resistance to normative pressures, a unilateral approach was followed which only yielded to mechanisms of conformity when faced with formal coercive pressures, such as Supreme Court review.[102] The conse-

97. *Id.* at 120. For example, Charles Grant, director of the Centre for European Reform, stated that "[t]he European concern [is] that America doesn't believe in international law, doesn't believe in submitting itself to rules, organizations or norms that limit its freedom of action." *Id.* (emphasis added).

98. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).

99. *See* GOLDSMITH, *supra* note 90, at 124–25; *see also id.* at 76–77 (describing Addington's relationship with Vice President Cheney).

100. *Id.* at 124.

101. *Id.* (describing the governing legal questions advanced by Addington "whenever someone proposed that the White House work with Congress to clear away a legal restriction or to get the legislature on board: 'Do we have the legal power to do it ourselves?' (meaning on the President's sole authority), and 'Might Congress limit our options in ways that jeopardize American lives?'").

102. *See id.* at 125 ("Whenever the Supreme Court threatened to review one of the administration's terrorism policies, Paul Clement was able to eke out small concessions from the White House.").

quential long-term undermining of organizational legitimacy was left for later, to be dealt with in Addington's words, "when and if it is necessary to do so."[103]

Another view of this insular development process was persuasively articulated by David Glazier, who details how the PMO Commissions were created in a manner walled off from considerations about external legitimacy—even those considerations which may have been articulated by Cabinet officials within the administration. Glazier notes that, "[w]hile an interagency working group was exploring legal options in the fall of 2001, Vice President Cheney circumvented normal governmental processes by having [David Addington] draw up a military order that he then persuaded the President to sign."[104] This drafting excluded from the process the Attorney General and presumably the State Department and members of the military who could offer input regarding the legitimate practices of contemporary tribunals.[105] The consequences of this insular process, shielded from the insight of professionals who could have exerted normative isomorphic pressure, resulted in the mimicry of a 1942 order that, Glazier notes,

> Roosevelt himself had partially repudiated two years later. And given the major advances in U.S. military and civilian criminal justice in the last half-century as well as the substantial protections subsequently codified in both the law of war and International Human Rights Law, it was irrational for any lawyer to conclude that 1940s trial standards would be acceptable today.[106]

While these accounts suggest that one person, or a handful of people, were singularly responsible for rejecting concerns grounded in the value of external support and legitimacy, top officials throughout the administration largely shared a view of international relations which demonstrated little concern for the benefits of legitimacy and external support. In fact, many administration officials, according to one account, believed that in dealing with threats and challenges, "'the United States and Europe have parted ways.' The militarily powerful United States . . . is strategically devoted to maintaining peace and security through unilate-

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103. *Id.* at 125–26 (explaining how Addington "focused on preventing an attack that day or that week, and not on what might happen next year or beyond").

104. David Glazier, *A Self Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 147 (2008).

105. *See id.*

106. *Id.* at 148.

ralism and coercion . . . . [W]eak Europeans, by contrast, were strategically devoted to securing these ends using international laws and institutions, and through persuasion and negotiation."[107] Operating under this mindset, the White House believed that the international community was "dead set against the military approach to counterterrorism that the United States thought necessary," leaving little room—or need—for compromises.[108] The legitimacy costs with regard to the administration's Guantánamo policy were dismissed as inconsequential, and arguments in favor of conformity were disregarded as "fashionable" or meeting "the aesthetic of the moment."[109]

Thus, returning to our theories of institutional isomorphism, we can see that, mimetically, the PMO Commissions were a response to uncertainty because they were directed at the indeterminacy regarding how to deal with the Al-Qaeda threat and mimicked an existing form by copying much of their procedures from the World War II commissions and the precedent of *Quirin*.[110] They therefore satisfy two of the theoretical prerequisites for mimetic isomorphism; however, mere duplication under pressure in the face of uncertainty is not enough. Institutional theory posits that the isomorphic pressure must also lead to conformity within an institutional field. It is on this point—field selection—

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107. GOLDSMITH, *supra* note 90, at 127 (quoting Robert Kagan, *Power and Weakness*, 113 POLICY REV., June–July 2002, at 3). Kagan's essay was "widely circulated inside the administration" and "gave structure to intuitions that top administration officials already possessed." *Id.*

108. *Id.* For example:

> Addington and company [ ] [believed] that there were few if any real strategic costs to not compromising. They thought the heated public reaction to GTMO and military commissions was rhetorical froth that had few real consequences for the war on terrorism. The same allies that complained bitterly in public were vigorously cooperating behind the scenes on issues like intelligence sharing and interdiction of terrorist financing, where they had much to gain.

Id. at 127–28. Faced with such gains in effectiveness behind the scenes, it is perhaps unsurprising that administration officials were unconcerned with the potential legitimacy costs of nonconformity.

109. *Id.* at 128–29 (quoting Jeffrey Goldberg, *A Little Learning: What Douglas Feith Knew, and When He Knew It*, NEW YORKER, May 9, 2005, at 36) (describing an interview with Douglas Feith, Under Secretary of Defense for Policy, who stated: "'When history looks back, . . . I want to be in the class of people who did the right thing, the sensible thing, and not necessarily the fashionable thing, the thing that met the aesthetic of the moment.'" According to Goldsmith, "[t]his was precisely David Addington's attitude to hard legal decisions about terrorism.") *Id.* at 129.

110. Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 12.

in which the PMO Commissions can best be described as a form of *imperfect* mimetic isomorphism—they duplicated a trial system which had largely fallen out of favor in the nearly sixty years since their prior use.[111] In short, the organizational designers mimicked an organizational form which was no longer legitimate in its field.

As suggested earlier, the questionable legitimacy of the *Quirin* commission and its unreliability as a precedent—especially in light of history—should have been apparent to the designers of the PMO Commissions. In fact, in 1944, just a few years after the *Quirin* case, the United States again captured saboteurs within its borders, but instead of following the tribunal practices used in *Quirin,* they created a new structure with improved due process rights aimed at bolstering the tribunal's legitimacy.[112] This seeming repudiation of the *Quirin* precedent should have been enough to cue the designers of the PMO Commissions into their potential legitimacy challenge.

However, even more evidence existed. Louis Fisher points out that shortly after the Court released its *Quirin* opinion, Justice Frankfurter requested that an expert on military law evaluate the decision.[113] That expert concluded that the administration "disregard[ed] . . . 'almost every precedent in the books' when it

111. *Cf.* Otto Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333 (1965) (showing support for Nuremberg shortly after the trials); Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681 (1997) (describing the United States' resistance to the "creation of collective international structures"); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, (2006) (highlighting the similarities and differences between the post-World War II tribunals and the modern tribunals to show how humanitarian law has evolved). *But see* Paul Hoffman, *Justice Jackson, Nuremberg, and Human Rights Litigation*, 68 ALB. L. REV. 1145 (2005) (advocating Justice Jackson's view of international criminal law). *See generally* Henry T. King & Theodore C. Theofrastous, *From Nuremburg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47 (1999) (tracing international criminal law from Nuremburg to the Rome statute); Paul D. Marquandt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73 (1995) (describing constitutional objections to the development of International Criminal Courts).

112. *See* Davis, *supra* note 36, at 125–26.

113. FISHER, *supra* note 63, at 180 (explaining how "Frederick Bernays Wiener, [Frankfurter's] former student but by then an acknowledged expert on military law" evaluated the decision and "emphasized that court-martial procedures had 'almost uniformly been applied to military commissions,' and that it was 'too plain for argument' that the President could not waive or override the required" review).

established the military tribunal."[114] Similarly, in 1962 Justice Douglas criticized the procedures followed by the court stating that "[t]he experience with *Ex Parte Quirin* indicated, I think, to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the . . . examination of the grounds that had been advanced is made, sometimes those grounds crumble."[115] Another more recent critique referred to the *Quirin* opinion as an example of the Court's status as "'an unreliable guardian of the Bill of Rights'" while another called the opinion "'an agonizing effort to justify a *fait accompli*'" which "represented a 'constitutional and propaganda victory' for the executive branch but 'an institutional defeat' for the Supreme Court."[116] If legitimacy were the goal of the PMO Commissions—which is still an open question—the lessons of the *Quirin* precedent should have suggested that goal would not be achieved.

Other legitimacy lessons were present for the designers of the PMO Commissions—lessons that they did not heed. In the world of war crimes tribunals, the *Quirin* commissions do not stand alone as being subject to criticism on grounds of illegitimacy. In fact, the judicial innovation, which characterizes international criminal courts was throughout history subject to criticism on illegitimacy grounds.[117] King Charles I, during his seventeenth century trial, "demanded to know 'by what authority—legal, I

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114. *Id.*

115. Conversation between Walter F. Murphy, McCormick Professor of Jurisprudence Emeritus, Princeton University, with Justice William O. Douglas (June 9, 1962) (on file at the Seeley G. Mudd Manuscript Library, Princeton University), *available at* http://www.princeton.edu/~mudd/finding_aids/douglas/douglas10.html.

116. FISHER, *supra* note 63, at 180–81 (citing Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 95 (1980); David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 61 (1996)). Danelski "cautioned the Court to 'be wary of departing from its established rules and practices, even in times of national crisis, for at such times the Court is especially susceptible to co-optation by the executive.'" *Id.* at 181 (citing Danelski, *supra*, at 80).

117. *But see* Richard P. Dimeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 155, n. 161 (2005). Dimeglio states:

> Whether recent war crimes tribunals have been effective in generating public confidence in the legitimate process of justice is debatable. Unfortunately, negative views by the ruling government in a nation that is undergoing tribunals can undermine public confidence in the process. This has occurred in both Rwanda and Serbia as those national governments have taken actions to criticize and undermine the legitimacy of the international tribunal process.

Id.

mean—do you sit as a court to judge me?'"[118] Following World War II, Chief Justice Harlan Fiske Stone described the Nuremburg tribunal as "a high-grade lynching party," while Supreme Court Justice William O. Douglas believed the process was premised upon "an ex post facto law," which, despite Nazi "guilt[,] did not justify us in substituting power for principle."[119] Indeed, "[w]hen given a copy of his indictment before the International Military Tribunal at Nuremberg, Herman Göring stroked the phrase '[t]he victor will always be the judge and the vanquished the accused' across its cover."[120] The view of the World War II Tokyo tribunal was no less charitable. One jurist, "Justice Röling[,] conceded that the Japanese were being tried for 'political crimes,'" while another, Justice Pal, felt the distinctions made in selecting triable crimes were "of purely 'propagandist relevance.'"[121] Similarly, the trial of General Tomoyuki Yamashita was characterized as being "flawed from start to finish, with twelve international correspondents voting 12 to 0 that he should have been acquitted."[122] While arguments about the legitimacy of the military commissions were playing out, Slobodan Milsovic was arguing in The Hague that his trial was a sham, stating:

> I wish to say that the entire world knows that this is a political process. So we are not here speaking about legal procedures that evolve into political ones. This is a political process to begin with, and as far as what I would prefer, I would prefer the truth.[123]

More recently, in Iraq Saddam Hussein argued against his war crimes tribunal by claiming it was illegitimate, ultimately boycotting the proceedings, and forcing the chief judge in his case to hear his lawyers' arguments to that effect.[124]

As the preceding discussion makes clear, in theory, one may be able to design an institutionally isomorphic—and thereby legitimate—tribunal, custom-tailored to the contingencies of particular crimes and criminals and designed to maximize its effectiveness. However, the history of prior attempts at judicial innovation

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118. SCHARF & MCNEAL, *supra* note 50, at 15.

119. Jeremy Rabkin, *Nuremberg Misremembered*, 19.2 SAIS REV. 82–83 (1999).

120. SCHARF & MCNEAL, *supra* note 50, at 15.

121. GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 15 (2007).

122. FISHER, *supra* note 63, at 182.

123. SIMPSON, *supra* note 121, at 14–15.

124. *See* SCHARF & MCNEAL, *supra* note 50, at 78–79.

without concern for legitimacy stands as a solemn warning.[125] In fact, not only does the history of war crimes tribunals make evident their vulnerability to critiques on legitimacy grounds (mostly from potential defendants), their departure from what may be perceived as the accepted organizational form for criminal trials further contributes to their lack of legitimacy in their organizational field (other courts). This suggests the possibility that reviewing courts will invalidate attempts at contingent-based designs.

It is important to recall that organizational theory argues that an organization's adoption of the normatively appropriate structure can lead to legitimacy and support from external organizations.[126] In the context of a solution for the military commissions, this suggests that such an institution must be structured like existing U.S. courts (e.g., Article III courts or courts-martial). Structuring such tribunals in any other fashion, even one mimicking other existing war crimes tribunals, may fail to achieve an optimal level of legitimacy. This is a key lesson for military commission reformers and advocates of national security courts.

B. *The Lessons of the MCA: Illegitimacy Identified and the Seeds of Incomplete Isomorphism*

1. The *Hamdan* Mandate as Formal Coercive Isomorphism

In its 2006 *Hamdan* decision, the Supreme Court ultimately found that the PMO Commissions were illegitimate.[127] The Court held that *Hamdan*'s military commission lacked power to proceed "because its structure and procedures violate both the UCMJ and the Geneva Conventions."[128] The *Hamdan* opinion can be understood as formal coercive isomorphism. It was a command from the Court to the executive branch mandating a structure and set of procedures for the military commissions that could satisfy the requirements of legality and legitimacy. Structurally, the PMO

125. *But see* Asa W. Markel, *The Future of State Secrets in War Crimes Prosecutions*, 16 MICH. ST. J. INT'L L. 411, 413 n.6 (2007) (noting that "[b]oth war crimes tribunals of the 1940's paid lip service to legitimacy, to varying degrees, derived from the United Nations").

126. *See* DiMaggio & Powell, *supra* note 7, at 150–51.

127. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006).

128. *Id.* at 567.

Commissions featured several defects that violated the UCMJ and the Geneva Convention's requirement of a "regularly constituted court."[129] Among those defects were a lack of jurisdiction to try offenses not committed within the field of command of the convening authority, no showing of military necessity, and a failure to demonstrate the existence of war crimes both substantively and temporally.[130]

Procedurally, the Court found "significant procedural improprieties" interrelated with the previously identified problem of "whether a 'regularly constituted court' [had] been created."[131] In this respect, the Court's mandate was explicitly isomorphic, noting the requirement that "[t]he UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations.'"[132] Additional concerns that the Court articulated included: the exclusion of the accused and his counsel from proceedings; lax rules of evidence, which allowed for the admission of nearly any evidence; and an insular appellate process.[133]

Perhaps most importantly for our purposes, the Court articulated "the general need for 'uniformity' of courts-martial and military commission procedures."[134] Both formally and informally, the Court was coercively declaring that the PMO Commissions must conform with the legitimate institutions in their field. The Court stated:

> [T]he procedures governing trials by military commission historically have been the same as those governing courts-martial. . . . As recently as the Korean and Vietnam wars . . . the principle of procedural parity was espoused as a background assumption.
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> . . . .
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> The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that ne-

129. JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 121 (2007).

130. *Id.*

131. *Id.* at 121–22.

132. *Hamdan*, 548 U.S. at 613 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

133. *See id.* at 123.

134. PAUST, *supra* note 129, at 123.

> cessitates it. . . . Article 36 [of the UCMJ] places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ—however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.[135]

The *Hamdan* Court's recognition of a tension between uniformity and practicality can be understood in organizational terms as a tension between legitimacy through conformity and effectiveness —the same tension observed in the conflict between institutional and contingency theories of organizational design. The Court further noted the illegitimacy of a departure from accepted practices, especially when such a departure was not even grounded in a structural contingency-based rationale of effectiveness:

> The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, the jettisoning of so basic a right cannot lightly be excused as "practicable."[136]

Importantly, the Court did not limit its evaluation to mere conformity with the UCMJ, a formal coercive measure; it also mandated that the tribunal comport with Common Article 3 of the Geneva Conventions, a heretofore informal coercive dictate.[137] The Court required that the tribunal be a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[138] Thus, the Court mandated two additional legitimacy requirements: first, the notion of regular constitution; and second, indispensible judicial guarantees.[139] The former speaks to legitimacy in formation while the latter speaks to legitimacy in function. Both are the concern of in

135. *Hamdan*, 548 U.S. at 617–20 (internal citations omitted).

136. *Id.* at 624 (internal citations omitted).

137. *See id.* at 631–32.

138. PAUST, *supra* note 129, at 125 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(d), *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

139. *See Hamdan*, 548 U.S. at 630–33.

stitutional theory as they are tied to the acceptance of the tribunal by its external environment.

With regard to the term "regularly constituted court," the opinion noted that the term "is not specifically defined in either Common Article 3 or its accompanying commentary" but other sources (which can be termed informal coercive mechanisms) help to explain its core meaning.[140] In dicta, the Court stated:

> The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "regularly constituted" tribunals to include "ordinary military courts" and "definitely excludes all special tribunals." . . . [O]ne of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organised in accordance with the laws and procedures already in force in a country." . . . (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").[141]

The passage above illustrates the mechanisms of isomorphism at work. First, the Court formally and coercively mandated a requirement for regular constitution, citing to an informal coercive mechanism. Then, in dicta, the Court informally yet coercively cited to sources that help explain what structure and practices will lead to legitimacy by referencing the commentary to the Geneva Conventions and the treatises of the Red Cross. The Red Cross, through its interpretations of the Geneva Conventions, exerts a form of informal coercive isomorphism, and in so far as professionals from the Red Cross represent the core beliefs of professionals educated and professionalized within the field, they also exhibit the conformity pressures of normative isomorphism which is internalized by professionals, particularly lawyers within the U.S. military.[142] Regardless of which particular mechanism of

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140. *Id.* at 632.

141. *Id.* (internal citations omitted).

142. The ICRC in fact plays a formal role in the development and interpretation of international humanitarian law which influences the U.S. and other nation's interpretations of the Geneva Conventions. *See* Roger P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 VA. J. INT'L L. 61, 93-95 (2008) (explaining that the ICRC's duties include developing, monitoring, promoting, enforcing, protecting, and interpreting international humanitarian law). This description of the role of the ICRC suggests that the organization's pronouncements are at a minimum examples of informal coercive pressure, and in fact border on formal coercive pressure. For a more thorough overview of the work of the ICRC, see DAVID P. FORSYTHE, THE HUMANITARIANS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS (2005); Knut Dörmann & Louis Maresca, *The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments*, 5 CHI. J. INT'L L. 217 (2004).

conformity one attributes to these developments, each of the sources the court cited identify as legitimate those courts that are established, organized, and recognized, declaring that "all special tribunals" tailored to the circumstances, no matter how efficient or effective are "definitely exclud[ed]."[143]

In procedure as well, the Court mandated compliance with the accepted form within the military commission's institutional field, rejecting creative efforts to depart from popularly legitimated practices. The Court held that "the procedures governing the tribunal" must afford "'all the judicial guarantees which are recognized as indispensable by civilized peoples.'"[144] Those guarantees "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law."[145] Four of the five judges constituting the majority looked to Protocol I of the Geneva Conventions of 1949 (adopted in 1977 but not ratified by the United States) as persuasive evidence of Protocol I's status as customary international law.[146] In this respect, the Court mandated (using both a formal and informal coercive mechanism) that legitimacy comes from conformity—and not merely conformity with binding rules, but conformity with recognized practices and customs.[147]

Justice Kennedy's concurrence, largely framed in terms of statutory interpretation, provided additional informally coercive reinforcement of the principle that departures from recognized

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See also Till Müller, *Customary Transnational Law: Attacking the Last Resort of State Sovereignty*, 15 IND. J. GLOBAL LEGAL STUD. 19, 25–26 (2008) ("The ICRC is an active participant in all aspects of international law. It routinely is involved in negotiating and drafting international treaties. Moreover, the ICRC is the only organization monitoring compliance with humanitarian law and the prohibition of torture on a regular basis, thus decisively shaping the content of these norms. Finally, the ICRC is publishing an extensive work on 'Customary International Humanitarian Law,' which, given the prominent role of the ICRC in the field of humanitarian law, should be regarded as authoritative and will surely be used by every state official active in this field.").

143. *Hamdan*, 548 U.S. at 632.

144. *Id.* at 633 (quoting Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 138, 6 U.S.T. at 3320, 75 U.N.T.S. at 138).

145. *Id.*

146. *Id.*

147. *See generally*, MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW (1999); MICHAEL BYERS, *Custom, Power, and the Power of Rules: Customary International Law From an Interdisciplinary Perspective* 17 MICH. J. INT'L L. 109 (1995) (explaining the interaction between formal rules, informal customs, and politics in the development and force of customary international law).

practices would undermine the legitimacy of the proceedings unless some practical justification was expressed.[148] For example, he noted the departure from the rules of evidence governing regular courts-martial[149] noting that the Military Rules of Evidence are largely based upon the Federal Rules of Evidence, but unlike either set of rules, Commission Order Number 1 allowed the admission of evidence if it "would have probative value to a reasonable person."[150] Under this standard, any statement, regardless of reliability, could possibly be admitted into evidence. This was a departure from the accepted and thereby legitimate rules for trials because the Military Rules of Evidence prohibited evidence "obtained through coercion, hearsay, the product of multiple levels of hearsay, or unsworn depositions."[151] Elsewhere, the Court stated:

> [A] striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn.[152]

The plurality of the Court, joined by Justice Kennedy, rejected the government's contingency-based approach. Under that approach, the government argued that "the danger posed by international terrorism" made adoption of military commission rules that conformed with courts-martial impracticable.[153] Rejecting this argument, the Court instead required conformity with the legitimated practices of courts-martial regarding coerced testimony.[154]

Perhaps even more instructive for institutional reformers of military commissions and national security court proponents is the fact that Justice Kennedy went beyond mere statutory interpretation and provided guidance to Congress on how to resolve the deficiencies in the PMO Commissions. He stated that Con-

148. *See Hamdan*, 548 U.S. at 640–41 (Kennedy, J., concurring).

149. *Id.* at 640.

150. Dep't of Def., Military Commission Order No. 1 § 6(d)(1) (2002).

151. Douglas A. Hass, Note, *Crafting Military Commissions Post-*Hamdan: *The Military Commissions Act of 2006*, 82 IND. L.J. 1101, 1118 (2007) (internal citations omitted).

152. *Hamdan*, 548 U.S. at 614 (internal citations omitted).

153. *Id.* at 623.

154. *Id.* at 624.

gress had the power to "change [the commissions], requiring a new analysis consistent with the Constitution and other governing laws."[155] Moreover, Justice Kennedy joined Justice Breyer's short concurrence, which noted that since "no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger."[156] The suggestion of this concurrence was that if the President conformed the military commissions to congressional requirements, those commissions would be legitimate and the Court would have no grounds for overturning them.[157] Implicit in this point though, is the belief that Congress would act in a manner consistent with the accepted practices in the relevant organizational field; that is to say that Congress would craft a system that was legitimate both as a matter of domestic law and of international law—at least as viewed by the Court.[158]

2. The MCA: Selective Isomorphism

In response to the *Hamdan* decision, Congress passed the MCA,[159] bringing military commissions into partial conformity with what the Court suggested were the legitimate practices of Article III courts and courts-martial.[160] The process by which the MCA was developed, however, suggests that many of the mistakes of the PMO Commission's design process were repeated, mistakes which national security court proponents should remain cognizant of. Moreover, analyzing the MCA design process also provides insight into how effectively the President and Congress

155. *Id.* at 653 (Kennedy, J., concurring).

156. *Id.* at 636 (Breyer, J., concurring).

157. *See id.*

158. *But see* Boumediene v. Bush, 128 S. Ct. 2229, 2275 (2008) (invalidating provisions of the MCA). *See generally* Richard Klingler, *The Court, the Culture Wars, and Real Wars*, A.B.A. NAT'L SEC. L. REP., June 2008, at 1, 4 ("When the Court first overturned the Executive's claim that statutory habeas did not extend to Guantánamo, Congress promptly reversed that decision. Overlooking that statutory bar, the Court then overturned the President's military commissions—because Congress had not endorsed them and with the invitation for the President and Congress to address the issue together. They did so through the MCA, overruling or modifying nearly every aspect of the Court's decision. In *Boumediene*, the Court insisted on the final word . . . finding the MCA's tribunal process inadequate and striking its treatment of habeas suits. *Boumediene* thus joins a long line of cases where the Court insists that it finally determine, on uncertain legal grounds, a repeatedly contested political or policy issue.").

159. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

160. *See Hamdan*, 548 U.S. at 622.

responded to the *Hamdan* Court's concerns with conformity and legitimacy. While the *Hamdan* decision made the illegitimacy of the PMO Commissions clear and suggested that Congress should conform any new system to the accepted practices of other tribunals,[161] the drafters' process for developing the MCA suggests they resisted the call for conformity, selectively complied with *Hamdan* and selectively mimicked legitimate structures and practices. The result of this selective development process can be termed incomplete or selective isomorphism, the results of which were a failure to garner external support grounded in legitimacy.

As the prior discussion of institutional theory made clear, legitimacy is derived from conformity. While conformity may not always lead to the most effective organizational structure, effectiveness is not the dependent variable for the theory of institutional isomorphism.[162] The MCA is an instructive example of selective isomorphism, where conformity pressures were effective in bringing about some reforms that forced aspects of the military commissions to conform with legitimate practices, while nonetheless ensuring that the organization would continue to be perceived as illegitimate overall due to incomplete conformity. To understand this outcome, it is helpful to analyze the legislative history of the MCA.

On September 6, 2006, President Bush held a press conference where he announced that the administration had transferred a group of "High Value Detainees" ("HVDs") to Guantánamo Bay, Cuba, and confirmed that these detainees had been interrogated by the CIA.[163] The President also confirmed that these HVD's were subjected to interrogation using "an alternative set of procedures," which the Department of Justice had reviewed and determined to be lawful.[164] Concurrently, the President announced he was submitting draft legislation to Congress, later titled the Military Commission Act of 2006.[165] The draft legislation "author-

161. *Id.* at 633–35.

162. *See* DiMaggio & Powell, *supra* note 7, at 147.

163. President's Remarks on the War on Terror, 42 WKLY. COMP. PRES. DOC. 1569, 1570–71 (Sept. 6, 2006). These HVDs include Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and eleven other alleged terrorists. *Id.* at 1573.

164. *Id.* at 1571.

165. *See id.* at 1575; *see also* White House Press Release, Fact Sheet: The Administration's Legislation To Create Military Commissions (Sept. 6, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-6.html (last visited Feb. 27, 2009).

ize[d] military commissions to try detainees, amend[ed] the War Crimes Act, and specif[ied] [that military commissions complied] with Common Article 3" of the Geneva Conventions.[166]

In response to the President's proposal, numerous pieces of draft legislation were introduced in Congress. Most proposals were identical to the President's proposed legislation.[167] Of particular note were the "Bringing Terrorists to Justice Act of 2006," introduced by Senator Bill Frist;[168] the "Terrorist Tracking, Identification, and Prosecution Act of 2006," also introduced by Senator Bill Frist;[169] and the "Military Commissions Act of 2006," introduced by Representative Duncan Hunter.[170] At the center of the legislative debates were differences of opinion regarding how information derived by torture or coercion would be handled, and whether such information would be admissible in a military commission despite its inadmissibility in U.S. courts and international tribunals.[171] As noted above, the use of such evidence was a concern of the *Hamdan* Court, and this concern was felt by legislators as coercive isomorphic pressure to conform their new system with the legitimate practices of other tribunals by explicitly rejecting the admission of testimony derived by torture or coercion. Moreover, as public scrutiny began to mount in the short period of legislative debate, members of Congress, as institutional designers, began to feel pressure in the form of culturally driven isomorphism.

Given the pressure for conformity and uncertainty regarding how to respond, the proposed legislation was largely mimetic, selectively copying near-verbatim provisions from the UCMJ. Congressman Hunter, one of the sponsors of the bill that ultimately became the MCA, identified twenty-six "basic and fundamental rights," which the legislation applied to the military commissions, such as:

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166. MICHAEL JOHN GARCIA, CONG. RESEARCH SERVICE THE WAR CRIMES ACT: CURRENT ISSUES 5 n.15 (2009), *available at* http://www.fas.org/sgp/crs/intel/RL33662.pdf [hereinafter GARCIA].

167. *Id.*

168. Bringing Terrorists to Justice Act of 2006, S. 3861, 109th Cong. (2006).

169. Terrorist Tracking Identification, and Prosecution Act of 2006, S. 3886, 109th Cong. (2006).

170. Military Commissions Act of 2006, H.R. 6054, 109th Cong. (2006).

171. *See generally* 152 CONG. REC. H7522–60 (daily ed. Sept. 27, 2006) (floor debate on Military Commissions Act of 2006).

> The right to counsel, provided by government at trial and throughout appellate proceedings. An impartial judge. A presumption of innocence. A standard of proof beyond a reasonable doubt. The right to be informed of the charges against him as soon as practicable. The right to service of charges sufficiently in advance of trial to prepare a defense.[172]

However, the selective nature of this isomorphism was readily apparent to the legislation's opponents, who noted that the legislation incompletely chose what legitimate provisions it would borrow from the UCMJ, and because of this fact, it was, on its face, subject to Constitutional challenges. For example, Congressman Skelton in his floor statement argued that the legislation would likely face several challenges to its legitimacy.[173] First, it failed to provide the right to habeas corpus,[174] a point the Supreme Court agreed with in its 2008 decision in *Boumediene*.[175] Second, it created ex post facto laws,[176] a subject of a recent challenge in *Hamdan v. Gates*.[177] Third, it left open the question of whether "the Supreme Court would uphold a system that purports to make the President the final arbiter of the Geneva Convention[s]."[178] Fourth, it failed to comport with evidentiary provisions

172. 152 CONG. REC. H7534 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter). The other twenty-six rights identified by Congressman Hunter were: The right to reasonable continuances; Right to peremptory challenge against members of the commission and challenges for cause against members of the commission and the military judge; Witness must testify under oath; judges, counsel and members of military commission must take oath; Right to enter a plea of not guilty; The right to obtain witnesses and other evidence; The right to exculpatory evidence as soon as practicable; The right to be present at court with the exception of certain classified evidence involving national security, preservation of safety or preventing disruption of proceedings; The right to a public trial except for national security issues or physical safety issues; The right to have any findings or sentences announced as soon as determined; Right against compulsory self-incrimination; Right against double jeopardy; The defense of lack of mental responsibility; Voting by members of the military commission by secret written ballot; Prohibitions against unlawful command influence toward members of the commission, counsel or military judges; 2/3 vote of members required for conviction; 3/4 vote required for sentences of life or over 10 years; unanimous verdict required for death penalty; Verbatim authenticated record of trial; Cruel or unusual punishments prohibited; Treatment and discipline during confinement the same as afford to prisoners in U.S. domestic courts; Right to review of full factual record by convening authority; and Right to at least two appeals including to a Federal Article III appellate court. *Id.*

173. 152 CONG. REC. H7536 (daily ed. Sept. 27, 2006) (statement of Rep. Skelton).

174. *Id.*

175. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008).

176. 152 CONG. REC. H7536 (daily ed. Sept. 27, 2006) (statement of Rep. Skelton).

177. 565 F. Supp. 2d 130, 134 (D.D.C. 2008).

178. 152 CONG. REC. H7536 (daily ed. Sept. 27, 2006) (statement of Rep. Skelton); *see also* George P. Fletcher, Hamdan *Confronts Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT'L L. 427, 430–33 (2006) (discussing Common Article Three's role in the MCA);

found in federal law and the UCMJ, including those dealing with coerced testimony, the right to confront witnesses and hearsay rules,[179] all challenged by detainees in the recent *Gates* case.[180] Finally, the legislation could face potential legitimacy problems due to violations of due process and equal protection rights.[181]

As the preceding discussion makes clear, the selective mimicry of legitimate institutions by the drafters of the MCA was perceived as illegitimate from the outset. This criticism should have signaled to the designers of the MCA that their proposed system would likely fail to garner external support due to its nonconformity-based illegitimacy. However, their focus, much like the focus of those who seek to craft national security courts, was on effectiveness, not legitimacy.[182] Moreover, even those provisions that were identical to legitimate institutional forms, such as those copied verbatim from the UCMJ, were deemed illegitimate because they failed to comport with the type of fair trial standards one would expect in an Article III court.

One particular example stands out as representative of the legitimacy challenges, faced by those provisions directly mimicking the UCMJ. During the truncated debate over the MCA, three bills included language in proposed section 949b intended to deal with unlawful influence, a form of supervisory conduct that could allow superiors to order subordinates to offer evidence derived from torture.[183] In all three provisions, that language was identical to article 37 of the UCMJ, which states:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel

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David A. Martin, *Judicial Review and the MCA: On Striking the Right Balance* (Univ. of Va. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 70, 2007), *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art70 (providing an overview of Congress's and the President's response to *Hamdan v. Rumsfeld* in the form of the MCA). *See generally* Hass, *supra* note 151 (discussing the MCA's incorporation of the Geneva Conventions and how they fail to meet the fairness requirement set out by the Court in *Hamdan*).

179. 152 CONG. REC. H7536 (daily ed. Sept. 27, 2006) (statement of Rep. Skelton).

180. *See Gates*, 565 F. Supp. 2d at 134.

181. *See* 152 CONG. REC. H7536.

182. *See generally* 152 CONG. REC. H7533–60 (daily ed. Sept. 27, 2006) (floor debate on the Military Commissions Act of 2006).

183. *See* Military Commissions Act of 2006, H.R. 6054, 109th Cong. § 3 (2006); Terrorist Tracking, Identification, and Prosecution Act of 2006, S. 3886, 109th Cong. § 104 (2006); Bringing Terrorists to Justice Act of 2006, S. 3861, 109th Cong. § 4 (2006).

> thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.[184]

For all three bills, the language in section 949b for military commissions mirrored this UCMJ provision:

> (1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings.
>
> (2) No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.
>
> (3) Paragraphs (1) and (2) do not apply with respect to—
>
> (A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or
>
> (B) statements and instructions given in open proceedings by a military judge or counsel.[185]

On its face, this language seemed to provide adequate protection from unlawful influence and was perceived as legitimate given its adoption from the UCMJ. However, as the discussion below will make clear, there are key differences between courts martial, and military commissions, which could allow for potential abuses if this provision were allowed to stand. As debate within Congress continued, greater attention was paid to the issue of detainee treatment; such attention demonstrated how the mechanisms of

184. 10 U.S.C. § 837(a) (2006).

185. *See, e.g.*, Military Commissions Act of 2006, H.R. 6054, 109th Cong. § 4 (2006).

conformity were able to influence the institutional design process.[186] For example, more extensive debate allowed the public and interest groups to voice their opinions (informal coercive isomorphism), the military judge advocates and other attorneys could express their views as to the professional and legal standards that should govern tribunals (normative pressures), and in the face of more extensive debate, legislative staff were able to dedicate greater attention to the requirements the Supreme Court established (formal coercive isomorphism) and best practices adopted by legitimate tribunals (mimetic isomorphism).

It was in this process that Senator Warner proposed new legislation, which took a harder stance regarding cruel treatment of detainees, a stance intended to engender greater legitimacy for the proposed system of military commissions. His bill, submitted on September 14, 2006,[187] followed the standards put forward in the McCain Amendment to the Detainee Treatment Act.[188] The McCain Amendment "prohibits persons in the custody or control of the U.S. government, regardless of their nationality or physical location, from being subjected to 'cruel, inhuman, or degrading treatment or punishment.'"[189] The public debate over this issue prominently placed Senator McCain and other senators at odds with the administration over the issue of torture.[190]

While the public debate focused on torture and the inadequacy of the proposed legislation, behind closed doors the mechanism of normative isomorphic pressure was at work. Colonel Morris Davis, then Chief Prosecutor for the Office of Military Commissions, feared that he would be pressured by administration officials to offer evidence derived from torture in future military commission proceedings.[191] While the provisions in section 949b mirrored the UCMJ, Colonel Davis felt that such provisions were insufficient

186. *See, e.g.*, 152 CONG. REC. S10352–63 (daily ed. Sept. 28, 2006) (floor debate on military commissions).

187. *See* Military Commissions Act of 2006, S.3901, 109th Cong. (2006).

188. *See* 151 CONG. REC. S11061–62 (daily ed. Oct. 5, 2005) (proposal of amendment by Senator McCain) (codified at 10 U.S.C. § 801 note and 42 U.S.C. § 2000dd (2006)).

189. MICHAEL JOHN GARCIA, CONG. RESEARCH SERVICE, INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT 3 (2009), *available at* http://www.fas.org/sgp/crs/intel/RL33655.pdf.

190. *See, e.g.*, Janet Hook & Richard Simon, *McCain Stand Comes at Price*, L.A. TIMES, Sept. 19, 2006, at A1.

191. It should be noted that from 2006 to 2007 the author served as an academic legal consultant to Colonel Davis until his resignation as Chief Prosecutor.

to meet the Supreme Court's concerns, articulated in *Hamdan*, regarding coerced testimony. He met with legislators to ensure they would include provisions protecting military attorneys from political pressure. In an e-mail to the staff of Senator Lindsey Graham prior to publication of S.3901, Colonel Davis stated:

> I recommend amending the language in your section 949b, "Unlawfully influencing action of military commission," by modifying section (a)(2) to read:
> (2) No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case; the convening, approving, or reviewing authority with respect to their judicial acts; or the exercise of professional legal judgment by trial counsel or defense counsel.[192]

He made clear his rationale for adding this important provision, stating:

> The second part of the proposed section 949b provides defense counsel some protections from adverse performance reviews and assignments based upon zealously defending an accused, but the section does not offer a prosecutor any protection at all. If, for instance, I determine the prosecution will not offer any statement obtained as a result of water boarding I shouldn't be subject to reprisal if someone above me believes waterboarding is an acceptable way to extract evidence.[193]

It's helpful here to recall the earlier theoretical explication of the tension between legitimacy and effectiveness and how an organization might segment itself in a manner intended to maximize both. Segmentation is often observed where the apex of an organization (here the Office of the Chief Prosecutor) is structured to meets the demands of external legitimacy; while the internal operating core (here the line prosecutors) may be structured to fit contingencies such as the specific need to have flexibility regarding what evidence might be offered at trial. The goal in segmented adaptation is to meet both contingency and institutional requirements. As the earlier discussion made clear, achieving this goal is nearly impossible, a point illustrated by the selective mimicry provisions found in the UCMJ.

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192. E-mail from Col. Morris Davis to staff of Sen. Lindsey Graham (March 3, 2008, 17:08 EST) (on file with the author) [hereinafter E-mail].

193. *Id.* As the contemporaneous legislative history and public debates make clear, the issue of torture and evidence derived from it permeates the entire military commissions process. *See* McNeal, *supra* note 36, at 36–38.

The concerns articulated above provide an illustration of the conflict between effectiveness and legitimacy. While the rules proposed in the MCA mimicked those of the UCMJ—perhaps lending them external legitimacy due to the perception that the UCMJ was in general, sufficiently protective—in the specific case of the military commissions, with its different structures and internal practices, there existed the possibility that segmentation would allow for an external perception of legitimacy while internally the commission could act in a normatively illegitimate manner. In organizational theory terms, such segmentation refers to the adoption of a structure or rules which fit the institutional requirements in one part of the organization (e.g., legitimacy through conformity with the external expectation of an independent prosecutor), while adopting a form that meets the contingencies in another part of the organization (e.g., the desire on the part of some within the administration to use evidence derived through coercion).[194]

A close analysis of the legislative history of the MCA also reveals further organizational legitimacy concerns which stemmed from Congress' attempt to adopt provisions that appeared legitimate but would fail to allow the organization to actually conform with culturally driven isomorphic expectations of fair and legitimate trials. This internally voiced concern was stated as follows:

> I believe it is important for a variety of reasons to make it patently clear that a "military" commission is a "military" proceeding and not some second-rate subterfuge for a federal district court where DOJ attorneys can prosecute terrorists without the obstacles they'd face in federal court. The military commissions are a part of the war effort and its structure should reflect the same.[195]

Recognizing these concerns, Congress went beyond the requested protections requested by the Chief Prosecutor, adding provisions for prosecutors which extended to "the exercise of professional judgment by trial counsel or defense counsel"[196]—more expansive language than the narrower "professional legal judg-

194. Donaldson, *supra* note 74, at 11–15 (explaining the potential tension between contingency and institutional theories and how segmented adaptations can but likely will not allow an organization to maximize both external support and internal effectiveness). For a more detailed discussion of the independence of the military commission prosecutor, see generally McNeal, *supra* note 36.

195. E-mail, *supra* note 192.

196. *See* Military Commissions Act of 2006, S. 3901, 109th Cong. § 949b(a)(2)(c) (2006) (draft legislation by Sen. John Warner).

ment" urged by Colonel Davis. Subsequently, three additional bills were introduced, all of which were titled "The Military Commissions Act of 2006."[197] These three other bills "reflected an agreement reached by the Bush Administration and certain lawmakers to resolve [their] differences"[198] and arrive at a compromise necessary to get the MCA passed before Congress recessed to campaign for the midterm elections.[199] While this example shows how normatively driven isomorphic pressure can have an influence, it is largely an anomaly attributable to one individual who, due to his position, was able to highlight his concerns regarding select aspects of the new military commission system. The story of the Chief Prosecutor's influence stands as an example of how the strength of any one mechanism of conformity may largely depend upon the force with which that mechanism is felt.

The MCA process, largely unconcerned with isomorphic pressures which could lead to conformity, failed to address the broader societal concerns regarding legitimacy advanced by many other interested parties and members of Congress. The process was isolated from other isomorphic mechanisms due in large part to the truncated time Congress allocated for debate. Congressman Levin highlighted this point in voicing his opposition to the MCA, stating:

> [T]he Republican Leadership has chosen to stampede far-reaching legislation through the House without adequate debate or any opportunity for Members to offer amendments . . . The 96-page bill before the House was negotiated in secret last weekend and only introduced less than 48 hours ago. After waiting 5 years, can't we take even 5 days to consider a bill of this magnitude?[200]

The process, much like the process that created the PMO Commissions, was largely walled off from the mechanisms of isomorphism, which institutional theory suggests will prompt conformity and thereby legitimacy. Such isomorphic pressure, if felt, may have ensured that the concerns of the MCA's opponents would have been addressed ex ante rather than creating a system

197. GARCIA, *supra* note 166, at 5 n.15.

198. *Id.* (citing Kate Zernike & Sheryl Gay Stolberg, *Differences Settled in Deal over Detainee Treatment*, N.Y. TIMES, Sept. 23, 2006, at A9.

199. Kate Zernike, *Top Republicans Reach an Accord on Detainee Bill*, N.Y. TIMES, Sept. 22, 2006, at A1.

200. 152 CONG. REC. H7553 (daily ed. Sept. 27, 2006) (statement of Rep. Levin).

which was destined to be challenged after its creation.[201] Speaking to the concerns of external legitimacy, Congressman Cardin stated: "We should heed the warning given by our former Chairman of the Joint Chiefs of Staff and former Secretary of State Colin Powell, who states that 'the world is beginning to doubt the moral basis of our fight against terrorism.'"[202] Institutional reformers and national security court proponents should remain cognizant of these legitimacy challenges.

C. *Lessons from the Military Commissions*

Perhaps the most interesting lesson to be learned from the organizational analysis detailed above is that innovation aimed at achieving effectiveness is largely viewed as illegitimate when it fails to conform with already accepted institutional forms. Organizational theorists studying businesses have persuasively shown that innovation most often fails because it violates established institutional practices or falls into a void where no shared understanding about its merits exists.[203] Both reasons for failure stem from a perception of illegitimacy that attaches to innovation when compared to accepted practices.[204] Legal scholars should note how the history of military tribunals suggests a similar fate for innovative judicial institutions. All such innovations, including those in Nuremburg, Tokyo, the Hague, and Baghdad, have faced critics who railed against the legitimacy of these models that were tailored to the exigencies of their circumstances. So too was the case with both the PMO Commissions and the MCA iteration, which begs the question: why should we expect any greater perception of legitimacy to attach to a national security court? If or-

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201. *See, e.g.*, *id.* (statement of Rep. Jackson-Lee) ("[The MCS] creates an unfair trial system for military detainees, and does almost nothing to curb the President's power to authorize interrogation tactics that are widely recognized as torture. Mr. Speaker, this so-called compromise bill, is actually nearly identical to what the administration has sought all along. The bill continues to allow secret evidence in trials, prohibits detainees from challenging the merits of their detention in courts, and effectively allows the President to authorize the CIA to continue inhumane detention and interrogation.").

202. 152 CONG. REC. H7554 (daily ed. Sept. 27, 2006) (statement of Rep. Cardin); *see also* 152 CONG. REC. H7553 (daily ed. Sept. 27, 2006) (statement of Rep. Blumenauer) (arguing that the legislation "repeat[s] the mistakes of the past," and "does nothing for our security and attempts to add legitimacy to the current improper actions of the Bush administration").

203. Deborah Dougherty & Trudy Heller, *The Illegitimacy of Successful Product Innovation in Established Firms*, 5 ORG. SCI. 200, 201 (1994).

204. *Id.*

ganizational theorists are correct in positing that legitimacy stems from conformity, how can specialized tribunals with differing substantive and procedural rules fraught with disparate impacts upon individual rights ever be viewed as legitimate? If history is a guide, the well-intentioned efforts at creating a national security court will face the same legitimacy challenges which have plagued other structurally contingent tribunals.

IV. IMPLICATIONS

The previous discussion demonstrated that for an organization to be perceived as legitimate, it must conform its practices to mirror those that exist in its organizational field. Three fundamental principles form a general framework for assessing existing institutions: effectiveness, fairness, and efficiency.[205] Interestingly, lacking from this framework is the value of legitimacy. Thus, these principles, rather than being viewed as absolute terms, instead serve as a general framework that must be considered alongside legitimacy.

In this framework, effectiveness suggests a system that will make a society free from terrorism, but this is a contingent value because how far a nation is willing to go toward achieving this goal will necessarily impact the effectiveness of a tribunal.[206] As discussed earlier, effectiveness is not the primary concern of an institution seeking to conform through mechanisms of isomorphism, but the theory does not go so far as to say that effectiveness is irrelevant overall. In fact, we can presume that the existing institutions have, through an evolutionary process of differential survival, adopted an optimal level of effectiveness that is deemed legitimate. Similarly, effectiveness and equity are linked to efficiency. While a nation may be "willing to compromise human rights and disregard the rule of law . . . [to] produce a higher level of effectiveness," such measures may come "at the cost of equity or fairness."[207] As institutions balance these values

205. Edward R. Maguire, Gregory J. Howard, & Graeme Newman, *Measuring the Performance of National Criminal Justice Systems*, 22 INT'L J. COMP. & APPLIED CRIM. JUST. 31, 38 (1998).

206. *See id.* ("All nations want to be free of crime (effectiveness), but how far are they willing to go to achieve this goal? Are they willing to devote a substantial proportion of their workforce and/or their gross national product to criminal justice? If so, they may achieve a high level of effectiveness . . . .").

207. *Id.*

within this general framework, we can assume that "all nations can be located somewhere in a three dimensional space defined by the effectiveness, fairness, and efficiency"[208] of their criminal justice and related counterterrorism systems, and that three-dimensional space and the institutions it creates will form a benchmark of legitimacy to which new institutions must conform.

Herein lies the challenge for national security court proponents: the legitimacy that comes from conformity with the principles of an Article III court will necessarily be in conflict with any national security court proposal premised upon efficiency and effectiveness. In short, a national security court, which by its nature will be different from an Article III court, cannot logically achieve a similar balance of the three fundamental principles articulated above and therefore will face the potential for illegitimacy. Granted, some theorists argue that each of the dimensions above can be treated equally, perhaps to create theoretical models or to strip cultural biases from a study.[209] In the abstract, such an approach makes sense. For example, it may be useful to weigh each dimension equally to create a study that seeks to compare different jurisdictions along the same measures or to use in a study that seeks to come up with an idealized system beginning from scratch. However, for the purposes of this article, which has as its focus a conformity model of legitimacy, the challenge national security court proponents must sensitize themselves to is that their rationally derived prescriptions, seeking to maximize effectiveness, may be insufficient on their own.[210] Instead, I contend that institutional designers of national security courts are cabined in their efforts by the path dependency of existing and dominant institutions that have already garnered legitimacy.

208. *Id.* at 38–39.

209. *Id.* at 39 ("[C]onsider two nations that have the same crime rate, where one devotes twice the resources to criminal justice compared to the other but is half as fair or equitable. These two nations would have the same level of performance according to the scheme that we will suggest. Both nations presumably made choices about how to deal with their crime problems: one chose to invest more resources, and one chose to play more loosely with human rights standards. From a bias-free perspective, however, the two have achieved equal levels of criminal justice performance.").

210. *See* Barreto & Baden-Fuller, *supra* note 4, at 1563 (explaining that the main difference between an institutional approach and an economic approach concerns the underlying mechanism which triggers conformity behaviors). In economic conformity behavior models, the source of such behavior is an economically rational purpose, effectiveness in the example of military commissions, whereas in isomorphic frameworks it is the normatively rational motive of legitimacy which can both prompt and justify conformity behavior. *See id.*

Furthermore, the lessons from the development of the military commissions indicate that selective mimicry of components drawn from legitimate institutions as a means to create new institutions will likely fail.[211]

In light of the legitimacy constraints facing national security court proponents, the most appropriate institutional design approach may be to begin with an accepted and legitimate institutional form and make selected modifications to that form to achieve limited, structurally contingent gains. Stated differently, the best method for approaching the institutional design process of national security courts is to assess the legitimate Article III court framework and determine where those courts are insufficient to meet the objectives of a robust counterterrorism program.[212] An institutional designer should then make selective modifications to meet the deficiencies of the Article III framework and in so doing, should explicitly acknowledge how they are balancing the trade-offs between legitimacy and effectiveness and how they are ordering these values.

Granted, some of the national security court proposals have taken this approach but have done so partly in reverse. They have taken a bottom-up approach by identifying deficiencies in the current processes and then suggested the creation of entirely new institutions, rather than a top-down approach, which would make modifications from the existing legitimate form.[213] In light

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211. *See supra* notes 170–199 and accompanying text (discussing immediate challenges to MCA and experiences of Colonel Davis during the drafting of the MCA).

212. Notably, as this article went to print, a more detailed proposal by Jack Goldsmith began to take this approach and even acknowledges the legitimacy benefits to be derived from selective modifications to the Article III court framework. *See* Jack Goldsmith, Long-Term Terrorist Detention and Our National Security Court 6 (Feb. 4, 2009) (unpublished manuscript), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf (noting that "one way or another, Article III judges will be in the detention game, helping to regularize, legalize, and legitimize the detention process, while reviewing the adequacy of the factual basis for each detention judgment. In other words, once we accept that there will be a system of long-term, non-criminal, military detention of alleged terrorists and that federal judges will supervise that process, the debate about a national security court becomes a debate about what form this federal judicial supervision should take"); *see also* WITTES, *supra* note 1, at 34–35 (explaining how Article III courts are capable of handling cases involving individuals who pose a risk of future dangerousness, such as the mentally ill who are sometimes detained based on violent acts that their condition may lead them to commit). *But see* Guiora & Perry, *supra* note 1, at 361–63 (argument of Prof. Guiora, arguing for a hybrid domestic terror court which substantially modifies the Article III court process to account for the need to protect intelligence information).

213. *See* Stephen I. Vladeck, *The Case Against National Security Courts*, 45

of the history of illegitimacy associated with the military commissions, I suggest that an approach that departs in too many respects from an Article III court will find itself saddled with challenges to its legitimacy. In fact, when one considers the criticism directed at innovation *within* Article III courts intended to deal with the detention and trial of sexual predators and other particularly dangerous criminals, it is evident that legitimacy challenges may plague even my suggested approach focused on new procedural and substantive rules.[214] This history within Article III courts of resistance to innovation, coupled with the checkered history of military commissions, suggests that the bar is set perilously high for proponents of new institutions such as national security courts. The analytical framework and design process outlined above adds legitimacy considerations to the institutional designer's set of considerations. While this additional analytical component may further complicate any design effort, I contend that the benefits to be derived from maximizing legitimacy are too important to neglect.

V. CONCLUSION

Institutional designers should factor into their proposed reforms an explicit consideration of the value organizations can derive from legitimacy based conformity. The analytical framework outlined above provides a conformity based model for evaluating the legitimacy of an institution. This framework is useful for sensitizing institutional designers and legal scholars to notions of legitimacy which are derived from the pressure for conformity placed on institutions by external observers. That conformity pressure can force organizations to comply with formal and informal external mandates, overcome uncertainty by copying exist-

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WILLAMETTE L. REV. (forthcoming 2009) (explaining that most national security court proposals "fall into four rough groups: (1) That preventative detention of terrorism suspects is not unlawful; (2) that CIPA and other evidentiary rules render traditional criminal prosecutions of terrorism suspects unworkable; (3) that, in general, the Article III courts are inappropriate forums for terrorism cases; and (4) that there are no analogous tribunals and/or procedures already available under extant law").

214. *See, e.g.*, Erwin Chemerinsky, *Detentions Without Due Process of Law Following September 11th*, 20 TOURO L. REV. 889, 889–93 (2005) (explaining that the history of American law is replete with unlawful detentions sanctioned by and brought about through Article III courts); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 57–58 (1995) (critiquing Federal Rule of Evidence 413, which makes evidence of a defendant's prior instances of sexual violence admissible, as a departure from three hundred years of Anglo-American jurisprudence).

ing and legitimate forms, and conform with the prevailing norms in a professionalized field.

This analytical framework, with its focus on legitimacy, sensitizes scholars to the fact that while an institution may achieve legitimacy, it may do so by adopting an inefficient form. The discussion thus highlights that an institutional innovation such as a national security court may effectively achieve certain goals associated with counterterrorism, but may nevertheless fail to achieve an optimal level of legitimacy. On balance this may be an acceptable legal and policy outcome; however, scholars should explicitly recognize the legitimacy tradeoff which is at play in their proposals.

As this article explains, the tradeoffs reflected in the tension between effectiveness and legitimacy are apparent through a close analysis of the history of innovative judicial institutions. Institutional designers who seek to maximize legitimacy should carefully scrutinize the institutional design process and its susceptibility to influence by mechanisms of conformity. A failure to do so may lead to either incomplete or selective conformity which may result in an institutional design which fails to achieve optimal levels of legitimacy.

The complex interaction between conformity, legitimacy, effectiveness, and efficiency detailed above suggests that for a national security court to be perceived as legitimate it must conform its practices with existing judicial institutions. This observation suggests that because a national security court will by its nature depart from the structure and practice of an Article III court, national security court proponents must sensitize themselves to the challenge of balancing conformity-based legitimacy with effectiveness and efficiency. The best approach for the institutional design process may be to narrowly and selectively modify the existing legitimate institutional form present in Article III courts, rather than taking a bottom up approach which creates new institutions from scratch. Because the simultaneous maximization of effectiveness and legitimacy is unlikely, scholars and institutional designers should highlight the tradeoffs in their design proposals and account for what factors they've elevated over others, noting whether their design poses the risk of criticism on the grounds of suboptimal legitimacy or suboptimal effectiveness.

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