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# Structural Constitutionalism as Counterterrorism

Aziz Huq

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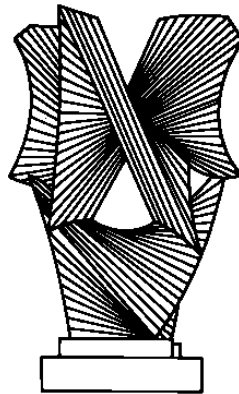
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## STRUCTURAL CONSTITUTIONALISM AS COUNTERTERRORISM

*Aziz Z. Huq*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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# Structural Constitutionalism as Counterterrorism

Aziz Z. Huq\*

*During the past decade, federal courts have adjudicated proliferating challenges to novel policy responses to terrorism. Judges often resolve the individual rights and statutory interpretation questions implicated in those controversies by deploying presumptions or rules of thumb derived from the Constitution's Separation of Powers. These "structural constitutional presumptions" serve as heuristics to facilitate adjudication and to enable judicial bypass of difficult legal, policy, and factual questions. This Article challenges the use of such structural presumptions in counterterrorism cases. Drawing upon recent empirical research in political science, political psychology, and security studies, it demonstrates that abstract eighteenth-century Separation of Powers ideals do not translate into robust and empirically defensible generalizations for twenty-first-century security decisions. Structural constitutionalism thus cannot serve as a foundation for heuristics or shortcuts in the judicial consideration of new security measures. To the extent courts properly pass on the legality of counterterrorism policies, judges should rely instead on the ordinary tools of doctrine, statutory construction, and fact finding. The ensuing jurisprudence of counterterrorism would look much more like ordinary public law.*

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## INTRODUCTION

Imagine a terrorist organization that exploits Twitter and similar social networking services to disseminate false rumors of impending airborne toxic events in major American cities. To prevent harmful public panic, the federal government shuts down the services without notice, seizes all traffic data, and installs contemporaneous monitoring of the network to capture the localities and identities of all future users.<sup>1</sup> How should a judge analyze the inevitable constitutional challenge lodged in a federal court? Of course, this would hardly be the first time a post-9/11 counterterrorism policy had been challenged in court. In the past decade, the federal government has adopted new measures on

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1. For a pithy introduction to the problem of web-based terrorism, see RICHARD A. CLARKE & ROBERT K. KNAKE, *CYBER WAR: THE NEXT THREAT TO NATIONAL SECURITY AND WHAT TO DO ABOUT IT* 69–102 (2010). Tight government control of instant messaging services has been one proposed response to the August 2011 London riots. See Eric Westervelt, *British PM Cameron Proposes Tactics to Quell Riots*, NPR (Aug. 11, 2011), <http://www.npr.org/2011/08/11/139558719/british-pm-cameron-proposes-tactics-to-quell-violence>.

electronic surveillance, military detention, war-crime trials, targeted killing, and border searches—and in so doing catalyzed a wave of judicial challenges.<sup>2</sup> Our judge, confronted by the hypothetical regulation of social networking, would thus have ample post-9/11 case law to mine for signposts about how to deal with her legal question.

She would find a jurisprudence that spoke softly to the empirics of security policy,<sup>3</sup> but that contained multitudes of examples, precedents, and reflections about the proper distribution of authority between branches of the national government.<sup>4</sup> Courts, she would discover, routinely resolve the statutory construction and individual rights questions implicated in those cases by applying heuristics or rules of thumb drawn from the Separation of Powers.<sup>5</sup> That is, she would come across judges often (albeit not always) asking whether a policy conforms to guidelines derived from what might be termed the logic of “structural constitutionalism” instead of engaging directly with the complexities of statutory interpretation or empirical fact finding.<sup>6</sup> Using structural constitutional presumptions, she would find judges frequently engage in a second-order inquiry about *how a policy came to be* instead of asking the first-order question *how a policy works on the ground*.<sup>7</sup> She would find conservative judges tending to ask whether the executive has endorsed a policy, and liberal judges tending to search for congressional blessing before allowing a controversial decision to go forward. By looking at the second-order question of a policy’s origin rather than the first-order merits of the policy, liberal and conservative judges alike have sought to leverage the insights of the structural design of our 1787 Constitution. At the same time, they aim to avoid delving too deeply into difficult empirical and policy questions raised by new technologies and rapidly evolving security threats.

The extent of judicial reliance upon a logic of Separation of Powers as a crutch for the adjudication of counterterrorism cases is unparalleled in other

2. See, e.g., cases cited *infra* note 5.

3. I use the term “national security policy” here interchangeably with “counterterrorism policy” to refer solely to policies adopted in response to transnational terrorist groups such as al-Qaeda. My argument does not extend to the larger realm of foreign relations law.

4. See *infra* Part I (surveying cases).

5. Every major Supreme Court case about a post-9/11 counterterrorism policy has used Separation of Powers theory in this way. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (extending constitutional habeas jurisdiction to Guantánamo Bay detentions); *Munaf v. Geren*, 553 U.S. 674 (2008) (upholding executive discretion to dispose of U.S. citizen detainees seized in Iraq by transfer to another sovereign); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (invalidating first-generation military commissions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (upholding U.S. citizen’s right of judicial review of grounds for military detention); *Rasul v. Bush*, 542 U.S. 466 (2004) (extending statutory habeas jurisdiction to Guantánamo Bay detentions).

6. I use the term “structural constitutionalism” in this Article to refer exclusively to inferences drawn from the Separation of Powers. I do not address federalism questions.

7. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811 (2007) (explaining the difference between second-order and first-order analysis).

policy domains. To be sure, inferences premised on the Separation of Powers do enter into policy areas as diverse as environmental law, financial regulatory jurisprudence, and immigration. But the case law in those areas is not typically characterized by insistent reliance upon structural constitutional presumptions.<sup>8</sup> The function that structural constitutional presumptions play in the counterterrorism domain is thus distinctive and perhaps unique. It therefore warrants isolation and close analysis.

Undertaking that task, this Article challenges judges' use of structural constitutional presumptions in counterterrorism cases. Its core claim is that judicial employment of presumptions grounded in abstract and idealized accounts of the Constitution's Separation of Powers is unwise. The presumptions upon which both liberal and conservative judges tend to rely are empirically unsound. A large gap exists between the ideal-type branches imagined in eighteenth-century structural constitutional theory and observable realities on the twenty-first-century ground. As a result, abstract structural constitutional theories frequently provide no useful information as to whether a counterterrorism policy is appropriately tailored, justified by a compelling governmental need, or consistent with a statute's command. Courts should therefore abandon structural constitutional presumptions. Instead, I argue, they should grapple directly with legal and factual puzzles implicated in novel counterterrorism initiatives using ordinary tools of legal interpretation and fact finding. There is no reason to believe this would generate more erroneous results than the current approach.

At the threshold, I should emphasize that this claim is modest along several dimensions. First, my argument does not concern the appropriate scope of judicial review in counterterrorism cases. I thus make no claim about what class of disputes in this policy area should be amenable to resolution in an Article III forum consistent with standing and political question doctrines. Second, my claim is also limited to judicial consideration of *counterterrorism* policies. I do not deny that the Separation of Powers might play a role in litigation related to, say, foreign affairs or environmental matters quite apart from their direct application as constitutional rules of decision.<sup>9</sup> As a

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8. Another area in which such presumptions also play a role, albeit not one addressed in this Article, is foreign affairs law.

9. Hence, I do not deny that structural constitutionalism has many doctrinal applications that are simply orthogonal to the arguments developed in this Article. For example, Separation of Powers principles are deployed to reach judgments about the consistency of governance arrangements with the text of Articles I and II. *See* *Clinton v. City of New York*, 524 U.S. 417, 438–47 (1998) (invalidating line-item veto); *Bowsher v. Synar*, 478 U.S. 714, 732–34 (1986) (invalidating direct congressional control of spending); *INS v. Chadha*, 462 U.S. 919, 951–59 (1983) (invalidating one-house legislative veto). This Article does not address these direct applications of the Separation of Powers.

consequence, I bracket the question whether the arguments developed here would have force elsewhere in respect to other policy questions.<sup>10</sup>

Third, my claim is limited to *judicial* consideration of counterterrorism policies. Many of the arguments and much of the empirical evidence developed below may well bite on the question of how an institutional designer might go about allocating national security-related responsibilities between or within the political branches. My argument here, though, concerns only the modalities employed by federal judges in the resolution of cases and controversies.<sup>11</sup> I do not claim that courts should engage in the first-order design of counterterrorism policy, as it is clear that the political branches have been and will continue to be first movers in this domain. I simply posit that the *ex post* review that now occurs through constitutional and statutory challenges should be conducted in a different way.

Fourth, the arguments developed in this Article are consequentialist and pragmatic. Thus, they do not address judges' and scholars' reliance on historical, originalist grounds for employing structural constitutional presumptions. Working in that pragmatic vein, I assume that the goal of policy making in the counterterrorism domain is to maximize some rough measure of social welfare. I make no strong claims about the appropriate social welfare function. For my purposes, it suffices to say that there is general accord that counterterrorism policies should minimize both the quantum of harm from terrorists' actions and also the scale of intrusions upon individuals' constitutionally defined liberty interests, and do so at the least feasible cost.<sup>12</sup>

That roughly welfarist goal, I argue, is best achieved when federal courts abjure structural constitutional presumptions in favor of the ordinary processes of fact finding and legal reasoning.

To make that core claim more lucid, it may be helpful to sketch quickly how structural constitutional presumptions tend to be employed as heuristics in

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10. I suspect that the arguments from institutional capacity developed in Part II have broad echoes in nonsecurity contexts, while the arguments from political environments in Part III have a narrower compass.

11. The modesty of this claim should not be overblown. There is an enormous body of literature on how judges resolve constitutional and statutory cases because these are consequential subjects given the role that judicial review has come to have in our system of government. *Cf.* Aziz Z. Huq, *When Was Judicial Restraint?*, 100 CALIF. L. REV. 579 (2012) (developing a historical account of the growth of judicial willingness to invalidate statutes and regulations on constitutional grounds). There is a separate set of questions concerning the institutional design of counterterrorism policies that warrant separate consideration. *Cf.* Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415 (2012) (examining one such design question: the allocation of adjudicative responsibilities among different possible venues in the terrorism context).

12. It is worth noting that I also do not take the position that comparative institutional analysis of all stripes is fruitless. To the contrary, I believe much progress can be made by thinking about institutional design questions. My concern here is the employment of structural constitutional presumptions derived from eighteenth-century political theory, which strike me as far too coarse and inaccurate to be effective in that way.

counterterrorism cases.<sup>13</sup> Judges are often called upon to consider whether a specific policy conforms to a statutory rule or one of the Constitution's individual rights guarantees. In so doing, they can draw upon one of two presumptions grounded in the Founding-era theory of the Separation of Powers. First, some judges value executive primacy in counterterrorism matters on comparative institutional competence grounds.<sup>14</sup> They presume the executive should have broad, perhaps exclusive, prerogative to craft counterterrorism policy in light of its epistemic and functional advantages over Congress and the courts. On this account, any counterterrorism action with the executive's blessing is likely to be treated as constitutional, and hence not amenable to second-guessing by federal judges. In practice, this view tends to cash out as broad endorsement of most or all security-related government action. Second, other judges believe that congressional involvement is the sine qua non of lawful, effective action against terrorism. These judges fear that the executive is subject to pervasive cognitive distortions, such that the participation of both political branches is necessary to leverage the nation's full stock of political wisdom. They therefore find security policies valid only if Congress has given a clear seal of approval. This position results in occasional invalidations of policies based on the manner in which they were adopted.

The "pro-executive" analysis and the "pro-Congress" approach have more in common than is first apparent. Both draw inferences from eighteenth-century Separation of Powers theory in the abstract in order to resolve concrete controversies. And both assume a federal court is more likely to reach the correct answer to a legal question if it looks at the arc of a policy's enactment rather than directly at whether a policy conforms to binding legal rules.<sup>15</sup>

This Article develops two reasons for skepticism about the deployment of structural constitutional presumptions in counterterrorism cases. Both arguments target the empirical foundations of such presumptions. In tandem they suggest the Separation of Powers model does not provide a reliable source of heuristics for counterterrorism cases.

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13. Part I provides more extended examples beyond this terse exemplar.

14. For a crisp explanation of institutional competence arguments in general, see Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886, 925–48 (2003).

15. The same structural arguments are found in national security cases debating the appropriate measure of deference to executive judgments on statutory meaning. Hence, there is a parallel debate in the literature on statutory interpretation about the proper quantum of deference to executive interpretations of statutes in the national security domain. Compare Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 851 (2011) ("[C]ategorical deference is not formally required (as a matter of executive power) and may be formally prohibited (as a matter of judicial power)."), with Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204 (2007) (arguing that the executive is best placed to resolve difficult foreign affairs questions requiring judgments of policy and principle, and that the judiciary should defer to the executive based on its foreign policy expertise).



The first ground for skepticism of the Separation of Powers presumptions starts with the observation that such heuristics take no account of the *internal ecology* of each branch. Such presumptions typically assume the branches can be analyzed as functionally indivisible units. The political branches, however, contain complex internal ecologies of committees, agencies, and bureaucratic rivalries. This internal variety means that an executive often labeled “unitary” turns out on closer inspection to be at war with itself. Similarly, as a result of its own internal fragmentation, Congress is much less likely to engage in deliberation than its advocates suggest. Historical and political science research suggests that these problems are especially acute in the counterterrorism domain. Attention to the internal ecology of the branches casts doubt on the stable institutional characteristics ascribed by the Separation of Powers to the political branches (e.g., efficiency and deliberation). Bringing into focus the internal ecology of the branches also underscores the high variance in the quality of both branches’ performance. In so doing, it undermines claims of comparative institutional competence lodged on behalf of the executive or Congress.

The second ground for skepticism of structural constitutional presumptions is that the canonical Separation of Powers logic used by judges in counterterrorism jurisprudence ignores the *external political environment* that surrounds and buffets the elected branches. Yet it is a matter of common notoriety that both political branches are strongly influenced by the external ecosystem of constituency pressures, strategic interest group action, and exogenous political shocks. Judges and commentators on counterterrorism jurisprudence tend to bracket these forces. I claim this is a mistake. Recent political science and empirical social psychology work on government and public responses to terrorism suggests that such external influences strongly and consistently press toward outcomes that are distant from optimal policy choices.<sup>16</sup> If both political branches are equally vulnerable to such distorting external influences, it is hard to see why a judge would have cause to prefer one over the other.

These two arguments cast doubt on the reliability of the Separation of Powers as a source of heuristics for determining the conformity of new counterterrorism policies with statutory commands or individual rights guarantees. Rather than repairing to structural presumptions, I argue, courts should employ the ordinary tools of constitutional adjudication, statutory interpretation, and fact-finding to decide cases. This does not mean courts should displace the political branches in crafting threshold policy frameworks and institutions. It is simply to posit that courts should judge such frameworks on the merits, not on the back of ill-founded structural presumptions, within the framework of an otherwise properly justiciable case. Further, there is no reason

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16. See *infra* Part III.

to believe that the exercise of courts' independent judgment—always and necessarily informed by the empirical record created by the legislature and the government—will yield incorrect answers more often than application of systemically flawed structural constitutional presumptions. Judges, after all, benefit from a relative insulation from the distortive influences upon the political branches. In consequence, their independent judgment about the fit between a government decision and the law may be particularly telling.

Part I of the Article illustrates how the Separation of Powers has been used in recent judicial precedent as a heuristic for resolving the legality of new counterterrorism measures. Parts II and III develop the two complementary critiques of structural constitutional presumptions. Part II explores the internal ecology of the political branches. It argues that the stable characteristics assigned to each branch by structural constitutional presumptions are illusory. Part III then turns to the external political ecology of the political branches. It contends that external democratic pressures constrain both branches in ways that distort outcomes beyond the salvific reach of the Separation of Powers. The Article responds to these critiques in Part IV by explaining how judges can and should address legal challenges to new counterterrorism policies without employing presumptions grounded in structural constitutionalism.

## I.

### THE SEPARATION OF POWERS AS COUNTERTERRORISM

The jurisprudence of American counterterrorism can, with but a touch of caricature, be labeled an exercise in as-applied structural constitutionalism. A decade after the 9/11 attacks, counterterrorism casebooks begin with the division of constitutional authority between Congress and the President.<sup>17</sup> Constitutional law casebooks situate counterterrorism precedent in the Separation of Powers chapter.<sup>18</sup> Scholars routinely frame counterterrorism as a “choice between promulgating anti-terrorism measures through the executive branch [or] . . . through the legislative branch.”<sup>19</sup> The link between national security and structural constitutionalism is so embedded in the legal consciousness now it hardly needs explication or defense.

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17. See, e.g., STEPHEN DYCAS ET AL., COUNTERTERRORISM LAW 39–63 (2007) (discussing division of war powers between the political branches).

18. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 381–92 (6th ed. 2009) (discussing terrorism detention cases in the course of addressing the Separation of Powers); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 299–323 (8th ed. 2007) (same).

19. Daphne Barak-Erez, *Terrorism Law Between the Executive and Legislative Models*, 57 AM. J. COMP. L. 877, 877 (2009); accord Laurie R. Blank, *Principles of Counter-Terrorism Law*, 25 EMORY INT'L L. REV. 771, 772 (2011) (book review); see also Patricia L. Bellia, *Designing Surveillance Law*, 43 ARIZ. ST. L.J. 293, 329 (2011) (“Institutional competence arguments about communications surveillance law tend to focus on the choice between *legislative* and *judicial* controls on executive action . . .”).

This Part outlines two specific ways in which courts have drawn on the deep reservoir of Founding-era ideas about the Separation of Powers to craft heuristics that lower decision costs in challenges to counterterrorism policies. First, Separation of Powers arguments have been invoked to support executive exclusivity based on the functional advantages of the presidency. Second, there are arguments for necessary congressional involvement. These hold that optimal results are attained when both branches speak in accord. Conservatives tend to favor the first line of cases, and liberals the second. Despite their different normative and political valences, both arguments make two key assumptions: (1) that the branch is the fundamental level of analysis and (2) that both the political branches have durable characteristics that enable comparative institutional judgments. One aim of this Article is to show that those shared assumptions are fragile and cannot bear the weight they are routinely asked to sustain.

#### *A. Separation of Powers Arguments for Executive Primacy*

The first presumption derived from the Separation of Powers turns on the executive's assumed comparative advantage in national security matters. This argument for executive primacy is rooted in the textual allocation of "the" executive power in the President and the concomitant authorizations of the "Take Care" Clause and the "Commander in Chief" Clause.<sup>20</sup> It further finds support in Founding-era writings of Alexander Hamilton, an early advocate of broad executive prerogatives.<sup>21</sup> In the Federalist No. 70, Hamilton famously emphasized the capacity of the President to act with "[d]ecision, activity, secrecy, and dispatch."<sup>22</sup> Modern commentators amplify the Hamiltonian

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20. Section 2 of Article II of the Constitution makes the President the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States," while Section 3 stipulates that the President "shall take care that the Laws be faithfully executed." U.S. CONST. art. II, § 2; see *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President in fulfilling his duties as Commander in-chief" had met with a situation justifying treating the southern States as belligerents and instituting a blockade was a question "to be decided *by him*" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted.").

21. Hamilton had been among the pro-executive party even at Philadelphia. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 255 (1996).

22. THE FEDERALIST No. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Elsewhere in the Federalist Papers, however, Hamilton expresses more reservations about executive discretion. See, e.g., THE FEDERALIST No. 75, at 425–26 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("[I]t would be utterly unsafe and improper to intrust [the sole power of treaty-making] to an elective magistrate of four years' duration . . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of [the President]."). In his 1793–1794 debate with Madison about President Washington's Neutrality Proclamation, Hamilton again emphasized his endorsement of a "broad and comprehensive" set of executive authorities. See THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794:

position by underscoring the functional advantages of the presidency over the legislature in matters of security.<sup>23</sup> They assert that the executive has “critical advantages over a multi-member legislature in reaching foreign policy and national security decisions.”<sup>24</sup> To exploit these advantages, “the executive branch needs the flexibility to act quickly, possibly in situations where congressional consent cannot be obtained in time to act on the intelligence.”<sup>25</sup>

There was robust support for the pro-executive position in Supreme Court precedent even before the 9/11 attacks. In the foreign affairs domain, for example, Justice Sutherland’s 1936 opinion in *United States v. Curtiss-Wright* licensed presidential actions that would be unconstitutional in the domestic sphere.<sup>26</sup> In matters of military discipline, the Court typically evinces large deference to the government.<sup>27</sup> And when the executive has raised concerns about sensitive or classified material, the Court has almost always accepted those concerns without searching investigation.<sup>28</sup>

TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 16 (Morton J. Frisch ed., 2007) [hereinafter PACIFICUS-HELVIDIUS DEBATES].

23. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

24. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006).

25. John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 820 (2004); see also JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 120 (2008) (“If ever there were an emergency that Congress could not prepare for, it was the war brought upon us on 9/11.”); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005). To the extent that Professor Yoo’s arguments rely on historical claims, other scholars have persuasively and comprehensively shown them to be belied by the historical record and indeed at odds with elementary standards of legal historical work. See Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 381–82 (2011) (“Yoo’s constitutional history . . . misstates crucial facts, misunderstands important episodes, and misrepresents central primary sources . . . [and] omits and obscures evidence that contradicts its claims.”).

26. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322–24 (1936) (authorizing broader delegations in foreign affairs than in domestic matters). The *Curtiss-Wright* case was the nub of early and devastating criticism. See David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467, 478–90 (1946). But it still has force among the Justices. A unanimous Court, for example, recently confirmed the President’s free-standing authority to “waive” or “suspend” provisions of law in the foreign affairs domain. See *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) (“[T]he notion of the President’s suspending the operation of a valid law . . . is well established, at least in the sphere of foreign affairs.”); see also *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24–25 (2008) (evinced similar deference).

27. For cases involving fundamental rights see *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (rejecting religious liberty claim); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (holding that challenge to National Guard actions presented nonjusticiable political question); see also *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (noting that “perhaps in no other area has the Court accorded Congress greater deference” than in military affairs).

28. See *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (declining to review “[p]redictive judgment[s]” concerning classified information made by the Navy in the course of employment decisions); *CIA v. Sims*, 471 U.S. 159, 169–73 (1985) (showing similar deference to the judgment of the political branches on secrecy and classification issues). For an unusual and interesting counterexample involving the government’s effort to present evidence in an espionage case without disclosures to the public, see *United States v. Rosen*, 487 F. Supp. 2d 703, 716–17 (E.D. Va. 2007).

The Court also approaches executive counterterrorism initiatives in a deferential spirit. Indeed, even when the Court rejects a security-related claim, it goes out of its way to underscore the continuing priority of plausible security concerns.<sup>29</sup>

Two recent cases illustrate the Separation of Powers' roots of current judicial deference to executive judgments. The first is the Court's 2010 judgment on the material support law that has been used extensively for criminal interdiction of suspected terrorists in the United States.<sup>30</sup> Chief Justice Roberts's majority opinion in *Holder v. Humanitarian Law Project (HLP)* focused in part on the construction of the material support statute, 28 U.S.C. § 2339B, and so is not strictly speaking directly about the scope of executive authority. But its First Amendment analysis pivoted quite clearly on a structural presumption rooted in notions of executive branch competence on security matters.<sup>31</sup>

First Amendment claims are typically adjudicated with close attention to particular facts.<sup>32</sup> Confronted by the government's argument in *HLP* that intermediate scrutiny should be applied, the Court first held that it would use a more "demanding" standard to review the material support law.<sup>33</sup> But Chief Justice Roberts did not engage in a particularized inquiry about the speech at issue or the likely consequences of the statute on the universe of possible future speech. He focused instead on the abstract question of the executive's institutional capacity in national security matters.<sup>34</sup> Chief Justice Roberts

29. For example, in the path-breaking case of *Boumediene*, in which the Court extended the Suspension Clause to protect alien detainees at Guantánamo Bay, Justice Kennedy underscored that "[o]ur opinion does not undermine the Executive's powers as Commander in Chief." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). Similarly, in *Hamdi*, Justice O'Connor's plurality opinion cautioned that the "Constitution recognizes that core strategic matters of warrmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality opinion).

30. See *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705 (2010) (upholding 18 U.S.C. § 2399B(a)(1), which makes it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization," against First Amendment challenge); see also Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16 (2012) (analyzing *HLP* in the larger context of the Roberts Court approach to political speech). On the use of material support offenses, see generally CTR. ON LAW & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2010 (2010), available at [http://www.lawandsecurity.org/Portals/0/documents/01\\_TTRC2010Final1.pdf](http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf).

31. See *HLP*, 130 S. Ct. at 2727–30.

32. See, e.g., *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 505 (1984) (requiring appellate courts hearing speech cases to conduct an independent review of the facts); *Speiser v. Randall*, 357 U.S. 513, 520 (1958) ("[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law . . .").

33. *HLP*, 130 S. Ct. at 2724. At least one court of appeals has since construed *HLP* to apply strict scrutiny. See *Al Haramain Islamic Found. v. U.S. Dep't of the Treasury*, 660 F.3d 1019, 1049 (9th Cir. 2011).

34. *HLP*, 130 S. Ct. at 2727.

emphasized “the lack of competence on the part of the courts” and categorically committed the “evaluation of the facts [to] the Executive”<sup>35</sup>:

One reason for . . . respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess . . . . In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government . . . . The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.<sup>36</sup>

Applying that presumption of executive competence, Chief Justice Roberts transformed what he had initially framed as an exercise in strict scrutiny into a gesture of broad and uninflected deference. A presumption drawn from an idealized account of structural constitutionalism in *HLP* thus lightened judicial scrutiny of a policy that otherwise would have triggered possibly fatal First Amendment strict scrutiny.<sup>37</sup>

Second, in the 2008 case *Munaf v. Geren*, the Court considered the habeas petitions of two American citizens detained by coalition forces in Iraq.<sup>38</sup> The Court held that although it had jurisdiction over the petitions, it would decline to issue relief on “equitable” grounds.<sup>39</sup> Addressing petitioners’ concerns about the risk of torture upon transfer to Iraqi custody, the Court repaired to a Hamiltonian logic of institutional competence: “The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area.”<sup>40</sup> There was no need for judicial supervision, the Court added, since the executive could be trusted not to transfer a U.S. citizen to possible abuse. The Court’s argument on this score did not rest on empirical evidence about conditions and detainee treatment in Iraqi prisons.<sup>41</sup> It instead relied on a Separation of Powers

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35. *Id.*

36. *Id.* at 2727–28.

37. Strict scrutiny is not always fatal in fact. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796–97 (2006) (finding, based on survey of cases, about one in three laws survive strict scrutiny challenges, but survival rate varies according to right at issue). But the material support law, for reasons explained by Justice Breyer in dissent, was not a snug fit with its asserted policy justifications. See *HLP*, 130 S. Ct. at 2736–37 (Breyer, J., dissenting).

38. *Munaf v. Geren*, 553 U.S. 674, 681–83 (2008). Caveat lector: the author was counsel for the habeas petitioners in this case. The following discussion, however, draws exclusively on material available in the public domain.

39. *Id.* at 693.

40. *Id.* at 702. Of course, judges do this all the time in asylum and refugee cases.

41. Indeed, the public record suggests cause for concern on this score. See Sam Dagher, *Report Details Torture at Secret Baghdad Prison*, N.Y. TIMES, Apr. 27, 2010, at A9.

presumption of executive competence and good faith. That presumption wholly ousted the factual inquiry that usually beats at the heart of the Great Writ.

Both *HLP* and *Munaf* involved questions of law or mixed questions of fact and law. But it is worth noting that the same presumption of executive competence can be used to narrow or oust the scope of factual inquiry even when a court is clearly tasked with adjudicating whether specific facts fit within the bounds of a statutory authorization. In a series of cases involving challenges to the military detention of “enemy combatants” at the Guantánamo Naval Base under a September 2001 statute, for example, the D.C. Circuit has held that the government need only show a preponderance of the evidence to vindicate a detention decision, rejecting arguments that a “clear and convincing” standard was constitutionally mandated.<sup>42</sup> It has also assigned a presumption of regularity to intelligence reports based on the claim that the Government has “the strongest incentive to produce accurate reports and no incentive to frame innocent bystanders.”<sup>43</sup> In so doing it has arguably “come[] perilously close to suggesting that whatever the government says must be treated as true.”<sup>44</sup> And by emphasizing that the Government need only “meet at least a certain minimum threshold of persuasiveness” to prevail,<sup>45</sup> the circuit court has in effect amplified military detention authority without overtly altering the substantive law regulating such lock-ups. Under that standard, the D.C. Circuit has never found a detainee to be wrongfully detained.<sup>46</sup> Given current law, one might doubt it ever will.

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42. See *Odah v. United States*, 611 F.3d 8, 13–14 (D.C. Cir. 2010); *Al-Bihani v. Obama*, 590 F.3d 866, 875–76 (D.C. Cir. 2010).

43. *Latif v. Obama*, 666 F.3d 746, 752 n.3 (D.C. Cir. 2011). This claim is at odds with the fact that the government, without prompting by a federal court, has released almost eighty percent of those detained at Guantánamo. See Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 401–04 (2010) (collecting and presenting data in graphical and tabular form). The *Latif* majority misstates the problem by imagining a world with only two categories: proper detentions and “frame[d]” innocents. There is also a category of those who are detained simply in error, and there is no reason to believe that even the optimal approach to battlefield detentions will yield zero erroneous detentions.

44. *Latif*, 666 F.3d at 779 (Tatel, J., dissenting) (quoting *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008)). Judge Tatel, correctly in my view, explains that the *Latif* opinion ends the possibility of “meaningful” review through habeas corpus of Guantánamo detentions. *Id.* There is an intelligence report akin to the one relied on by the *Latif* court for every detainee that remains at the Cuban base. If the invocation of such reports endows the government’s case with a rebuttable presumption, the *Latif* ruling has in effect switched the burden of persuasion in a way that will be almost impossible to overcome. Since the D.C. Circuit had never identified a detainee worthy of release before *Latif*, though, it is possible to posit that the latter simply makes obvious what was previously implicit: detainees always lose.

45. *Almerfedi v. Obama*, 654 F.3d 1, 10 (D.C. Cir. 2011).

46. In a related area of national security law, that court has also taken a narrow view of the permissible bounds of judicial review of orders freezing the assets of alleged terrorists. See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003). But see *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 225–28 (D.C. Cir. 2010) (exercising closer review of the designation of an alleged terrorist organization that had been delisted in Europe and the United Kingdom).

*B. Separation of Powers Arguments for Mandatory Congressional Involvement*

A second line of precedent and scholarship rooted in the Separation of Powers contends that the Constitution mandates congressional involvement in hard decisions about security against terrorism. Legislative involvement does not mean leaving operative control in congressional hands. It is common ground that with the exception of impeachment and disciplining its members, Congress has little independent law-implementation authority. Advocates of Congress do not claim congressional exclusivity in counterterrorism. Instead, they propose that congressional involvement should be a necessary predicate for the legality of security-related actions by the executive. The basic intuition behind this claim is that the more ample deliberation implicit in legislative consideration conduces to wiser and more richly informed policy choices and minimizes the risk of insular cliques capturing and directing government power to their own ends.<sup>47</sup> Two branches, simply put, are better than one.

Two independent lines of reasoning derived from the Separation of Powers support the claims of mandatory congressional involvement. The first presumption is grounded again in a claim about Congress's comparative institutional competence. It was summarized crisply by Justice Souter in a concurrence to the 2004 *Hamdi v. Rumsfeld* decision.<sup>48</sup> In *Hamdi*, the Court confronted conflicting claims about the government's authority to detain a citizen seized in relation to combat operations in Afghanistan.<sup>49</sup> The parties to the case invoked two seemingly inconsistent statutes, the September 2001 Authorization for the Use of Military Force (AUMF)<sup>50</sup> and the 1971 Non-Detention Act,<sup>51</sup> to define the government's detention authority. A plurality of the Court, with Justice O'Connor writing, held that the government's claim of implied authority under the September 2001 authorization prevailed.<sup>52</sup> Justice O'Connor emphasized "that Congress has the authority to determine that certain types of conduct can justify noncriminal detention in wartime, and that Congress had in fact authorized such detentions in the AUMF."<sup>53</sup> Writing for himself and Justice Ginsburg, however, Justice Souter elaborated on the need for more explicit congressional involvement and clearer evidence of legislative consideration of the detention question. He explained that absent such clear evidence, he found the Non-Detention Act to be the more relevant statutory authority.<sup>54</sup> To justify his position, he articulated an account of the

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47. See, e.g., sources cited *infra* in notes 55 and 60.

48. 542 U.S. 507, 539 (2004) (Souter, J., concurring).

49. *Id.* at 510–11 (plurality opinion).

50. Pub. L. No. 107-40, 115 Stat. 224 (2001).

51. 18 U.S.C. § 4001(a) (2006).

52. *Hamdi*, 542 U.S. at 517–19 (plurality opinion).

53. Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1045 (2008).

54. *Hamdi*, 542 U.S. at 542–46 (Souter, J., concurring).



specialization of governmental functions informed by the Constitution's Separation of Powers:

[D]eciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch . . . . Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.<sup>55</sup>

Justice Souter's argument is premised on the empirical generalization that a deliberative multimember body is less likely to overestimate risks and to act precipitously than a lone institutional actor.<sup>56</sup> To buttress that claim, Justice Souter could have added citations from the Federalist Papers, where Madison makes a similar "cooler heads" argument about the Senate,<sup>57</sup> and the fourth Helvidius letter (also by Madison).<sup>58</sup> In the security context, Justice Souter's argument would conduce to a strong clear statement rule. Courts applying such

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55. *Id.* at 545 (Souter, J., concurring). For a scholarly development of this argument, see Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1602–08 (2009); accord GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION 118 (2009) (“[F]idelity to the Constitution requires that we preserve, not abandon, the core principle of checks and balances by working within our system of divided power to meet new challenges through democratic means.”); Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 398 (2008) (making a similar claim on doctrinal grounds); Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547, 573 (2007) (“The past five years have taught the United States a particularly painful lesson in just how counterproductive to its security interests excessive secrecy—and unchecked executive authority—can be in counterterrorism intelligence operations.”).

56. Legislative deliberation, by including new perspectives and thus new information, and by focusing reasoned debate, has other virtues that may conduce to better decisions. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 69–75 (1999) (setting forth virtues of collective deliberation).

57. THE FEDERALIST No. 10, at 126 (James Madison) (Isaac Kramnick ed., 1987) (explaining that in a republic, the legislature would “refine and enlarge the public views by passing them through the medium of a chosen body . . . .”); THE FEDERALIST No. 62, at 366 (James Madison) (Isaac Kramnick ed., 1987) (“The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions . . . .”).

58. PACIFICUS-HELVIDIUS DEBATES, *supra* note 22, at 87 (“In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not the executive department . . . . [T]he trust and the temptation would be too great for any one man . . . .”).

a rule would demand purposeful and unequivocal congressional involvement before endorsing controversial policies that touch on basic entitlements.<sup>59</sup>

The second argument for necessary congressional involvement rests on an image of balance between the two political branches. This argument does not view one branch as better suited to addressing terrorism in the vein of Justice Souter's claim. It rather posits that optimal policy emerges only if both branches are involved in decision making.<sup>60</sup> Justice Blackmun captured the basic intuition of this bilateralism claim when he explained for the Court in *Mistretta v. United States* that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct."<sup>61</sup> They instead created a system "of overlapping responsibility, a duty of interdependence as well as independence" and "differentiated government power."<sup>62</sup> The overlap between branches yields a "truly balanced system" of government.<sup>63</sup> Each governmental decision then draws in diverse branches "with different democratic pedigrees, different incentives, and different interests."<sup>64</sup> This pushes diverse governmental actors with different information and different national constituencies—different "draws" from the same pool of national political preferences—to aggregate information and converge on action supported by a broad, informed public consensus.

The Court has endorsed the proposition that bilateral counterterrorism policy making eases the way to judicial endorsement of policies in several cases. The notion is most clearly articulated in the concurrences of Justice

59. See, e.g., Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 50–56, 75–99 (advocating that courts require clear congressional authorization of actions intruding on constitutional liberties).

60. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 139 (2006) (arguing that courts should preserve the political equilibrium between the political branches); Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL STUD. 189, 192 (2009) ("[L]egislative oversight of executive conduct of war, both its engagement externally and its vigilance internally—is key to the survival of democracy under threat").

61. 488 U.S. 361, 380 (1989).

62. *Id.* at 381; see also *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Separation of powers . . . operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority").

63. *Nixon v. United States*, 506 U.S. 224, 244 (1993) (White, J., concurring) (further noting "the basic principles of checks and balances underlying the Constitution's separation of powers is clear"); see also THE FEDERALIST No. 49, at 314 (James Madison) (Isaac Kramnick ed., 1987) (endorsing the "purpose of maintaining the constitutional equilibrium of the government"); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 275 (1980) (arguing that each branch "has tremendous incentives jealously to guard its constitutional boundaries"). For an insightful critique of balancing arguments in the Separation of Powers context, see M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–57 (2000) (arguing that ideas of balance or separation provide no determinate answer to institutional design questions).

64. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5 (2004).

Breyer and Justice Kennedy in *Hamdan v. Rumsfeld*, in which the Court held that military tribunals established by executive order in November 2001 exceeded the President's congressionally authorized war powers.<sup>65</sup> Justice Stevens's majority opinion in *Hamdan* focused on discord between the presidential military commission system and the statutory requirements of the Uniform Code of Military Justice.<sup>66</sup> But in his concurrence, Justice Kennedy, joined by Justices Souter, Ginsburg, and Breyer, emphasized the libertarian aspiration of the Constitution's structure.<sup>67</sup> Given that design goal, Justice Kennedy explained, the survival of a novel counterterrorism measure challenged in federal court turned on the fact of legislative involvement: "Congress has prescribed these limits [and] Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided."<sup>68</sup> Justice Breyer's concurrence, signed by the same Justices as Justice Kennedy's, was more explicit. Bilateralism, explained Justice Breyer, "strengthens the Nation's ability to determine—through democratic means—how best to [respond to terrorism]."<sup>69</sup> Because "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," judicial enforcement of the Constitution's bilateralism command simply increases the likelihood of informed, effective counterterrorism responses.<sup>70</sup> Use of such a presumption in favor of bilateral political branch action might be thought desirable because it would obviate the need for more mundane but costly statutory or constitutional analysis of the fit between challenged policy and relevant law.

*Hamdan* is not the only time the Court has conditioned endorsement of a counterterrorism policy on congressional involvement. The plurality opinion in *Hamdi v. Rumsfeld* also invoked the functional merits of bilateralism. After finding congressional support for the government's claimed detention authority, Justice O'Connor encouraged bilateral authorization by raising the possibility of "appropriately authorized and properly constituted" procedures for fulfilling due process obligations.<sup>71</sup> That is, congressional sanction would provide a safe harbor for more expansive detention measures in the future.

In sum, judges have mined structural constitutionalism for presumptions that facilitate adjudication of statutory and rights-based challenges to novel counterterrorism measures. Such presumptions can reduce decision costs.

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

66. *Id.* at 624–25 (identifying statutory standards).

67. *Id.* at 638 (Kennedy, J., concurring) ("Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid."). It seems likely that Justice Stevens agreed with these sentiments.

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

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

70. *Id.*

71. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion).

Judges need only know how a policy was adopted, not how closely it fits with a statute or constitutional provision's command. In this way, the Separation of Powers casts a larger shadow in counterterrorism jurisprudence than in other domains of law and policy.

## II.

### THE INTERNAL ECOLOGY OF THE BRANCHES AND COUNTERTERRORISM

But do the presumptions of structural constitutionalism derived from eighteenth-century political theory and applied in *HLP*, *Omar*, *Hamdi*, and *Hamdan* (among other cases) hold water? Are they sufficiently empirically robust today to bear the weight the Justices and judges place upon them? The balance of this Article argues that structural constitutional presumptions cannot satisfy the demands imposed upon them by the federal bench in the counterterrorism domain.

Drawing on political science and empirical research, this Part argues that the *internal ecology* of each branch undermines the empirical assumptions upon which such presumptions rest. To see the relevance of internal institutional ecology, notice first that the Separation of Powers presumptions isolated in Part I assume that the political branches are entities with stable, durable, and unitary characteristics. But neither Congress nor the executive is unitary.<sup>72</sup> Congress has two houses, numerous committees, and operates under the shadow of the President's veto. The executive too contains "a host of different organizational structures,"<sup>73</sup> including departments, agencies, boards, commissions, advisory panels, and task forces.<sup>74</sup> Nor is the net operation of these multiple components stable through time or across different policy functions. An analysis of each branch's national security decision-making apparatus demonstrates that the attributions of executive speed or congressional deliberation upon which structural constitutional presumptions hinge are consequently contingent and empirically weak.

This argument draws in an important way upon an insight first embodied in the "general theorem of the second-best" formulated by R.G. Lipsey and Kelvin Lancaster. This theorem states, "[I]f there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Paretian conditions [i.e., the circumstances that generate Pareto optimal outcomes], the other Paretian conditions, although still attainable, are, in general, no longer desirable."<sup>75</sup> The theorem shows that once a system peels

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72. The observation was made of Congress first in the classic article by Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

73. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3168 (2010) (Breyer, J., dissenting).

74. For a partial accounting, see *id.* at 3184–214.

75. R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956). An allocation of resources or rights is optimal in the Paretian sense if there exists

away from the ideal on one axis, and thereby is second-best, welfare cannot be maximized by hewing to remaining first-best conditions.<sup>76</sup> As a result, a failure to optimize one variable in a complex system means that other variables may need to take suboptimal values in order to secure a desirable result. My aim in this Part is to apply that theorem of the second-best to structural constitutional presumptions as follows. Judicial opinions about counterterrorism implicitly assume that the branches are first-best exemplars. But if branches do not live up to idealized standards, the theory of the second-best suggests that predictions based on the assumption of first-best conditions will be untrustworthy. There are systematic deviations from the ideals imagined in the Separation of Powers theory in our political world. It follows that inferences drawn on a first-best model of political institutions cannot stand.

This second-best theorem also has implications for comparative claims of institutional competence. It undermines claims that one or the other branch has a clear comparative advantage based on institutional competence when assumptions of institutional optimality do not hold. When there is wide variance from institutional ideals on all sides, it is far from clear that comparative institutional advantage is a reliable heuristic when gauging the merits of disputed policy decisions.

#### *A. Executive (In)action Against Terrorism*

An analysis of institutional competence arguments on behalf of the executive branch should start with the observation that the executive is less an “it” than a “they.” What is typically characterized as the most unitary and single-minded of the branches is in fact diverse and plural. Abstractions about the executive’s speed and efficiency obscure the complexity of the executive’s actual operation, and hide details that undermine the President’s claim to functional primacy.

Observation of this internal variety yields two grounds for rejecting a general logic of executive primacy. The first concerns that part of the administrative state dealing with terrorism. Those agencies are structured as political compromises by happenstance configurations of politics at their birth. Their subsequent development is path dependent and sclerotic. It is unlikely that they will develop, even over time, into optimal tools against organizations such as al-Qaeda. Second, because the tools available to the President to resolve institutional shortfalls are imprecise, costly, and blunted by trade-offs between expertise and control, the occupant of the White House is not well

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no other feasible allocation in which all individuals are at least as well-off, and at least one is strictly better off, than they were initially.

76. For applications of the theory in legal academia, see Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 7, 17–23 (2009) [hereinafter Vermeule, *Foreword*]; Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 421 (2003) [hereinafter Vermeule, *Hume’s Second-Best*].

situated to identify and resolve agency-level design problems.<sup>77</sup> Simply put, sometimes the executive will get it right, sometimes Congress will—and sometimes they will both err gravely.

### *1. The Origins of Security Agencies*

The executive includes an embarrassment of agencies and departments tasked with counterterrorism missions, from the Central Intelligence Agency (CIA) to the Department of Homeland Security (DHS). The embedded structure and default modes of operation of these agencies are a function of historically situated political bargains channeled through Congress,<sup>78</sup> which is usually instrumental in designing agencies.<sup>79</sup> But legislators work with incomplete information and perverse incentives. As a result, agencies are highly unlikely to emerge well fashioned from the legislative lathe. If agency structures and mandates reflect legislated deals between historically situated interest groups and bureaucratic factions, each focused on parochial, often time-bound, concerns, the resulting institutional frameworks will not be “rationally designed” but rather “reflections of their political environment.”<sup>80</sup> To be sure, bargaining may sometimes throw up a stable, desirable equilibrium by happenstance. Federal Reserve independence, for example, was a happy result of interest-group dynamics in 1913.<sup>81</sup> But if the Federal Reserve’s design is successful—although this is now contested—it was by mere fortuity.<sup>82</sup> Congress is not necessarily well suited to craft the bureaucracy that is systematically optimal.

In the counterterrorism domain, a consequence of limited congressional capacity is that agencies function in ways their designers neither intend nor foresee. The result is a mix of foreordained failures and unexpected, if minor, successes. Consider one unsought success, the National Security Council (NSC), which is currently the interagency space for formulating national

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77. Confronted with second-best problems, political scientists have argued that it is sometimes possible to identify reforms that generate stable benefits in different institutional settings. Robert E. Goodin, *Political Ideals and Political Practice*, 25 BRIT. J. POL. SCI. 37, 55–56 (1995). Resort to the President as a “fixer” of agency-level problems is a solution of this kind.

78. See PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 105 (2004) (noting that agencies are structured to “serve the interests of those who created” them).

79. Usually but not always. See William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095 (2002) (analyzing creation of executive branch agencies by unilateral presidential action).

80. AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 8, 42 (1999); cf. Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992) (suggesting that Congress pursues policy goals through agency design, for example, by deciding whether to create single- or multi-industry regulatory agencies).

81. See Gyung-Ho Jeong et al., *Political Compromise and Bureaucratic Structure: The Political Origins of the Federal Reserve System*, 25 J.L. ECON. & ORG. 472 (2008).

82. For a helpful introduction to current debates on the role of the Federal Reserve, see DAVID WESSEL, *IN FED WE TRUST: BEN BERNANKE’S WAR ON THE GREAT PANIC* (2009).

security policy. The NSC was created by the 1947 National Security Act, but not on the basis of any design goal clearly formulated *ex ante*.<sup>83</sup> The Navy first floated the idea of the NSC in legislative negotiations as a device to stave off consolidation with the War Department.<sup>84</sup> A reluctant President Truman first agreed to inclusion of the NSC in the legislation, but then turned aside the Navy's objections to unification.<sup>85</sup> As a result, while the NSC remained in the final bill, it was stripped of its intended function, and left with only a "purely advisory" role.<sup>86</sup> What is now the central organizing structure of national security law<sup>87</sup> was in its origins a vestigial legacy of internecine interagency squabbling. The NSC is a success despite, not because of, its original design.

By contrast, another product of the 1947 National Security Act, the CIA, "was born with crippling defects" as a result of fierce opposition from the Department of State and the Pentagon.<sup>88</sup> It lacked a formal charter and for two years received no appropriations.<sup>89</sup> The drafters of the 1947 Act never intended to create a powerful intelligence agency. To the contrary, the Act was drafted precisely to preserve the autonomy of each armed service's freestanding intelligence operations and to tack onto them a "weak" coordinating body—the CIA.<sup>90</sup> Paradoxically, the CIA grew in significance because the Act did not clearly delimit its responsibilities. This lacuna empowered presidents to employ the agency in ad hoc clandestine actions.<sup>91</sup>

And yet, in a further irony, the Agency's record proved dismal along many important metrics. It "failed daily" in its efforts to recruit Cold War-era human sources<sup>92</sup> (a failure that seems to have persisted with respect to al-

83. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified in scattered portions of the U.S.C.); see JAMES E. BAKER, *IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES* 105–10 (2007) (describing the National Security Council's functions). The term NSC may be confusing because it can refer to cabinet officers who staff that body, to the larger group of agency and department heads that meet with the cabinet officials, or even to the bureaucrats who make up the staff of the "organization by which the various views and capabilities of the U.S. government are reconciled, harmonized, and, ideally, knit together to create effective action." DAVID J. ROTHKOPF, *RUNNING THE WORLD: THE INSIDE STORY OF THE NATIONAL SECURITY COUNCIL AND THE ARCHITECTS OF AMERICAN POWER*, at xiv (2005). I mean to reference all three aspects of the NSC in this discussion.

84. ZEGART, *supra* note 80, at 57–62.

85. *Id.*

86. *Id.* at 67. Presidential treatment of the NSC subsequently veered wildly between ignoring it (Truman) to co-opting it (Eisenhower) to circumventing it but using its space as a White House foreign policy team (Kennedy). *Id.* at 79–84; ROTHKOPF, *supra* note 83, at 57 (arguing that the NSC was initially "seen as unwieldy and its role was ill defined").

87. See ROTHKOPF, *supra* note 83, at 29 ("[T]he National Security Council has come to be the hub of all U.S. international engagement . . .").

88. TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* 24 (2007).

89. *Id.* at 25.

90. ZEGART, *supra* note 80, at 165, 180–81.

91. See *id.* at 187–90, 232. The Agency filled an "ecological niche[]" created by the White House's need for covert action, and thereby flourished. PIERSON, *supra* note 78, at 73.

92. WEINER, *supra* note 88, at 579.

Qaeda) and otherwise was unable to supply reliable intelligence on key issues.<sup>93</sup> Both the successful growth and the mission failures of the Agency can arguably be traced back to an “initial hardwiring”<sup>94</sup> that envisaged a very different path.

The CIA’s history illustrates yet another salient institutional constraint on executive effectiveness: as an agency invests in expertise and turf battles, it becomes more set in its ways and hence more reluctant to reorient toward new problems and to respond to new policy challenges. The CIA’s early history was thus characterized by path-dependency-creating positive feedback loops leading to inflexible and inefficient investments.<sup>95</sup> Having lavished attention on static, state-based enemies for decades, the post–Cold War CIA lacked linguistic skills, analytic capacity, and aptitude to address new threats in the more fragmented international environment. Additionally, security threats in the last decade differ critically from previous state-based threats because they evolve much faster.<sup>96</sup> Worse, some have argued, Cold War intelligence investments in anti-Soviet movements provided subsequent infrastructure for terrorist groups in ways that U.S. intelligence did not apprehend or act to forestall.<sup>97</sup> Agency personnel had sunk effort and time into developing skills, networks, and assets that were not merely irrelevant to new security challenges but positively detrimental. These sunk costs distorted the allocation of subsequent investments.

Strenuous efforts by political appointees to change the Agency’s orientation in light of new threats failed. For example, in the 1990s the Director of Central Intelligence (DCI), George Tenet, pushed for greater attention to counterterrorism.<sup>98</sup> He failed to overcome internal resistance. His promotion of greater interagency cooperation also foundered. Agency employees, for example, refused to give up identification badges issued by their old agencies

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93. See RHODRI JEFFREYS-JONES, *THE CIA AND AMERICAN DEMOCRACY* 118 (3d ed. 2003) (describing the Agency as “accident-prone” and hobbled by faulty reasoning in the 1960s); ZEGART, *supra* note 80, at 190–95; see also SHANE HARRIS, *THE WATCHERS: THE RISE OF AMERICA’S SURVEILLANCE STATE* 95–98 (2010) (documenting one example of legislative skepticism of the CIA’s intelligence).

94. Macey, *supra* note 80, at 101.

95. For background on positive feedback loops, see PIERSON, *supra* note 78, at 17–18. For example, one leading counterterrorism specialist in the Pentagon later reflected candidly that “[e]ven at the height of the terror wave in the eighties he had never contemplated a massive assault on U.S. soil.” HARRIS, *supra* note 93, at 146.

96. THOMAS FINGAR, *REDUCING UNCERTAINTY: INTELLIGENCE ANALYSIS AND NATIONAL SECURITY* 30 (2011).

97. See generally IAN JOHNSON, *A MOSQUE IN MUNICH: NAZIS, THE CIA, AND THE RISE OF THE MUSLIM BROTHERHOOD IN THE WEST* (2010) (arguing that post–World War II recruitment of Muslim soldiers from Central Asia into anti-Communist efforts morphed into more general support of the Muslim Brotherhood).

98. AMY B. ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11*, at 80–83 (2007).



in favor of a system-wide one.<sup>99</sup> Tribal pride beat out systemic efficacy. The net result of the agency's "bounded rationality" and "structural secrecy" was to block most of Tenet's efforts to revise "structures, habits, cultures, and procedures [that] had grown impervious to change after decades of fighting the Cold War."<sup>100</sup> The agency remained focused on older threats as al-Qaeda metastasized.<sup>101</sup> In the years after Bin Laden fled from Sudan to Afghanistan to plot first the attack on the USS *Cole* and then the 9/11 attacks, "policy makers in the Clinton and Bush administrations didn't have any overarching strategy for Afghanistan."<sup>102</sup> In the immediate run up to the attacks on New York and Washington, the executive branch was "strangely somnambulant" about the threat from al-Qaeda, and still fixated on state-based threats.<sup>103</sup> Even after 9/11, although the CIA and the FBI claimed to change gears quickly,<sup>104</sup> subsequent studies have identified a persisting "inability to respond creatively to failures."<sup>105</sup>

Recent institutional reforms have had equally ambiguous outcomes. There remain "political constraints on reorganizing the intelligence community"<sup>106</sup> that result in second-best institutional realities. The 2004 reorganization of the intelligence services, for example, failed to address excessive interservice diffusion of intelligence functions because of Defense Department opposition.<sup>107</sup> The same Act failed to resolve interagency conflicts between the CIA and FBI.<sup>108</sup> Even after the Act's passage, the Pentagon still actively resisted coordinating efforts by the new Director of National Intelligence (DNI).<sup>109</sup> That new coordinating job was in any event compromised at birth by

99. *Id.* at 82.

100. *Id.* at 90–91, 99–100; *see also* LOCH K. JOHNSON, *THE THREAT ON THE HORIZON: AN INSIDE ACCOUNT OF AMERICA'S SEARCH FOR SECURITY AFTER THE COLD WAR* 8 (2011) ("In a new, uncertain world, the CIA seemed to have lost its way."); *id.* at 366 (noting failure of intelligence reform efforts in the late 1990s).

101. On the eve of 9/11, the CIA's al-Qaeda unit had been relegated to the basement, WEINER, *supra* note 88, at 483, and there was no system-wide organization focused on counterterrorism. Thomas H. Hammond, *Why Is the Intelligence Community So Difficult to Redesign? Smart Practices, Conflicting Goals, and the Creation of Purpose-Based Organizations*, 20 *GOVERNANCE* 401, 419 (2007).

102. PETER L. BERGEN, *THE LONGEST WAR: THE ENDURING CONFLICT BETWEEN AMERICA AND AL-QAEDA* 41 (2011).

103. *Id.* at 43. To be precise, most of Bergen's criticism is directed at the political leadership, and not the agencies. *See id.* at 47–50 (documenting George Tenet's failed efforts to motivate White House action in early 2001).

104. ZEGART, *supra* note 98, at 175–76.

105. ROBERT JERVIS, *WHY INTELLIGENCE FAILS: LESSONS FROM THE IRANIAN REVOLUTION AND THE IRAQ WAR* 178 (2010).

106. Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 *CALIF. L. REV.* 1655, 1701 (2006).

107. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat. 3638 (2004).

108. *See* RICHARD A. POSNER, *COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS* 21–22, 33–69, 108 (2007).

109. ZEGART, *supra* note 98, at 184.

disagreements between the House and the Senate, with House leaders protesting that Senate-driven reorganization under a strong DNI would imperil intelligence support for the military.<sup>110</sup> Paradoxically, the 2004 reform may have made failures to interdict terrorism attempts more likely. It set in motion an “intramural controversy” between DNI Dennis Blair and DCI Leon Panetta that displaced effort and attention from external threats to internal turf wars.<sup>111</sup> “[O]verlapping responsibility” for “all-source analysis on terrorism” hence did not improve threat prediction.<sup>112</sup> What it did instead was redirect White House energies away from threat assessment and toward bureaucratic infighting.<sup>113</sup>

The ambiguous effect of post-9/11 reorganizations is also evident in the electronic surveillance domain, where initiatives to improve security along one dimension have diminished security along other dimensions. Recent federal law enforcement efforts to amplify its capacity to intercept communications on the Internet have, according to some critics, the potential to create a greater risk of breaches and exfiltration of private internet security.<sup>114</sup> This apparently underappreciated risk-risk trade-off arose because no one agency has specific statutory responsibility for systemic security.<sup>115</sup> This dynamic shows how a dearth of coordination can contribute to cracks in national security.

Similarly, the 2004 legislative reorganization creating the Department of Homeland Security (DHS) did not result in clear efficiency gains and may even have had perverse and harmful policy effects.<sup>116</sup> Reform efforts that yielded the DHS were animated by the White House’s “domestic policy priorities independent of homeland security” and by legislators’ desire to expand committee jurisdictions.<sup>117</sup> A deregulation-focused White House pushed to bundle nonsecurity functions into DHS in the hope of using a departmental

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110. Patrick C. Neary, *Intelligence Reform, 2001–2009: Requiescat in Pace?*, 54 *STUD. INTELLIGENCE* 1, 2–3 (2010); see also James Kirchick, *Turf Warrior, Can Dennis Blair Save U.S. Intelligence*, *NEW REPUBLIC*, Jan. 25, 2010, at 12. For another example of interagency conflict, see HARRIS, *supra* note 93, at 212–13.

111. See Kirchick, *supra* note 110, at 1.

112. SUMMARY OF THE WHITE HOUSE REVIEW OF THE DECEMBER 25, 2009 ATTEMPTED TERRORIST ATTACK 4 (2010), [http://www.whitehouse.gov/sites/default/files/summary\\_of\\_wh\\_review\\_12-25-09.pdf](http://www.whitehouse.gov/sites/default/files/summary_of_wh_review_12-25-09.pdf) [hereinafter WHITE HOUSE REVIEW] (“[T]he overlapping layers of protection within the [counterterrorism] community failed to track [the] threat in a manner sufficient to ensure all leads were followed . . .”).

113. See Greg Miller, *White House Intervenes as Intel Directors Bicker*, *CHI. TRIB.*, Dec. 29, 2009, at C13 (noting White House resolution of a dispute over the hierarchy of spies in foreign countries).

114. See SUSAN LANDAU, *SURVEILLANCE OR SECURITY?: THE RISKS POSED BY NEW WIRETAPPING TECHNOLOGIES* 243–48 (2010).

115. *Id.* at 245.

116. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

117. Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 *STAN. L. REV.* 673, 678, 693–94 (2006).

“revenue neutral[ity]” rule to whittle away at those functions.<sup>118</sup> While President Bush’s deregulatory agenda played a catalytic role in the reorganization, he was only partially successful in securing his goals. The Republican-controlled Congress resisted presidential proposals to control agency transfers, to redistribute appropriations, and to appoint assistant secretaries without Senate confirmation.<sup>119</sup> DHS’s creation nevertheless changed the mix of policy tools used to address terrorism, albeit in ways that reflect the balance of power at the time of the department’s creation rather than any theory of optimal security agency design. Government components included in the new DHS were pressed toward a counterterrorism focus.<sup>120</sup> Agencies escaping consolidation, including the FBI and the Defense Department’s Northern Command, maintained a more varied mandate.<sup>121</sup> The match between agency and function was, in the end, the fortuitous result of politicking at the time of the 2004 legislation’s enactment and not deliberate design.

To summarize, the DHS’s and other security agencies’ development trajectories suggest that agency structure and jurisdiction are side effects of exogenous political agendas. It is only by happenstance that such dynamics can on rare occasions produce agency structures optimally designed for counterterrorism.<sup>122</sup>

## 2. *The Limits of Presidential Control*

All is not lost for claims of executive primacy. The executive is a hierarchy. At its apex sits the President, who is believed to have broad authority to fix problems arising in the bureaucracy below.<sup>123</sup> Even if agencies are flawed at birth, the vesting of unitary control in the Oval Office should in theory enable the President to reform and improve agency structure. In this vein, some scholars have argued that the President has extensive tools of “supervision” that allow the White House to set agencies’ policy agendas and convert “administrative activity into an extension of [the presidential] policy and political agenda,”<sup>124</sup> especially in the absence of congressional competition.<sup>125</sup>

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118. See Benjamin H. Friedman, *Managing Fear: The Politics of Homeland Security*, in *TERRORIZING OURSELVES: WHY U.S. COUNTERTERRORISM POLICY IS FAILING AND HOW TO FIX IT* 185, 207 (Benjamin H. Friedman et al. eds., 2010).

119. Cohen et al., *supra* note 117, at 697.

120. See, e.g., *id.* at 736–37 (examining this effect with respect to the Coast Guard).

121. Friedman, *supra* note 118, at 208.

122. Cf. Cohen et al., *supra* note 117, at 712 (arguing that legislative design ends in “legal mandates [that] are often, perhaps even typically, not designed to succeed at achieving their stated goals”); *id.* at 753–54 (doubting cost-benefit justifications for DHS).

123. See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (arguing in favor of broad presidential power to control the administration).

124. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2282, 2285–90 (2001); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94

Additionally, political incentives will align to promote vigorous use of such tools because presidents take a greater share of blame or praise for national performance than other elected actors and so take a more national perspective.<sup>126</sup> Even if presidents are constrained by crowded agendas, the Oval Office is therefore thought to be “in the best position” in terms of both incentives and tools to mitigate agency costs.<sup>127</sup>

But there are a number of problems with this account of presidential primacy. A threshold problem with claims on behalf of presidential control is that they may be flawed on technical, legal grounds. Congress may have crafted a framework statute in ways that render presidential control over policy decisions ambiguous. There is ongoing debate, for example, as to the scope of presidential supervisory authorization when Congress drafts a statute to assign a task to a specific department, agency, or official.<sup>128</sup> However this debate is resolved, it is sufficient to observe here that legal uncertainty may create constraints on presidential control.

More generally, while the vesting of unitary control in the Oval Office could in theory enable the President to reform and improve agency structure, the linkage between the political leadership in the White House and the bureaucracy is not without friction. The bureaucracy is an agent of the President, and in any agency relationship there will be slack between the principal and the agent.<sup>129</sup> As a result, when acting through the bureaucracy the

COLUM. L. REV. 1, 102–03 (1994) (making a “structural argument” for the unitary executive); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 185–88 (1986) (describing historical genesis of presidential review).

125. When both Congress and the President are competing for agency control, agencies have greater discretion. See Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 143, 162 (1996).

126. Kagan, *supra* note 124, at 2310–11; Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 11 (1994). For literature challenging this assumption, see *infra* text accompanying note 221.

127. Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 768 (1984).

128. Compare Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006) (arguing against the “recurring claim that statutes conferring power on executive officials should be read to include the President as an implied recipient of authority”), with Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 991–94 (1993) (defending the view that the President retains constitutional authority to substitute his or her judgment for judgment of executive official delegated authority by Congress, even when Congress prohibits presidential intervention). Many important national security initiatives have been taken without a clear statutory allocation of authority to the White House. See, e.g., Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918, 918 (2002), *reprinted in* 10 U.S.C. § 801 note at 346 (2006) (establishing military tribunals, claiming authority “as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution . . . and sections 821 and 836 of title 10, United States Code” (citation omitted)).

129. Agency costs arise when a task is delegated to an agent for which care or effort is required, and for which the principal can observe outcomes, but not the agent’s level of care or effort.

President cannot obtain the speed and decisiveness of executive action without paying agency costs. In practice, presidential control is further limited by a trade-off between control and expertise.<sup>130</sup>

Presidents have two main options to control agency costs. They can either centralize power by “shift[ing] the locus of effective decisionmaking authority” up to the White House,<sup>131</sup> or they can “politicize” agencies using their appointment power, at least to the extent Congress has not insulated the agency.<sup>132</sup> Both mechanisms, of course, assume presidents have sufficient political capital, although that is hardly a given.<sup>133</sup>

A threshold problem for presidents in overcoming agency costs in the counterterrorism domain is that they have limited tools at their disposal. Consider centralization first. The instruments used to centralize control in the White House are less powerful in the national security domain than in other policy areas. White House control of most agency policy is centralized in Office of Management and Budget (OMB) review of regulations.<sup>134</sup> OMB review, though, does not touch many security matters.<sup>135</sup>

Instead, the President relies on an Assistant to the President for Homeland Security and Counterterrorism.<sup>136</sup> This reliance on a personal presidential

If outcomes are imperfectly correlated with care and effort, the agent can exert suboptimal efforts or extract rents. Eric A. Posner, *Agency Models in Law and Economics*, in *CHICAGO LECTURES IN LAW AND ECONOMICS* 225 (Eric A. Posner ed., 2000).

130. See DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997*, at 29–30 (2003) (identifying possible trade-off). A further source of agency costs is inattention by agency officials to commands in the form of laws or internal instructions. See JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION* 165 (3d ed. 1984) (noting that “‘street-level’ bureaucrats are notorious for being too busy coping with their day-to-day problems to recite to themselves the policies they are supposed to apply”); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1261–62 (2006). This observation raises questions about the efficacy of any system of formal rules as an instrument of internal administrative control.

131. Moe & Wilson, *supra* note 126, at 18; see also DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 30–42 (2008) (cataloguing forms of political control).

132. Congress will insulate an agency through constraints on presidential removal during periods of divided government when Congress expects that a hostile President will remain in office for some significant time. LEWIS, *supra* note 131, at 49–55, 68–69.

133. Cf. TIMOTHY NAFTALI, *BLIND SPOT: THE SECRET HISTORY OF AMERICAN COUNTERTERRORISM* 315–16 (2005) (emphasizing political constraints on President Clinton’s ability to respond aggressively to al-Qaeda).

134. Kagan, *supra* note 124, at 2281–309 (describing OMB review in Clinton years); see also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 *COLUM. L. REV.* 1749, 1763–64 (2007); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *COLUM. L. REV.* 1260, 1263–68 (2006) (documenting history of presidential review).

135. See Exec. Order No. 12,866, §§ 2(b), 3(d)(2), 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2006) (“Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services” are excluded from OMB review.).

136. See, e.g., *WHITE HOUSE REVIEW*, *supra* note 112, at 1.

envoy rests on Cold War foundations.<sup>137</sup> Since the Eisenhower administration, presidents have placed confidants in assistant positions as a personalized mechanism for securing information and exercising control over national security agencies.<sup>138</sup> White House control via formal OMB review, though, is more potent than personalized channels. OMB review provides regularized and predictable screening of agency decisions on behalf of the White House, rather than mere ad hoc intrusion based on periodic political pressure.<sup>139</sup> The staggering volume of intelligence—“some 50,000 separate serialized intelligence reports under 1,500 titles” annually<sup>140</sup>—also makes it hard to see how a personalized oversight structure could ever be even remotely effective in ensuring that all items of importance (and only items of real importance) reach the Oval Office.

Even if more rigorous centralization were available (for example, by creating a “security OMB”), it is not clear presidents would seek it out. Although presidents sometimes benefit by controlling agencies, they also benefit from the possibility of denying responsibility for agency activities that violate federal law or that fail.<sup>141</sup> Implementing covert CIA plans in the Cold War, agencies thus “concealed their programs from those in higher authority” to minimize these political costs.<sup>142</sup> It is unlikely presidents would wish to maximize their control over security agencies given such downside risks. The optimal executive structure, from the perspective of the Oval Office, likely includes some agency insulation to vest the White House with plausible deniability.

Gains from centralization are further constrained because presidents face “team production” problems with respect to national security agencies that limit their ability to identify and remedy failing system components.<sup>143</sup> That is, security policy emerges from interactions between multiple agencies with

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137. See National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified at 50 U.S.C. § 401 (2006)); ZEGART, *supra* note 80, at 81–85.

138. ZEGART, *supra* note 80, at 80–85.

139. Policy makers are often better off if they are able to promulgate rules rather than engage in ad hoc policy direction. Finn E. Kydland & Edward C. Prescott, *Rules Rather Than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 473–74 (1977).

140. DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* 80 (2011).

141. For a summary of the historical evidence that presidents during the Cold War sought such plausible deniability, see FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 37–43 (2007).

142. S. REP. NO. 94-755, *FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES*, BOOK 1, at 11 (1976).

143. Team production problems arise when multiple agents, each with fixed compensation, are assigned a single task; individual contributions cannot be recognized, and compensation depends on net effort. See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779–81 (1972).

overlapping tasks of collection, assessment, coordination, and analysis.<sup>144</sup> It is hard to monitor and motivate appropriately all participants in this process. The cacophonous overlap of national security agencies resists consolidation or coordination. For example, before a Christmas 2009 attempt to down a U.S.-bound flight, both the CIA and the National Counterterrorism Center (NCTC) conducted relevant threat analysis.<sup>145</sup> While such “intentional redundancy” can reduce the risk of policy failure,<sup>146</sup> it also thins accountability and makes it more difficult for the President to know which agency to blame when matters go awry. Studies of the national security bureaucracy further suggest that the sheer complexity of agency design means that officials producing intelligence “are not fully in control of program budgeting” and are “never held accountable for failures in intelligence production.”<sup>147</sup>

Additionally, using politicization as a tool to control security agencies can only be employed at a price. The use of political appointments inevitably removes agency discretion to stray from White House preferences. Eliminating such discretion decreases the incentives of agencies to acquire information and take policy initiatives.<sup>148</sup> Political appointees, moreover, “reduce overall bureaucratic competence.”<sup>149</sup> One much-studied example of an agency in which presidential control was seemingly inversely correlated to expertise is the Federal Emergency Management Agency, a highly politicized agency under the second President Bush that was widely condemned for its performance during Hurricane Katrina.<sup>150</sup> Another example from the counterterrorism domain is the CIA. A 2004 effort by President George W. Bush to exercise closer control of the CIA through the appointment of former Congressman Porter Goss led to the exit of “almost every one of the CIA’s most senior officers” and “ferocious”

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144. See, e.g., DONALD F. KETTL, *SYSTEM UNDER STRESS: HOMELAND SECURITY AND AMERICAN POLITICS* 39 (2d ed. 2007) (“[T]he federal government [has] extraordinary expertise, but that expertise [is] highly compartmentalized.”). Team production dilemmas within government are described in Moe, *supra* note 127, at 750–51, 762–64 (noting that in government, the usual market mechanism of using the residual rents that are ordinarily produced through market transactions to motivate monitoring will not work because in government “there is no residual in the ordinary sense of the term” and “slack is not a functional substitute for the economic residual”).

145. See WHITE HOUSE REVIEW, *supra* note 112, at 3.

146. *Id.*

147. WILLIAM E. ODOM, *FIXING INTELLIGENCE: FOR A MORE SECURE AMERICA* 86–87 (2d ed. 2003); see also PRIEST & ARKIN, *supra* note 140, at 85 (“[W]asteful redundancy is endemic in Top Secret America . . . cultivated by the bureaucratic instinct that bigger is always better, and by the speed at which big departments like defense allowed their subagencies to grow.”).

148. See Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1, 3, 27 (1997).

149. David E. Lewis, *Testing Pendleton’s Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1074, 1084–86 (2007).

150. LEWIS, *supra* note 131, at 170 (finding both less skilled management and “hidden effects on the morale, tenure, and incentives of career managers” in FEMA due to politicization).

internal resentment.<sup>151</sup> Such internal resistance is expensive for the White House. “[B]ureaucratic expertise is endogenous, costly, and relationship specific”: it will be developed only when government induces its agents to invest in relationship-specific skills by granting job security and “some measure of control.”<sup>152</sup> Efforts at reining in the bureaucracy, in short, risk destroying the very expertise the President seeks to control.

Hostile agencies can also raise the price of both centralization and politicization by engaging in selective leaking to Congress and the press to undermine presidential agendas.<sup>153</sup> National security agencies have a storied record of resisting political appointees’ control with selective disclosures.<sup>154</sup> Most presidents anticipate such agency pushback against centralization or politicization efforts and trim their sails accordingly.<sup>155</sup> For this reason, de facto agency independence may often be the equilibrium outcome in the national security domain.

Limits to centralization and the trade-offs implicit in politicization have frustrated presidents for decades. As one scholar has noted, “no modern president has been fully satisfied with his institutional resources in national security policy. Whether in gathering information, analyzing and presenting policy options, or implementing particular programs, national security agencies appear to frustrate chief executives more than they please.”<sup>156</sup> There is no reason to expect departures from this pattern now. Presidential control, in short, is no panacea for the limits of agency design. To the contrary, it may be a source of additional frictions on effective counterterrorism policy.

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151. WEINER, *supra* note 88, at 502; *see also* LEWIS, *supra* note 131, at 92–93 (noting decline in morale and exodus of significant numbers of middle management). Goss, in any case, failed, lasting less than two years. *See* POSNER, *supra* note 108, at 19.

152. Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 874, 886 (2007).

153. *See, e.g.*, WEINER, *supra* note 88, at 503–04.

154. For example, the CIA resisted proposed reforms by President Carter’s outsider nominee for DCI, Stansfield M. Turner, who later commented that “he had been outmaneuvered by a bureaucracy that often treats outsiders like a hostile virus.” Mark Mazzetti, *A Difficult Road Awaits Panetta at the CIA*, N.Y. TIMES, Jan. 9, 2009, at A19. President Obama’s initial nominee, Leon Panetta, another outsider, faced similar resistance. *Id.*; *see also* Mark Mazzetti, *Obama Seeks to Mend Party Rift over Panetta*, N.Y. TIMES, Jan. 7, 2009, at A15 (“Deciding whether the director of the C.I.A. should be chosen from within the agency or installed from outside has confounded American presidents since the agency was established after World War II as the successor to the Office of Strategic Services.”).

155. Moreover, the choice between politicization and centralization will depend in part on the President’s relationship with Congress, and not solely on which option is more efficient. *Cf.* LEWIS, *supra* note 131, at 96 (noting that the costs of politicization differ in divided and unified government).

156. ZEGART, *supra* note 80, at 46.



### 3. *The Price of Executive Primacy*

Executive primacy has surprising costs. Evidence suggests that analytic failures are common in federal counterterrorism policy.<sup>157</sup> Much effort is currently wasted or misdirected, while resources and information are poorly deployed. Consider as illustration the Christmas 2009 attempt by Nigerian national Umar Farouk Abdulmutallab to explode a bomb aboard Northwest Airlines Flight 253 from Amsterdam to Detroit. Two months earlier, Saudi officials had warned U.S. authorities that an attack of the type Abdulmutallab tried was being planned in Yemen.<sup>158</sup> Weeks before the attempt, Abdulmutallab's father approached the CIA in Lagos to warn them of his son's links to Yemeni terrorist groups.<sup>159</sup> Nothing was done. Subsequent presidential and congressional inquiries found an "overall systemic failure": intelligence agencies had "dots [that] were never connected."<sup>160</sup> Far from an isolated incident, this failure appears symptomatic. Five years beforehand, the National Commission on the Terrorist Attacks upon the United States reached a similar diagnosis respecting 9/11. It found that "no one was firmly in charge of managing [threat information] . . . and able to draw relevant intelligence from anywhere in the government" about the 9/11 attacks.<sup>161</sup> A similar failure of analysis preceded the deadly November 5, 2009, shootings at Fort Hood, Texas,<sup>162</sup> where the military intelligence unit tasked with tracking internal threats focused instead on student associations<sup>163</sup> that were more readily analyzed but ultimately harmless. It is clear, therefore, that the executive branch has not wholly heeded the 9/11 Commission's warnings.

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157. Unsurprisingly, veterans of the intelligence community contest this assessment. See FINGAR, *supra* note 96, at 3, 9 (contesting ascriptions of intelligence failure).

158. In an October 2009 White House briefing, Saudi intelligence head Muhammad bin Nayef raised concerns about the growing al-Qaeda threat from Yemen, specifically warning of bombs sewn into clothing. Mark Hosenball et al., *The Radicalization of Umar Farouk Abdulmutallab*, NEWSWEEK, Jan. 11, 2010, at 37. Intelligence agencies failed to take this as a basis for additional aviation scrutiny. Karen DeYoung & Michael A. Fletcher, *U.S. Was More Focused on al-Qaeda's Plans Abroad Than for Homeland, Report on Airline Bomb Plot Finds*, WASH. POST, Jan. 8, 2010, at A1.

159. James Gordon Meek, *Failure to Communicate. Bumbling Counterterror Agency Never Tried to Follow Up on Clues Month Before Bomb Try*, N.Y. DAILY NEWS, Dec. 31, 2009, at 5.

160. WHITE HOUSE REVIEW, *supra* note 112, at 4; accord S. REP. NO. 111-199, ATTEMPTED TERRORIST ATTACK ON NORTHWEST AIRLINES FLIGHT 253, at 1-2 (2010), available at <http://intelligence.senate.gov/100518/report.pdf>; Paul Rosenzweig, *Connecting the Dots and the Christmas Plot*, NAT'L SEC. J. (Jan. 25, 2010, 7:50 AM), <http://www.harvardnsj.com/2010/01/connecting-the-dots-and-the-christmas-plot>.

161. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 400 (2004) [hereinafter 9/11 COMMISSION REPORT].

162. An intelligence analyst identified email messages from Major Nidal Malik Hasan to Yemeni cleric Anwar al-Awlaki, who has promoted violence, but did not flag or forward that information. Scott Shane & James Dao, *Investigators Study Tangle of Clues on Fort Hood Suspect*, N.Y. TIMES, Nov. 14, 2009, at A1.

163. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at A1.

To summarize, the internal architecture of national security institutions within the executive branch can hinder just as much as it can foster rapid, informed responses to terrorism. Presidential control through Article II's assumed unitary hierarchy provides no panacea. There is hence no reason to believe that executive responses to terrorism will either be optimal or even as accurate, timely, and efficient as is generally believed. The institutional competence logic of pro-executive structural constitutional presumptions thus rests on shaky ground.

*B. Legislative Incentives to Deliberate and Congressional Responses to Terrorism*

What of Congress as a necessary partner against terrorism? This Section develops two criticisms of the Separation of Powers arguments that celebrate Congress's role in counterterrorism policy making. First, Congress tends to respond to rather than anticipate terrorism risks. As a result, legislative change is likely to lag behind the need for policy innovation. Second, while effective legislation requires information, Congress lacks mechanisms in the counterterrorism domain to gather sufficient information or to oversee how agencies are putting statutory commands into operation. Given these conditions, the Madisonian belief in the benefits of congressional deliberation seems less than convincing when applied to the counterterrorism context. By extension, judicial identification of legislative involvement as the sine qua non of well-crafted policy may be misguided.

*1. Legislating Too Little, Too Late*

Passing laws in the United States is difficult. In addition to Article I, Section 7's bicameralism and presentment requirements, both Houses have developed additional internal procedures to address information asymmetries and what political scientists have termed "cycling" problems<sup>164</sup> that further impede statutory enactment. While congressional committees address informational and agenda-setting needs,<sup>165</sup> acting as counterweights to the executive's informational and agenda-setting advantages, they also operate as

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164. Cycling refers to the instability of collective choice within multimember bodies such as legislatures. See generally KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) (providing general conditions under which the exercise of collective choices through majority-rule voting does not yield stable outcomes); Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 984–88 (1989) (describing briefly cycling and the underlying voting paradox). Cycling is often thought to be resolved through agenda-setting mechanisms and other legislative rules. Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 507 (1981) (arguing that "institutional restrictions on the domain of exchange induce stability, not legislative exchange per se" (emphasis omitted)); see generally KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 14–16 (1998) (exploring institutional solutions to cycling).

165. See Barbara Sinclair, *The Role of Committees in Agenda Setting in the U.S. Congress*, 11 LEGIS. STUD. Q. 35, 37 (1986).

supplemental “veto gates” (necessary stages in legislation where a group has the ability to derail a bill) that supplement the baseline of three (bicameralism and the veto) or five (including two supermajority votes if the President opposes a law).<sup>166</sup>

The organization of the legislative process around so many sequential constitutional and subconstitutional veto gates ramps up the enactment costs of new statutory policies considerably. At each veto gate, a different, often submajoritarian, coalition can hold up a bill. So long as at least one pivotal coalition favors the status quo, or resists being bought off, no change will occur. As a corollary, “only when the status quo is extreme relative to the ideal points of the president and [all] pivotal legislators” will Congress converge on a new policy.<sup>167</sup> As even casual observation of Capital Hill reveals, the result is long stretches of inactivity punctuated by frantic moments of change when “old policies . . . are out of equilibrium with respect to current preferences.”<sup>168</sup>

This model of congressional action implies that Congress’s interventions will be responsive and not anticipatory. In the counterterrorism domain, Congress’s tendency to move only when it is too late is particularly acute. Anticipatory policies would be hard to craft even if Congress had the necessary expertise. Before an attack, the high variance in terrorists’ strategies<sup>169</sup> renders policy prescription difficult. Until 2001, there was also little constitutional jurisprudence illuminating the boundaries of permissible counterterrorism coercion and targeting, such that Congress faced the additional burden of writing on a largely blank slate so far as constitutional jurisprudence was concerned.

Experience after 9/11 shows responsive lawmaking to be the norm. In some cases, it illustrates how congressional involvement can be affirmatively harmful. Consider four waves of post-9/11 legislation in turn. A first wave of post-9/11 security legislation, including the 2001 Authorization for the Use of Military Force<sup>170</sup> and the USA PATRIOT Act,<sup>171</sup> responded to the 9/11 attacks. However wise the diverse regulatory changes contained in these laws might

166. William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008) (describing opportunities for House or Senate members to derail proposed legislation at “vetogates.”).

167. KREHBIEL, *supra* note 164, at 35.

168. *Id.* at 46; *see also* George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 293 (1995). The use of supermajoritarian procedures, including both the veto override and the filibuster, means that it will often be the case that a losing coalition is larger than a mere majority. *Id.* at 38–39.

169. *See* OFFICE OF HOMELAND SEC., NATIONAL STRATEGY FOR HOMELAND SECURITY 7 (2002), *available at* [http://www.dhs.gov/xlibrary/assets/nat\\_strat\\_hls.pdf](http://www.dhs.gov/xlibrary/assets/nat_strat_hls.pdf) (“One fact dominates all homeland security threat assessments: terrorists are strategic actors . . . . Where we insulate ourselves from one form of attack, they can shift and focus on another exposed vulnerability.”).

170. S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

171. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 283 (codified in scattered titles and sections of the U.S.C.).

have been, they were nothing if not untimely. The second wave then responded to court opinions. In 2004, the Supreme Court issued opinions setting forth new constitutional rules for detainees.<sup>172</sup> In the aftermath of those cases, Congress enacted a new jurisdictional scheme stripping federal courts of jurisdiction to consider habeas petitions by Guantánamo prisoners and placing detention review in the hands of Combatant Status Review Tribunals and Administrative Review Boards.<sup>173</sup> When that was partially invalidated,<sup>174</sup> Congress, at the President's urging, reinstated jurisdictional changes along with a reworked military commission scheme to replace the framework invalidated by the Court.<sup>175</sup> The net gain from this second set of legislative interventions might, without much exaggeration, be characterized as hundreds (perhaps thousands) of pages of recondite briefing and law review articles about federal jurisdictional issues without much by way of policy change.

A third wave of responsive lawmaking was Congress's reaction to the 9/11 Commission report, which took the form of the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>176</sup> While the net effect of that sprawling and complex law's reform of the intelligence community is hard to evaluate, some of its main impacts have been plausibly characterized as "obviously problematic."<sup>177</sup> For example, the law failed to allocate authority over hiring and firing decisions in the intelligence community to the new DNI, prompting President Bush's first choice as intelligence "czar" to decline the proposed appointment.<sup>178</sup> In other words, the reorganization was facially so flawed that the arguably most qualified person for intelligence community leadership turned down the task.

Finally, Congress's enactment in 2007 of statutory amendments to the framework for electronic surveillance was again a response to judicial pushback against ongoing mass surveillance programs.<sup>179</sup> Although no

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172. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (recognizing U.S. citizen's right of judicial review of grounds for military detention); *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (extending statutory habeas jurisdiction to Guantánamo Bay).

173. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005, 119 Stat. 2680, 2739 (2006).

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

175. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified in part at 28 U.S.C. § 2241 and note) (revoking any "court, justice, or judge[s] . . . jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination"). This provision was invalidated in *Boumediene*. See *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

176. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

177. PRIEST & ARKIN, *supra* note 140, at 97–98.

178. *Id.* (describing reasons for Robert Gates's decision not to take the post of DNI in 2005); see also *supra* text accompanying notes 107–112.

179. See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 108, 122 Stat. 2436, 2464; JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 90–94*, 181 (2007) (recounting enactment history).

comprehensive account of those statutory amendments' effects is yet available, the 2007 law at a minimum introduced considerable new complexity and opacity into the law of electronic surveillance, making any democratic accounting of executive action in this domain much more elusive. The record of responsive lawmaking, in short, only highlights the dim prospects for congressional leadership in the counterterrorism policy realm.

The legislative tendency to act only too late may be entrenched beyond repair. Legislators are driven by electoral incentives. They tend to be downside-risk-averse due to the lopsided incentives created by our first-past-the-post election mechanism and, as a result, unlikely to generate breakthrough ideas about how counterterrorism should work. To see why, notice that politicians in a first-past-the-post system seek only the barest majority necessary to win.<sup>180</sup> Beyond that, they have scant incentive to work for more votes. Incumbents thus benefit little from large upswings of support, but may be leery of small downward drops in electoral support because generally they hold their seats by small margins. Members of Congress, therefore, may view innovations in counterterrorism policy that have uncertain effects with skepticism, as they fear the downside risk (loss of a seat) more than they desire the upside benefit (victory by a more comfortable margin).<sup>181</sup>

## *2. Electoral Incentives and the Substance of Counterterrorism Lawmaking*

Electoral pressures also influence along several significant vectors the types of proposals legislators will support when pressed by circumstance to act. First, rational legislators may prefer to support proposals that originate outside Congress because in such cases responsibility for the policies' consequences can be shared with others.

Second, legislators may be more skeptical about pro-liberty than about pro-security proposals. Error costs on the liberty margin involve harms to discrete, potentially scattered individuals. Errors on the security side are more likely to be widespread, affecting many people and imposing a high political cost. Pro-liberty innovation thus has a greater downside risk at the polls than pro-security innovation. As a result, pro-liberty legislative action is less likely than new pro-security law. A parallel dynamic has played out in the politics of crime control. Elected officials worry about relaxing crime controls and being blamed for high-profile crimes (which affect many electors) more than they

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180. For a classic discussion of electoral incentives in the federal legislative context, see DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 33–38 (1974).

181. David R. Mayhew makes a similar point and reaches the same conclusion that “minimax behavior . . . gives a better fit” for legislators. *Id.* at 46–47. Note that this analysis glosses over the potential dampening effect on electoral competition by, *inter alia*, district gerrymandering and assumes some degree of electoral competitiveness.

worry about erroneous convictions (which affect few, if any, electors).<sup>182</sup> Consider the impact of the 1988 “Willie Horton” ad run against candidate Michael Dukakis, which implied that the Massachusetts governor’s decisions had resulted in 268 first-degree murders.<sup>183</sup> Although the actual number was zero, the ad “substantially raised the public’s anxiety about Dukakis.”<sup>184</sup>

Third, the combination of such legislative risk along with the executive’s attitudes to risk may dramatically cabin the domain of feasible coordinated bilateral action by the political branches. Some analysts have argued that presidents attempt to “reduce . . . political risk by seeking and obtaining the approval of another government branch.”<sup>185</sup> By allying with Congress, the President signals that a given proposal is not the product of idiosyncratic preferences or interest-group capture.<sup>186</sup> Sharing praise as well as blame, presidents dilute both upside and downside risk. As a consequence, they are more willing to engage in risky policies with congressional support. But Congress seeks to avoid proposals with large downside risk. Precisely when the President wants congressional involvement because a proposal is risky, legislators will be slow to act. As a result, counterterrorism policies with some perceived downside risk are not enacted even if they are on balance beneficial.

Fourth, when legislators do act, they tend to avoid resolving hard questions. In a political system with “many veto players separated by large ideological distance . . . legislation can only be incremental.”<sup>187</sup> Multiparty bargaining delimits the possible policy space for solutions. As the complexity,

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182. Crime panics are also influenced by fear of new migrants, which may also play a role in the political dynamics of counterterrorism. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 23 (2011).

183. GEORGE E. MARCUS ET AL., *AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT* 4 (2000).

184. *Id.* at 72. In an important and persuasive book, sociologist Katherine Beckett has argued that rather than an example of “democracy-at-work,” the late twentieth century politics of crime are a result of “political elites—especially politicians and law enforcement personnel” using “mass media to disseminate images of the crime and drug problems that imply the need for greater punishment and control.” KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 11–12 (1997). It is at least worth considering whether a similar dynamic is at work in the counterterrorism domain.

185. Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 *HARV. L. REV.* 617, 640 (2010). The model assumes voters are unsure whether the President is biased away from the popular median. Consequently, voters pursue “an asymmetric reward and punishment strategy,” but “assign the primary decisionmaker different levels of electoral support depending not only on the ultimate outcome of the policy, but also on whether that branch acted unilaterally or with authorization from the other branch.” *Id.* at 621, 623. Executives respond by sharing risk with the legislature, which will “screen out” some initiatives. *Id.* at 644. The model relies on sophisticated voting strategies on the part of the public, however, which have yet to be empirically tested.

186. *Id.* at 631–33 (noting that their model assumes the probability of capture of each branch is independent).

187. George Tsebelis, *Veto Players and Law Production in Parliamentary Democracies: An Empirical Analysis*, 93 *AM. POL. SCI. REV.* 591, 605 (1999). Tsebelis is describing parliamentary systems, but the point applies here.

difficulty, and enactment costs of legislative specificity rise, legislators will tend more and more to delegate decisions rather than to resolve hard questions themselves.<sup>188</sup> Terrorism is a subject matter that is especially prone to legislative delegation because it often entails hard trade-offs. Post-9/11 legislation generally leaves large discretion in executive hands. For example, when fashioning substitutes for habeas corpus, Congress left open both substantive and procedural rules.<sup>189</sup> While pressing for military commissions in 2006 and 2009, Congress also left to the executive branch the discretion to decide in which cases to use such tribunals. The 2008 tinkering with the Foreign Intelligence Surveillance Act also left considerable discretion in executive hands about how surveillance resources would be deployed.<sup>190</sup>

Finally, it is worth underscoring that Congress's involvement does not mean that eventual policy will be more sensitive to values such as individual constitutional rights, despite Justice Souter's argument to that effect.<sup>191</sup> At the time that the Court happens to dispose of a case, there is no *ex ante* reason that subsequent legislative involvement will necessarily moderate executive decisions in ways that favor constitutional rights. Policy outcomes in a veto-gate system depend on the *relative* positions of Congress and the executive.<sup>192</sup> If the Supreme Court rejects a liberty-invading innovation by the executive, the ensuing statutory response will be less invasive of liberty only if Congress is more libertarian than the executive and the courts at the specific time that legislators are called on to act. If the executive is more libertarian than Congress at that instant, by contrast, judicial resetting of the policy framework may well end up producing a less libertarian outcome because it allows Congress to reset policy. Yet there is no *ex ante* reason to predict that Congress will always be more libertarian than the executive in this fashion. The relative preferences of Congress and the executive depend on the outcomes of recent elections. The "cooling" function Justice Souter predicted is thus a contingent function of transient politics.<sup>193</sup>

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188. DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 197 (1999).

189. See *Bismullah v. Gates*, 503 F.3d 137, 138–39 (D.C. Cir. 2007).

190. See *Amnesty Int'l USA v. McConnell*, 646 F. Supp. 2d 633, 637–40 (S.D.N.Y. 2009) ("The certification required by the FAA must be supported, as appropriate, by the affidavit of *any* appropriate official in the area of national security who is appointed by the President, by and with the advice and consent of the Senate, *or who is the head of an element of the intelligence community.*" (emphases added)).

191. See *supra* Part I.B (discussing Justice Souter's concurrence in *Hamdi*).

192. William N. Eskridge, Jr., & John Ferejohn, *The Article I, Section 7 Game*, 80 *GEO. L.J.* 523, 528–32 (1992).

193. It is worth noting that Justice Souter's argument in favor of legislative involvement might be recast in slightly different terms. He could be understood to be claiming that splitting decisional power between Congress and the President generates more libertarian outcomes because both branches must concur in the employment of a coercive power, and it is less likely that both Congress and the executive will agree on a policy that raises fundamental liberty concerns. At the very least judicial repudiation of unilateral executive action creates frictional resistance against some unwise actions that

In other words, legislative action on terrorism is unlikely to be timely and cannot be assumed to have a dampening effect on executive ardor. It is instead likely to respond erratically to exogenous pressures and to punt hard questions; often, it will be simply unwise. This is hardly the model of Madisonian deliberation assumed by the Separation of Powers.

### 3. *Overseeing Counterterrorism*

A necessary premise of effective legislative action is information, especially about how previously enacted laws are being implemented on the ground. Congress secures information through its oversight function. Standard accounts of generic Congress–executive branch relations identify three monitoring mechanisms to this end: procedural deck stacking, private rights of action, and close legislative supervision. None, however, function well for counterterrorism issues.<sup>194</sup> This suggests that Congress’s ability to exercise ex post control over security agencies will be minimal. Therefore, to the extent Separation of Powers theorists rely on an informed Congress to help solve hard questions of counterterrorism regulation, they fail to explain how legislators obtain necessary information to act wisely.

The first possible legislative information-gathering and oversight mechanism relies on private actors as instruments of oversight. Congress can structure a regulatory process to ensure that favored constituents have a larger voice in agency decisions and to tilt agencies toward desired outcomes.<sup>195</sup> Control by ex ante proceduralism, however, is generally overbroad, a scimitar and not a scalpel. The 1946 Administrative Procedure Act,<sup>196</sup> which applies to a plethora of substantive agencies, is criticized as being “too sparse to facilitate congressional monitoring.”<sup>197</sup> Moreover, procedures can function as frictions

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impinge on constitutional rights. But again, this argument is contingent on transient political dynamics. If Congress tends to be less libertarian than the President, it is hard to see how this bilateralism requirement could make a difference. It may also be that judicial invalidations trigger public backlashes against the courts or draw attention to the absence of government power to extinguish a right, which in turn would lead to the enactment of perhaps even more sweeping security measures. Over the long term, moreover, constant reminders by courts that the power to eliminate liberties lies with legislators may instead accentuate the probability that Congress will act against individual liberties.

194. The analytic arguments developed in this Section are supported by the empirical analysis found in AMY B. ZEGART, *EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY* 55–84 (2011).

195. For example, the procedural structure of environmental law around air quality was negotiated with an eye to giving particular industrial and environmental groups a stake in agency decision making. See Matthew [sic] D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442–44, 468–70 (1989); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 257–58 (1987) (“Administrative procedures, however, can be used to guide agencies to make decisions that are broadly consistent with the policy preferences of political principals.”).

196. 5 U.S.C. §§ 551–559, 701–706 (2006).

197. Bressman, *supra* note 134, at 1771.



on desirable agency action as well as avenues for oversight.<sup>198</sup> They thus have a deregulatory bias, which may have serious unintended consequences in the national security domain.

Even if procedural deck stacking as oversight could work, the generally applicable law of administrative procedure is unavailable or weakly constraining as applied to security agencies.<sup>199</sup> The one constitutionally committed form of judicial review, the habeas corpus writ,<sup>200</sup> also has much less effect than commonly believed in the realm of national security.<sup>201</sup> It is therefore difficult to see how proceduralism could yield meaningful oversight of national security agencies.

The second option for legislators also relies on private actors. Members of Congress can build “fire alarms” for constituents to sound when wronged by bureaucrats. Hence, Congress gives private groups standing to challenge administrative decisions or otherwise bring agency actions to congressional attention.<sup>202</sup> Fire alarms have several benefits. They tend to be cost effective; they can induce compliance in expectation without being triggered; they are “particularistic” in that they allow Congress to home in on specific problems; and they externalize search costs onto third parties.<sup>203</sup> But fire alarms are an incomplete response to information problems in the security domain. Many problems in counterterrorism turn on agencies’ ability to assimilate and analyze information. No interest group has the necessary access to the intelligence community’s counterterrorism analytic process to flag these concerns.

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198. Terry M. Moe, *The Positive Theory of Public Bureaucracy*, in *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 455, 468–69 (Dennis C. Muller ed., 1996).

199. The Administrative Procedure Act (APA) excludes “courts martial and military commissions” and “military authority exercised in the field in time of war or in occupied territory.” 5 U.S.C. §§ 551(1)(F)–(G) (2006); *cf.* *Bismullah v. Gates*, 514 F.3d 1291, 1294, 1295 n.4 (Ginsburg, C.J., concurring in denial of rehearing en banc) (analyzing status of Guantánamo Combatant Status Review Hearings, and concluding that even though they were “sui generis,” they fell outside the APA); *id.* at 1300 n.3, 1301 (Henderson, J., dissenting from denial of rehearing en banc) (reaching the same conclusion respecting the APA). Agency action related to national security that is covered by APA § 706(2)(A) is subject to “highly deferential standard of review.” *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003) (similar). Furthermore, federal courts have declined to apply the otherwise generally applicable presumption of appellate review with respect to national security matters. *See Dep’t of the Navy v. Egan*, 484 U.S. 518, 526–27 (1988); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999).

200. That remedy, guaranteed by Article I, Section 9 of the Constitution, is currently in force through 28 U.S.C. §§ 2241–2256 (2006).

201. *See* Huq, *supra* note 43, at 431 (suggesting that constitutionally compelled habeas has had scant effect on national security detention decisions at Guantánamo). For an argument that habeas is now also ineffective in other domains, see Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 795, 836–37 (2009).

202. *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

203. *Id.* at 172; *see also* Bressman, *supra* note 134, at 1769 (“[F]ire-alarm’ oversight is efficient because it shifts to third-parties the cost of gathering and processing information.”).

Problems therefore arise that receive “almost no public attention,” but affect “hundreds of billions of dollars” of counterterrorism spending.<sup>204</sup>

Litigation is no substitute, for while libertarian interest groups can use lawsuits to raise alarms about policies that yield excessive rights violations, doctrinal developments have narrowed this route.<sup>205</sup> Many counterterrorism programs, such as surveillance and racial profiling, cannot be judicially challenged under current standing<sup>206</sup> or other threshold dismissal doctrines.<sup>207</sup>

Finally, Congress can engage in “police patrols” of agencies, which involve the “centralized, active, and direct” oversight of agencies by legislators themselves.<sup>208</sup> In practice, this would mean expending committee time and staff resources on monitoring and understanding what agencies do. But police patrols, although expensive, often miss violations.<sup>209</sup> Additionally, given the median member’s attitude to risk, it is unclear what incentive she has to engage in such patrols. Even highly salient foreign policy questions “rank low on the list of voter concerns” in congressional elections, and in many counterterrorism matters, “the public . . . will not know whether Congress takes action or not anyway.”<sup>210</sup> The history of sua sponte congressional oversight of national security affairs indeed suggests that congressional attention to counterterrorism will be weaker than in other domains.<sup>211</sup> From the early 1950s, for example, congressional oversight of the CIA was “sporadic and largely ineffectual.”<sup>212</sup>

204. ODOM, *supra* note 147, at xxix. Odom singles out the Defense Intelligence Agency (DIA), responsible for providing the armed services with intelligence, as having numerous management flaws. *See id.* at 94–114 (describing military counterintelligence as “essentially headless”).

205. *See Aziz Z. Huq, Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 236–40 (2009) (explaining transsubstantive doctrinal developments, which include the reduced availability of injunctive relief).

206. Standing doctrine limits suits against perceived surveillance, *see* *ACLU v. NSA*, 493 F.3d 644, 653 (6th Cir. 2007), and render challenges to discriminatory investigative or policing measures difficult to mount, *see* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999) (rejecting judicial inquiry into selective enforcement in immigration law); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (vacating prospective injunction against discriminatory application of policing tactics). The Court of Appeals for the Second Circuit recently issued a decision allowing a challenge to classified electronic surveillance. *See Clapper v. Amnesty Int’l USA*, 638 F.3d 118, 122 (2d Cir. 2011), *cert. granted*, No. 11-1025 (May 21, 2012).

207. *See, e.g.,* *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (rejecting challenge to use of material witness detention on qualified immunity grounds); *Arar v. Ashcroft*, 585 F.3d 559, 564 (2d Cir. 2009) (*en banc*) (dismissing suit based on insufficiency of allegations and absence of *Bivens* remedy); *El-Masri v. Tenet*, 479 F.3d 296, 308–11 (4th Cir. 2007) (dismissal based on “state secrets” doctrine).

208. McCubbins & Schwartz, *supra* note 202, at 166.

209. *Id.* at 172.

210. ZEGART, *supra* note 194, at 40–41.

211. *See id.* at 66–67 (finding “that the Senate Intelligence Committee patrols far less than other Senate committees”).

212. *See* JEFFREYS-JONES, *supra* note 93, at 3, 78–80, 126, 157 (“[I]n the 1950s and 1960s those responsible for congressional oversight of CIA activities proved languid in the exercise of their invigilatory prerogative and duti[es].”); LOCH K. JOHNSON, *A SEASON OF INQUIRY: CONGRESS AND INTELLIGENCE* 6–11 (1988) (describing “failures of congressional oversight” of intelligence more generally in the 1960s and 1970s, and ascribing it to “the paralyzing awe engendered by the sheer size

Even after events such as the Pearl Harbor attacks, the Bay of Pigs fiasco, and 9/11, “most legislators [tried] to avoid tackling intelligence reform altogether or [even sought] to block it.”<sup>213</sup> The result was, to be kind, a record of “limited success.”<sup>214</sup>

In short, the three mechanisms developed by legislators in other policy domains to monitor the bureaucracy and keep agency costs in check work poorly in the counterterrorism domain. This has implications for executive action: without feedback from congressional oversight, it is likely that the executive will identify and correct fewer policy errors. Congress’s weak oversight capacity thus presents an additional institutional barrier to timely reform in response to policy errors or terrorist attacks and more reason to be concerned about the possibility of inefficient or ill-tailored policies in general.

### *C. Objections*

In response to the arguments developed in this Part, the Separation of Powers theorist might acknowledge that the branches are less than ideal. But even accepting that the political branches deviate from the paradigms imagined in Separation of Powers theory, she might nonetheless try to redeem her theory in two ways.

First, the Separation of Powers theorist might argue that while neither branch is optimal, it is nevertheless reasonable to believe that Hamilton and Madison accurately captured each branch’s *comparative* institutional advantage. That is, if the executive is incrementally more capable of rapid responses than the other branches, and if Congress is incrementally better at deliberation than the executive, then Separation of Powers intuitions can stand. Indeed, comparative institutional arguments might be extended to argue that courts, which are not experts in security policy, should play little role in reviewing security matters.

Even setting aside the theorem of the second best, however, it is far from clear that comparative claims (say, that the executive is inevitably better at speedy, accurate action, or that the legislature is necessarily better at deliberation) are sustainable. Comparative institutional claims of this kind

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and complexity of the intelligence community”); ZEGART, *supra* note 80, at 41, 213–17; *see also id.* at 101–04 (making the same observation for the National Security Council); ZEGART, *supra* note 98, at 144–45, 154–55 (noting the same for the FBI even in the 2000s). David Barrett’s historical analysis of congressional oversight of the CIA through the Kennedy Administration also found legislative deference and coverage gaps, but argues that legislators were periodically “hawkish” on covert action. DAVID M. BARRETT, *THE CIA AND CONGRESS: THE UNTOLD STORY FROM TRUMAN TO KENNEDY* 458–61 (2005). Zegart notes that congressional oversight is often spurred by covert action that went awry, but such oversight generally “did not lead to action.” ZEGART, *supra* note 80, at 215. And it is telling that the most significant congressional investigation of the CIA until the Church Committee was led by Joseph McCarthy. *See* JEFFREYS-JONES, *supra*, at 74–75.

213. ZEGART, *supra* note 98, at 57; *accord* ODOM, *supra* note 147 at 1–3.

214. ZEGART, *supra* note 194, at 9.

demand an empirical foundation. They demand, that is, a thick account of the relevant institutions to identify the location of relative advantages. But comparative institutional claims of this kind are often offered without any detailed, comparative account of the relevant institutions. This Part, by contrast, has pursued that empirical inquiry and explored the observed behavior of the political branches. It has found little support for the bold comparative institutional claims that most often characterize the literature.<sup>215</sup> To the contrary, empirical inquiry suggests reasons for thinking that agencies often fail to respond to new threats for years or even decades, and that legislative deliberation will often break down at the first hurdle. Under those circumstances, the force of comparative institutional claims is simply unclear and there is no way of knowing whether recourse to a strategy of executive control or one of bilateralism will yield optimal results in the median case. We should thus be cautious in endorsing even these weaker versions of Separation of Powers folk wisdom.

Moreover, it is worth emphasizing that the theorem of the second best does not entail that all judicial review should be abandoned. All that is required for judicial review of counterterrorism policies to be desirable is the possibility that political branch policy choices would be better with ex post judicial supervision than without. If courts rely on structural constitutional presumptions, judicial review may do little to improve policy outcomes. Judicial review will simply ensure a particular policy-making process has been followed, even though the choice of policy-making form is uncorrelated with desirable outcomes. But if courts instead apply the ordinary tools of legal reasoning and factual inquiry to test whether policies conform to statutory and constitutional commands, it is plausible to believe that the resulting mix of policy outcomes will improve. That is, there is no reason to think “outcomes after political process” are worse than “outcomes after political process and judicial consideration.” To the contrary, as Part IV develops, there is some reason to think policy results improve with judicial review because courts are not incapable of identifying some flawed policy outcomes. Nor is there a reason to think judicial review is uniquely unwarranted in the security domain, because judges in this area are no more likely to be wrong than right.

A second response to arguments in this Part might proceed as follows. A Separation of Powers advocate could acknowledge that each branch is suboptimal in the ways I have described, but counter that there are still “offsetting violations” of first-best conditions such that her threshold

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215. This may be because claims of comparative institutional competence can be made on the basis of either empirical evidence or on the basis of assumptions grounded on eighteenth-century Separation of Powers ideals. I suspect that most such claims are in fact claims founded on Separation of Powers assumptions rather than empirically inspired arguments. To the extent that comparative institutional claims are simply reworkings of the Separation of Powers arguments canvassed in Part I, they too are vulnerable to the theorem of the second-best.

assumption about institutional competence still leads to the best result.<sup>216</sup> That is, multiple violations of first-best assumptions counteract each other and net out to minimal variance from the optimal.

The problem with this logic of offsetting is that it is a question of fact whether the flaws of Congress and the executive do indeed counteract each other in this fashion. There is no ready empirical evidence that they do. There is also no a priori reason to believe that observed deficiencies in the branches, with different causes and operating in different timeframes, are related in ways that make offsetting likely. Of equal importance, the logic of offsetting assumes away distortions that affect both branches. But as Part III shows, both branches are affected by their political environment in ways that predictably push policy outcomes far from the optimal.

#### *D. Summary*

This Part has argued that both Congress and the executive branch fail to live up to the empirical generalizations upon which structural constitutional presumptions are based. Rather than unitary actors, Congress and the executive are internally heterogeneous, historically contingent entities driven by agencies, committees, factions, and bureaucratic interest groups. Arguments for executive predominance or congressional involvement that ignore this second-best reality are unlikely to generate successful predictions about the effectiveness of specific institutional arrangements. Consequently, it is not wise to use the origins of a policy as a proxy for its wisdom or its conformity to legal or constitutional commands.

### III.

#### THE EXTERNAL POLITICAL ENVIRONMENT AND COUNTERTERRORISM

This Part turns to the branches' external political environment. It examines how that ecosystem impinges on both elected branches to influence counterterrorism policy. Its core argument is that, at least when it comes to security policy, political pressures predictably move elected officials' policy choices away from what would be optimal. This Part therefore presents empirical and theoretical evidence suggesting that public preferences systematically push both political branches toward undesirable responses to terrorism. Structural constitutionalism contains no resources to address the resulting deliberative pathologies. These arguments (which are acute in the terrorism context, even if they are also more generally pervasive in politics)

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216. Vermeule, *Hume's Second-Best*, *supra* note 76, at 422, 429 (drawing from Hume the lesson that "multiple departures from the optimal or first-best constitutional arrangements might offset each other, producing compensating adjustments that ensure constitutional equilibrium"); *see also* Vermeule, *Foreword*, *supra* note 76, at 20–23 (giving examples).

complement the more general argument developed in Part II. They bite particularly on the “bilateralism” strand of Separation of Powers theory.

I begin by taking as a given that in a democracy elected officials’ policy choices are constrained by the preferences of the electorate. Officials cannot pursue policy goals absent success at the polls.<sup>217</sup> As a consequence, they are attentive to voter preferences.<sup>218</sup> They constantly engage in “activities related to reelection,” including campaign advertising, credit claiming, and casework.<sup>219</sup> Policy selection is also a function of what politicians believe constituents, or at least “(politically responsive) interests located within [a] district,”<sup>220</sup> desire. The resulting force of public pressure applies to both political branches.<sup>221</sup> Two outcomes flow from this. First, democratic polities mitigate collective action costs by delegating powers to elected agents in government. But this in turn induces new agency costs that distort policy choices. These agency costs may be especially weighty in the counterterrorism context. Second, growing empirical evidence suggests that terrorism events induce a cognitive need for stability that tugs policy outcomes away from the optimal. If agency costs and the electorate’s need for stability push both branches off track, it is unlikely that bilateral action, or the initiative of a single branch, will generate consistently good policy choices.

#### A. *Communicating Success in Counterterrorism*

A democratic public cannot act directly in the fashion of ancient Greek city-states’ publics because of the high transaction costs of such collective action.<sup>222</sup> Modern democracies minimize collective action costs by delegating

217. The canonical statement is MAYHEW, *supra* note 180, at 16–17.

218. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 7 (1990) (“I assume that when legislators have to make a decision they first ask which alternative contributes more to their chances for reelection.”).

219. MAYHEW, *supra* note 180, at 49–54.

220. Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 136 (1988) (emphasis omitted); accord KENNETH A. SHEPSLE, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 313–14 (1996).

221. Politicians in both branches are linked by shared membership in political parties; the variation of policy preferences among members of the same party may well be smaller than the variance among politicians within a single institution. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312–16 (2006) (emphasizing possibility of convergence in policy preferences of the executive and the legislature during periods of unified government). Ex ante it is hard to predict which branch will respond more closely to the national median voter. Just as the median legislator in the bicameral Congress might be close or far from the national median, so the functionally median voter in the Electoral College, who resides in one of a small number of contested states, may be far or close to the national median. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1235–39 (2006).

222. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 34 (1965) (analyzing comparative transaction costs of collective action for small and large groups).

power to central governments. But that delegation induces “agency” costs. That is, there are costs associated with the delegation of a task by a principal to an agent because of the principal’s imperfect ability to monitor and incentivize the agent. Voters have particular difficulty determining whether elected agents are applying sufficient effort to achieve voters’ favored policies or have divergent preferences. Hence, governments engage in costly efforts to signal their credible commitment against terror. The result is a trade-off between minimizing collective action costs and mitigating agency costs. The trade-off is especially dear in the terrorism context, where a potent signal of credible political commitment is the violation of core constitutional rights.

Agency problems between electors (the principal) and their representatives (the agent) persistently arise in democracies.<sup>223</sup> The agent will not always follow the principal’s preferences out of self-interest, divergent preferences, or a simple lack of information or skill. In ordinary contracting, a mix of financial incentives and insurance, neither of which are typically available in the political context, mitigate the resulting agency costs.<sup>224</sup> By contrast, the mechanism of ex ante electoral selection effects, in addition to retrospective voting (for example, voting on the basis of past performance), typically address agency slack between voters and their representatives.<sup>225</sup>

The agency problem in counterterrorism is especially acute because voters have difficulty assessing competing claims about the efficacy of proposed or even past policies.<sup>226</sup> That is, it is more difficult in the counterterrorism domain than in other policy areas for voters to identify successful policies. Voters do not know whether the government is detaining the right people or invading the right country because of the government’s functional monopoly on information. The most obvious metric of counterterrorism success—attack frequency—is untrustworthy because strategic and successful deployment of terrorism will be unpredictably distributed through time and space.<sup>227</sup> An absence of spectacular attacks on the U.S. mainland may indicate counterterrorism success or it may suggest al-Qaeda’s determination to exceed the effect of 9/11 with a plan that demands a decade or more to execute.<sup>228</sup> Successful counterterrorism might

223. Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 207, 209–10 (2005).

224. See Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55 (1979).

225. See TIMOTHY BESLEY, *PRINCIPLED AGENTS? THE POLITICAL ECONOMY OF GOOD GOVERNMENT* 105–06 (2006).

226. For a succinct and elegant account of this agency problem and some examples of solutions, see ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 141–50 (2010). For a critical analysis of those solutions, see Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. (forthcoming 2012).

227. See Claude Berrebi & Darius Lakdawalla, *How Does Terrorism Vary Across Space and Time? An Analysis Based on the Israeli Experience*, 18 DEF. & PEACE ECON. 113, 114, 130 (2007).

228. POSNER, *supra* note 108, at 11 (“At most, all that our good fortune in not being attacked since 9/11 implies is that the annual probability of a terrorist attack on the United States is low.”).

also *increase* attack frequency in the short term by driving moderates into negotiations while empowering the most radical elements of a terrorist organization.<sup>229</sup>

Nor can voters easily rate officials by how successfully they have tackled organizational impediments to successful counterterrorism. Consider the question whether the intelligence community should have been reorganized after the failures to aggregate and share information before 9/11, and then again after the Christmas 2009 airplane bombing attempt.<sup>230</sup> Even experts disagree as to whether the “net benefit[] of having unified bureaucracies with decreased redundancy [is] greater than the net benefits of decentralized, redundant delegation.”<sup>231</sup> How are voters to judge officials’ claim to resolve this problem when experts disagree whether centralization or dispersion is the best organizational response?<sup>232</sup>

Voters therefore distrust their elected agents and are inclined to withhold rewards such as reelection. There are two solutions to this credibility problem: (1) investment in observable measures against terror threats and (2) violating constitutional rules as a proxy for commitment to addressing the electorate’s security concerns. Each separately leads to inefficient resource allocations.

The first solution involves the prioritization of observable measures taken to combat terror threats. Policy responses fall into two categories. Some are “specific and publicly observable”; others are “general and not publicly observable.”<sup>233</sup> For example, in response to the Christmas 2009 attempt, the government could have introduced whole-body scanners at airports (observable) or recruited more experts in African nations’ cultures (not observable). Choosing between observable and non-observable investments, an elected official would prefer the former (all things being equal) because it better signals a pro-security commitment to voters. Resources thus will flow to observable rather than non-observable responses. Hence, the Christmas 2009 attempt prompted the highly publicized introduction of whole-body scanners

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229. See Ethan Bueno de Mesquita, *Conciliation, Counterterrorism, and Patterns of Terrorist Violence*, 59 INT’L ORG. 145 (2005) (developing formal model to explain observed increases in terrorist violence following concessions by states).

230. 9/11 COMMISSION REPORT, *supra* note 161, at 277; WHITE HOUSE REVIEW, *supra* note 112, at 4–5.

231. O’Connell, *supra* note 106, at 1688.

232. See RICHARD K. BETTS, ENEMIES OF INTELLIGENCE: KNOWLEDGE & POWER IN AMERICAN NATIONAL SECURITY 146–50 (2007) (canvassing pros and cons of centralization and pluralism); RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 127–62 (2005) (challenging 9/11 Commission’s recommendation of new centralization); O’Connell, *supra* note 106 at 1684–91 (canvassing costs and benefits of centralization and dispersion); Joshua Rovner & Austin Long, *The Perils of Shallow Theory: Intelligence Reform and the 9/11 Commission*, 18 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 609, 610–12 (2005).

233. Ethan Bueno de Mesquita, *Politics and the Suboptimal Provision of Counterterrorism*, 61 INT’L ORG. 9, 10 (2007).



and contrastingly poorly publicized investments in better intelligence gathering.<sup>234</sup>

This may lead to inefficient allocations of scarce resources. Evidence from an analogous context—national disasters—suggests how this problem of distorted allocations can arise. A 2009 study of county-level voting behavior found voters valued disaster relief only “when . . . expenditures are individually targeted, but appear not to value preparedness spending under any circumstances.”<sup>235</sup> The study concluded that constituency pressure to underinvest in precautionary public goods and to overinvest in individuated direct benefits decreased “social welfare by billions of dollars.”<sup>236</sup> There is no reason to believe public responses to terrorism escape that perverse dynamic.

Why don’t opposition politicians correct the public’s tendency to overrely on observable measures? Casual observation reveals few politicians playing this virtuous tutelary role. Perhaps voters have no way to sort between benevolent tutelary politicians and politicians who simply have different first-order preferences over security. Or perhaps the heuristics that voters rely upon are insufficiently fine grained to permit such sophisticated messaging.<sup>237</sup> Even assuming voters recognize the risk of distorted investments, they may believe the latter an acceptable cost of selecting more committed politicians.

The second proxy for commitment against terrorism is a politician’s willingness to violate constitutional (or statutory) rules. This turns on its head an insight from constitutional law, where theorists have posited that constitutional rules provide “focal points” for political coordination when “cooperation is valuable” and a benchmark is needed.<sup>238</sup> The value of constitutional rights to an official seeking to communicate a credible security commitment is founded on the assumption that the Constitution constrains government, and that existing policies almost or entirely fill the constitutionally permissible policy space. The only margin on which security might be increased, therefore, is through a reduction in rights protection.

The possibility of using constitutional rights as focal points in this fashion is not new. In the criminal procedure context, during his 1968 and 1972

234. Matthew L. Wald, *Airport Efforts to Detect Explosives Expand*, N.Y. TIMES, Feb. 18, 2010, at A16. More attention has, to be sure, been paid to Yemen, but in part this is a consequence of political change in that country. See Greg Miller, *Yemen Group a Top U.S. Worry; Intelligence Officials, in an Annual Terrorism Threat Report, Cite the Offshoot of al Qaeda*, L.A. TIMES, Feb. 3, 2010, at A4. It remains to be seen whether the death of Anwar al-Awlaki, the most visible and publicly vilified al-Qaeda figure in Yemen, will lead to a drawdown of attention to that country.

235. Andrew Healy & Neil Malhotra, *Myopic Voters and Natural Disaster Policy*, 103 AM. POL. SCI. REV. 387, 389–91, 401 (2009).

236. *Id.* at 402.

237. Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 955 (2001). Less sophisticated voters do worse with heuristics than without. *Id.* at 966–67.

238. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 910–11 (1996).

presidential campaigns, Richard Nixon inveighed against the Warren Court's rulings on criminal procedure and promised to appoint Justices to roll them back as a way to show his responsiveness to public concerns about crime.<sup>239</sup>

Using constitutional violations as focal points for voters to gauge representatives' responsiveness may be especially attractive when it allows a pro-security politician to co-opt political opponents' advocacy investments. For example, criticism from reliably libertarian voices, e.g., the American Civil Liberties Union (ACLU), "credentializes" a politician because voters can use public ACLU opposition as a rough proxy for credible security commitment. This effect is available for both Republican and Democrat politicians.<sup>240</sup> Appearing hard on terrorism thus lowers the net expected benefit from oppositional mobilization against national security measures, demoralizes those measures' opponents, and slants political competition against libertarian ends. Under such conditions, one cannot assume that democratic competition will lead to optimal policy choices by either Congress or the executive, or that the two political branches' errors will systematically offset each other.

In short, agency slack means that democratic accountability does not necessarily conduce to the principal's optimal policy choices. Rather, it is likely that a decade of counterterrorism policy, and the billions of dollars disbursed in that time, have been spent under systematically distorted government incentives.<sup>241</sup>

### *B. Democratic Deliberation and Cognitive Effects of Terrorism*

The empirical evidence of terrorism's cognitive effects on the general public yields more reason to doubt the utility of structural constitutional principles. Previous scholarship is sharply divided on the cognitive effect (if any) of terror risk. On one side is the claim that the public is "either swept up in the frenzy or, at the very least, cowed into submission"<sup>242</sup> in terrorism's wake. The claim is often described with arguments from behavioral economics and prospect theory about the availability heuristic,<sup>243</sup> the tendency to overestimate new risks,<sup>244</sup> and the amplifying force of "outrage" against an "identifiable

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239. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 113–16 (2007).

240. See, e.g., Juan C. Zarate, *Obama and Bush: Together on Terror Law*, WALL ST. J., Aug. 14, 2010, at A11 (invoking ACLU criticism as evidence that Obama is sufficiently pro-security).

241. See also PRIEST & ARKIN, *supra* note 140, at xviii ("[The] nation . . . ha[s] shelled out hundreds of billions of dollars to turn the machine of government over to defeating terrorism without ever really questioning what they were getting for their money.").

242. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 536 (2004).

243. See generally Cass R. Sunstein, *Precautions Against What? The Availability Heuristic and Cross-Cultural Risk Perceptions*, 57 ALA. L. REV. 75, 87 (2005) ("If people can easily think of such examples, they are far more likely to be frightened than if they cannot.").

244. See CASS R. SUNSTEIN, WORST-CASE SCENARIOS 23 (2007) (discussing cognitive effects when "risks . . . suddenly come 'on screen,' making people believe that where they once were safe,

perpetrator.”<sup>245</sup> On the other side is the view that any “security panic” after a terrorist attack reflects only rational updating based on new information,<sup>246</sup> and, even if overwrought, will be counterbalanced by a “libertarian panic” induced by overestimation of “the risk that government will impose excessive security measures.”<sup>247</sup> The choice between these positions is ultimately “empirical, and cannot be resolved through a priori reasoning.”<sup>248</sup> But increasing empirical evidence—none of which has been examined in the legal scholarship—suggests that terrorism has cognitive effects, that shifts in public attitudes cannot be explained by informational updating, and that these effects do not leave public preferences in a desirable equilibrium. There are two relevant bodies of research: one involving experimental studies, and the other population-level studies. This Section addresses each in turn.

### *1. Motivated Social Cognition and Terrorism*

Political psychologists seeking to explain public responses have developed a theory of “motivated social cognition.”<sup>249</sup> Research in “terror management theory” (TMT) suggests that a person’s understanding of the world does not only have an informational function. It also “serve[s] the existential function of allowing people to symbolically transcend the threat induced by the uniquely human awareness of one’s own mortality.”<sup>250</sup> Experimental studies in the TMT tradition demonstrate that stimulating awareness of mortality induces a heightened desire to experience control.<sup>251</sup> Further, some of those studies suggest that “highly threatening situations are frequently (but not always) associated with ideological shifts to the right.”<sup>252</sup>

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they are now unsafe”); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 928–29 (2004).

245. Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 507 (2007).

246. See POSNER & VERMEULE, *supra* note 23, at 64–65.

247. Adrian Vermeule, *Libertarian Panics*, 36 RUTGERS L.J. 871, 873 (2005) [hereinafter Vermeule, *Libertarian Panics*] (noting further that distorting information cascades may also go in either direction); see also POSNER & VERMEULE, *supra* note 23, at 78–80 (chronicling “libertarian panics” during colonial America and after the terrorist attacks of 9/11).

248. Vermeule, *Libertarian Panics*, *supra* note 247, at 884. *But cf. id.* at 888 (stressing the possibility that “panicky libertarians are especially likely to diagnose security panics” and “those who are most prone to accuse others of panicking are themselves most firmly in the grip of the irrational”).

249. Dana R. Carney et al., *The Secret Lives of Liberals and Conservatives: Personality Profiles, Interaction Styles, and the Things They Leave Behind*, 29 POL. PSYCHOL. 807, 807 (2008).

250. John T. Jost et al., *Political Ideology: Its Structure, Functions, and Elective Affinities*, 60 ANN. REV. PSYCHOL. 307, 320 (2009). For a detailed discussion of TMT and the social science research supporting the thesis, see TOM A. PYSZCZYNSKI ET AL., IN THE WAKE OF 9/11: THE PSYCHOLOGY OF TERROR 27–28, 37–80 (2003); Sheldon Solomon et al., *The Cultural Animal: Twenty Years of Terror Management Theory and Research*, in HANDBOOK OF EXPERIMENTAL EXISTENTIAL PSYCHOLOGY 13 (Jeff Greenberg et al. eds., 2004).

251. See Immo Fritsche et al., *The Role of Control Motivation in Mortality Salience Effects on Ingroup Support and Defense*, 95 J. PERSONALITY & SOC. PSYCHOL. 524, 525–26 (2008).

252. Jost et al., *supra* note 250, at 321.

Mortal threats also induce “a temporary increase in closed-mindedness” and “an affinity for . . . certainty-oriented . . . policies and opinions.”<sup>253</sup> This manifests as revised attitudes toward in-groups and out-groups<sup>254</sup> based on stereotypes that conduce to an “orderly, meaningful conception of reality necessary to protect people from deeply rooted existential fear.”<sup>255</sup> Sociotropic threats have larger effects than personal ones.<sup>256</sup> These effects are robust across the political spectrum; they are found among Democrats and Republicans alike.<sup>257</sup>

These are general findings about mortality salience. Is there evidence they extend to terrorism in particular? After 9/11, many psychologists turned to study terrorism’s cognitive effects on individuals. Their results confirm TMT’s application to terrorism.<sup>258</sup> They also reject the thesis implied by earlier studies of social diversity<sup>259</sup> that people tend to polarize toward opposite ideological poles, such that variance in ideological differences within the public may increase, but that there is no net change in median preferences.<sup>260</sup>

Evidence for TMT’s application to terrorism derives from experimental studies in which control and treatment groups’ preferences over candidates and policies are measured after the treatment group has been exposed to terrorism-related mortality reminders. Four studies are worth reporting. The first, conducted before the 2004 presidential election, found terrorism-related mortality reminders increased support for George W. Bush over John Kerry

253. *Id.*

254. Jeff Schimel et al., *Stereotypes and Terror Management: Evidence That Mortality Salience Enhances Stereotypic Thinking and Preferences*, 77 J. PERSONALITY & SOC. PSYCHOL. 905, 906 (1999); see also Jennifer Crocker & Riia Luhtanen, *Collective Self-Esteem and Ingroup Bias*, 58 J. PERSONALITY & SOC. PSYCHOL. 60 (1990) (identifying a trait of “collective self-esteem” that predicts a tendency to derogate out-groups).

255. Schimel et al., *supra* note 254, at 922.

256. DARREN W. DAVIS, *NEGATIVE LIBERTY: PUBLIC OPINION AND THE TERRORIST ATTACKS ON AMERICA* 77–78 (2007).

257. See generally George A. Bonanno & John T. Jost, *Conservative Shift Among High-Exposure Survivors of the September 11th Terrorist Attacks*, 28 BASIC & APPLIED SOC. PSYCHOL. 311 (2006) (finding a conservative shift in Democratic, Republican, and Independent survivors of the 9/11 terrorist attacks).

258. For summaries of the field, see Mark Dechesne & Arie W. Kruglanski, *Terror’s Epistemic Consequences: Existential Threats and the Quest for Certainty and Closure*, in HANDBOOK OF EXPERIMENTAL EXISTENTIAL PSYCHOLOGY, *supra* note 250, at 247, 259–60 (“[T]hreats of terror can culminate in ethnocentrism, outgroup derogation, and social judgments based on stereotypes . . . [due to] people’s general increased need for firmness in judgment and beliefs.”); Johannes Ullrich & J. Christopher Cohrs, *Terrorism Salience Increases System Justification: Experimental Evidence*, 20 SOC. JUST. RES. 117 (2007).

259. See KAREN STENNER, *THE AUTHORITARIAN DYNAMIC* 60–61 (2005).

260. See John T. Jost et al., *Are Needs to Manage Uncertainty and Threat Associated with Political Conservatism or Ideological Extremity?*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 989, 995–96 (2007). This study used reminders of terrorism as a means of provoking death anxiety, and specifically addressed the possibility of bilateral movement to different extremes. *Id.* at 993, 1004 (“[W]e found that uncertainty and threat management contribute independently to self-reported political conservatism, even after adjusting for ideological extremity.”).

among both liberals and conservatives, independent of rational Bayesian updating based on new information.<sup>261</sup> A second 2004 study found “registered voters . . . reported intending to vote for Senator John Kerry by a huge margin in psychologically benign conditions, but favored Bush after a mortality salience induction.”<sup>262</sup> Similar to the first study, experimental subjects were not supplied with new information about the candidates, which might have otherwise confounded the results of the study. The third study found that exposure to terrorism-related material led subjects to view President Bush as more charismatic and less blameworthy for policy failures on his watch.<sup>263</sup> More pertinent here, it also identified a positive effect for state-level politicians (for example, governors), who typically have few terrorism-related responsibilities.<sup>264</sup> The study found that subjects felt “particularly compelled to protect a given leader against accusations of wrongdoing” under conditions of terrorist threat.<sup>265</sup> In other words, threat induced the suppression of evidence inconsistent with a preference for a strong leader. The fourth study analyzed cross-sectional national polling data from 2000, 2002, and 2004. It found that positive feelings toward diverse out-groups, both with and without affective connections to terrorism (e.g., both immigrants *and* homosexuals), “decrease in the face of terrorist threat.”<sup>266</sup> This study is significant because it is not vulnerable to the external validity critiques to which studies conducted with university students are often subjected.

All four studies illustrate the effect of terrorism on preferences, even after controlling for the effect of new information. This last aspect of the studies merits emphasis. It might be thought that shifts in public preferences over the

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261. Mark J. Landau et al., *Deliver Us from Evil: The Effects of Mortality Salience and Reminders of 9/11 on Support for President George W. Bush*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1136, 1146 (2004). For similar results in parallel experiments, see Florette Cohen et al., *American Roulette: The Effect of Reminders of Death on Support for George W. Bush in the 2004 Presidential Election*, 5 ANALYSES SOC. ISSUES & PUB. POL’Y 177, 183–85 (2005); Matthew T. Gailliot et al., *Self-Regulatory Processes Defend Against the Threat of Death: Effects of Self-Control Depletion and Trait Self-Control on Thoughts and Fears of Dying*, 91 J. PERSONALITY & SOC. PSYCHOL. 49 (2006); cf. Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 PSYCH. SCI. 144 (2003) (finding fear and anger have different effects on risk perceptions).

262. Cohen et al., *supra* note 261, at 183.

263. JENNIFER L. MEROLLA & ELIZABETH J. ZECHMEISTER, *DEMOCRACY AT RISK: HOW TERRORIST THREATS AFFECT THE PUBLIC* 131, 140 (2009).

264. *Id.* at 106–07, 116–17.

265. *Id.* at 142. That the same result from terror was found among Mexican test subjects with respect to Mexican political leaders suggests again that rational updating is not at work. *Id.* at 152–53.

266. *Id.* at 83. A pair of studies conducted in parallel in Canada and the United States immediately after 9/11 found correlations between threat perceptions and reduced support for immigration in both countries. Gordon Hodson et al., *Perceptions of Threat, National Representation, and Support for Procedures to Protect the National Group*, in *COLLATERAL DAMAGE: THE PSYCHOLOGICAL CONSEQUENCES OF AMERICA’S WAR ON TERRORISM* 109, 116–22 (Paul R. Kimmel & Chris E. Stout eds., 2006) (finding “reciprocal and often reinforcing” interactions between threat perceptions and in-group solidarity).

past decade are best explained by the simple fact that a terrorist event provides observers with new information about the world. When controlling for this possibility, these studies isolate distortive cognitive effects that are independent of empirical updating. The third study additionally demonstrates that motivated cognitive responses to terrorism may *dampen* the processing of negative information about leaders in ways that leave incompetent or ill-intentioned leaders in place. And the final study suggests that judgments about in-groups and out-groups of all kinds change as terrorism risk perceptions change.

In the aggregate, this research demonstrates that the public will demand a policy response to terrorism based not merely on new information about risk, but also based on a cognitive tendency to weigh terrorism risk heavily. They will also suppress information about the government's failures and impose superfluous burdens on disfavored out-groups.

A second line of experiments tests how exposure to terror or threat affects people's normative judgments. It confirms that terrorism does not merely drive people to take more extreme versions of prior positions but pushes all toward pro-security policies. This research uses a concept of "authoritarianism," which is defined to include a predisposition to submit to authority and to prefer "moral absolutism and conformity"; intolerance and castigation of dissidents and deviants; and animosity and aggression toward racial and ethnic out-groups.<sup>267</sup> Consider a 2006 authoritarianism study of national cross-sectional data from the Cooperative Congressional Study.<sup>268</sup> The sample was divided by degree of perceived threat. Among those who did not see terrorism as a significant threat, there was a significant gap in preferences between authoritarians and nonauthoritarians. Among those who did see a large threat, the gap narrowed: nonauthoritarians' preferences moved toward those of authoritarians.<sup>269</sup> Under conditions of perceived threat, nonauthoritarians and authoritarians converged on a preference for military force over diplomacy.<sup>270</sup> Terrorism's effect on political psychology also appears to be asymmetric in the sense that it affects those with different normative priors in different ways.<sup>271</sup>

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267. STENNER, *supra* note 259, at 3, 14–15; *see also* MARC J. HETHERINGTON & JONATHAN D. WEILER, AUTHORIZATION & POLARIZATION IN AMERICAN POLITICS 33, 38–39 (2009) (reporting survey data to the same effect).

268. For more details on this national public opinion survey that focused on the public's views of their federal legislative representatives, *see New Data Source on Congressional Elections*, COOPERATIVE CONG. ELECTION STUDY (Sept. 22, 2011), <http://projects.iq.harvard.edu/cces/announcements/new-data-source-congressional-elections>.

269. HETHERINGTON & WEILER, *supra* note 267, at 123–27.

270. *Id.* at 127–29.

271. In an important article, Professor Vermeule reviews two TMT studies and finds "ambiguous results to date." Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155, 1168 (2008). He suggests that because mortality salience "causes stricter adherence to one's antecedent worldview" it will merely reinforce the conservative views of those with conservative priors and reinforce the libertarian views of those who favored rights *ex ante*. *Id.* The result is "simultaneous and *countervailing* political effects." *Id.* at 1167 (emphasis added).

In sum, recent empirical work demonstrates that terrorism triggers a need for increased security, predictability, and control. This induces voters across the political spectrum to tilt toward “resistance to change and opposition to equality, which reduce uncertainty and threat.”<sup>272</sup> Such biasing effect is not transmitted via briefly experienced emotion, but follows from a change in underlying cognitive demands.<sup>273</sup> The TMT research thus suggests that incidents of terrorism can have enduring cognitive consequences. Although experiments have not yet provided a satisfactory account of the temporal dimensions of cognitive change, one study found that the effects of 9/11 on

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It is not clear, however, that either of the studies that are cited in *Emergency Lawmaking After 9/11 and 7/7* supports this conclusion. First, Professor Vermeule cites a 1992 experimental study that found reminders of mortality made conservatives “more favorable” to another conservative subject and “more unfavorable” toward a liberal subject. Jeff Greenberg et al., *Terror Management and Tolerance: Does Mortality Salience Always Intensify Negative Reactions to Others Who Threaten One’s Worldview?*, 63 J. PERSONALITY & SOC. PSYCHOL. 212, 215 (1992). By contrast, liberals did not become more favorable to liberals and “became less unfavorable” toward conservatives. *Id.* This is not a finding of countervailing effects. Rather, “both the conservatives and the liberals became more favorable to the conservative target.” *Id.* The finding is consonant with other studies. See Landau et al., *supra* note 261, at 1146 (“[T]he increased appeal of President Bush in response to reminders of death or the events of 9/11 was not at all limited to conservative individuals and was not the result of an increase in political conservatism.”); Cohen et al., *supra* note 261, at 183 (finding a 400 percent increase in votes for Bush over Kerry). In addition, the Greenberg study suggests that even liberals will be more hostile to perceived out-groups. The study authors caution that “liberal ideology is also rooted in fundamental American and Judeo-Christian ideals.” Greenberg et al., *supra*, at 216. Those not perceived as “American and Judeo-Christian” may be seen as outsiders across the political spectrum. *Id.*; see also Schimel et al., *supra* note 254, at 909–10 (finding increased aversion to non-Americans). In short, the Greenberg study does not support the countervailing effects thesis.

The second cited study found that reminders of 9/11 increased support for “extreme military interventions . . . and the Patriot Act” among conservatives and “had no effect . . . among politically liberal Americans.” Tom Pyszczynski et al., *Mortality Salience, Martyrdom, and Military Might: The Great Satan Versus the Axis of Evil*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 525, 533 (2006). Again, this is not a finding of countervailing effects: it is a finding that the strength of conservatives’ preferences for force increases while that of liberals *remains constant*. To have an offsetting effect, liberals would have to become less supportive of force. The study’s authors explicitly reject the countervailing effects theory:

It seems clear that *reminders of mortality do not simply lead to an amplification of tendencies that exist under more neutral conditions*. Rather [mortality salience] leads people to gravitate toward conceptions of reality that provide security . . . . Often this entails affirming the dominant aspects of one’s worldview, but as the present and other results demonstrate, sometimes this entails moving toward less dominant aspects of the worldview that are heavily associated with feelings of superiority, structure, and security.

*Id.* at 536 (emphasis added); see also Jost et al., *supra* note 260, at 1004 (rejecting the hypothesis that threat is “associated with ideological extremity in general” and finding instead “that uncertainty and threat management contribute independently to self-reported political conservatism, even after adjusting for ideological extremity”). Other studies do find liberals moving toward a liberal extreme—but not in the United States. See Jacqueline M. Anson et al., *Political Ideology in the 21st Century: A Terror Management Perspective on Maintenance and Change of the Status Quo*, in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION 210, 223 (John T. Jost et al. eds., 2009) (citing unpublished study of French subjects).

272. Jost et al., *supra* note 260, at 990; accord John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339, 366 (2003).

273. See Landau et al., *supra* note 261, at 1137.

attitudes towards civil liberties lingered five years after the event.<sup>274</sup> Other experimental TMT studies have found significant effects in responses to questions about terrorism years after 9/11.<sup>275</sup> Thus, it might be posited that the operative cognitive mechanism is not a short-term response akin to quotidian fear or panic, but a more enduring species of cognitive transformation.

## 2. Election-Level Studies of Terrorism's Effects

Empirical evidence from Israel, the United States, Mexico, and Spain confirm the significance of socially motivated cognition effects that have been identified in the aforementioned individual-level studies. Terrorism influences electoral results in ways that cannot be explained by new information about the competence of a ruling administration or novel risk information.

Time-series studies suggest terrorism has a predictable cross-national effect on election outcomes. The best data comes from Israel, where experience with terrorism is unfortunately frequent enough to allow relatively precise measurement of its interactions with democratic processes.<sup>276</sup> The best available study uses Israeli parliamentary elections between 1988 and 2003. It found that a terrorist attack in a locality “causes roughly an increase of 1.35 percentage points for the right bloc,” independent of whether a right- or left-government had been in office during the attack.<sup>277</sup> Left-leaning constituencies also become more right-leaning when attacks occur within those constituencies.<sup>278</sup> By contrast, left and right blocs in localities that do not suffer attacks polarize.<sup>279</sup> That is, there is in those localities movement to *both* left and right extremes depending on whether they are left- or right-leaning respectively. The net effect of all these shifts is “an increase in the electorate’s support for the bloc of parties that is associated with a more intransigent position toward terrorism.”<sup>280</sup> A second study of election outcomes between 1990 and 2003 confirmed this pro-security swing.<sup>281</sup>

Similar effects can be found in the U.S. election data. Since presidential campaigns are infrequent, highly competitive, and based on bundled judgments

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274. See ADAM J. BERINSKY, *IN TIME OF WAR: UNDERSTANDING AMERICAN PUBLIC OPINION FROM WORLD WAR II TO IRAQ* 166–68 (2009).

275. See, e.g., Jost et al., *supra* note 260, at 993.

276. See Seymour Spilerman & Guy Stecklov, *Societal Responses to Terrorist Attacks*, 35 ANN. REV. SOC. 167, 178 (2009) (describing measures taken by the Israeli government in response to chronic terrorism).

277. Claude Berrebi & Esteban F. Klor, *Are Voters Sensitive to Terrorism? Direct Evidence from the Israeli Electorate*, 102 AM. POL. SCI. REV. 279, 287–88 (2008).

278. See *id.* at 292.

279. *Id.* at 293.

280. *Id.* at 299. Note that this is a rational strategy of an extreme faction within a given political movement seeking to peel followers away from a more moderate faction by forcing the hand of an opponent toward violence.

281. See Claude Berrebi & Esteban F. Klor, *On Terrorism and Electoral Outcomes: Theory and Evidence from the Israeli-Palestinian Conflict*, 50 J. CONFLICT RESOL. 899, 919 (2006).



about variegated policy issues, the discrete effect of terrorism is confounded and hard to isolate. Experimental studies and cross-sectional analyses can nonetheless identify some of terrorism's effects on voter preferences. Easiest to observe is the "rally-round-the-flag" effect favoring incumbent executives.<sup>282</sup> President Bush's approval ratings thus leapt from 51% on September 10 to 86% on September 15, 2001.<sup>283</sup> The "rally effect" diminished over time.<sup>284</sup> Some analysts argue nevertheless that the effect persisted into the 2002 and 2004 races, which saw significant gains for the Republican Party and fewer high-quality Democratic candidates running.<sup>285</sup>

While rally effects appear on first blush to be independent of the public's retroactive assessments of an elected official's competence or achievements,<sup>286</sup> they are amenable to both 'rational' and 'socially motivated cognition' explanations. On the one hand, it could be argued that whether or not it is truly deserved, the rally effect lowers political transaction costs for governmental adaptations to new risk. Hence, a rally renders rapid and controversial state responses to new threats less costly. On the other hand, rally effects are also consistent with TMT's prediction that threat perceptions induce increased attachment to in-group symbols (i.e., the presidency), with the net effect of facilitating distorted and undesirable policy outcomes.<sup>287</sup>

Rally effects wane over time. But they still have potentially perverse medium-term consequences. Suppose that a political leader is properly at fault for some failure of organization or response to a terror attack, or that she exploits the attack as an opportunity to pursue agendas unrelated to security. Because increased support for a political leader is correlated with unwillingness to blame that leader,<sup>288</sup> negative information about her failure that emerges during the rally's duration may be discounted and perhaps never acted upon. The leader thus *ex ante* has less incentive to avoid or correct policy errors.

282. Marc J. Hetherington & Michael Nelson, *Anatomy of a Rally Effect: George W. Bush and the War on Terrorism*, 36 PS: POL. SCI. & POL. 37 (2003). Further evidence of how responses to disaster are shaped by extant partisan affiliations is supplied by Neil Malhotra & Alexander G. Kuo, *Attributing Blame: The Public's Response to Hurricane Katrina*, 70 J. POL. 1, 9–14 (2007); see also Neil Malhotra, *Partisan Polarization and Blame Attribution in a Federal System: The Case of Hurricane Katrina*, 38 PUBLIUS: J. FEDERALISM 651, 656 (2008) ("In the wake of Hurricane Katrina, there was significant partisan division with respect to which government figures deserved the most blame.").

283. Hetherington & Nelson, *supra* note 282, at 37.

284. See Cindy D. Kam & Jennifer M. Ramos, *Joining and Leaving the Rally: Understanding the Surge and Decline in Presidential Approval Following 9/11*, 72 PUB. OP. Q. 619, 628–30, 637 (2008).

285. See Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 4–5 (2002); see also James E. Campbell, *Why Bush Won the Presidential Election of 2004: Incumbency, Ideology, Terrorism, and Turnout*, 120 POL. SCI. Q. 219, 225–26 (2005) (discussing effect of national security issues on 2004 election outcomes).

286. See Berrebi & Klor, *supra* note 277, at 291 & tbl.8 ("[T]he electoral effect of a terror fatality is not affected by the identity of the party holding office.").

287. See Kam & Ramos, *supra* note 284, at 621, 641.

288. MEROLLA & ZECHMEISTER, *supra* note 263, at 142.

Rally effects, in short, can be impediments to both precautions and post hoc course corrections even if they facilitate new responses to new security risks.

Moreover, macro studies find postterror spikes in preferences for in-groups as well as disfavor directed at out-groups.<sup>289</sup> One study, for instance, investigated “ethnocentrism” in post-9/11 political data. “Ethnocentrism” is defined in that study as “a predisposition to divide the human world into in-groups and out-groups.”<sup>290</sup> It is measured by assessing the strength of stereotyping beliefs or in-group preferences/out-group hostility.<sup>291</sup> Based on a series of multiple regressions of 2002 policy preference data that used 2000 ethnocentrism data as an independent variable, the study found a “statistically significant and substantively sizable” correlation between those 2000 ethnocentric preferences and 2002 policy views, even after controlling for conservatism, threat perceptions, authoritarian predispositions, and demographics.<sup>292</sup> A second study found authoritarian predispositions to influence threat perceptions after controlling for demographics, partisanship, and both temporal and geographic distance from 9/11.<sup>293</sup> A third cross-sectional study of Canadian and American attitudes towards pandemic and terrorism risks identified “nationality-based collective self-esteem” as a statistically significant predictor of people’s evaluations of terrorism risk, but not the risk from pandemics.<sup>294</sup> That is, in each of these studies some kind of in-group preference influenced either the perception of terrorism risk magnitude or preferences between different security-related policies.

It bears emphasis that rational updating based on new information cannot easily explain the pattern of changes in American attitudes to terrorism before and after 9/11. By September 2001, Americans had already been exposed to the risk of catastrophic domestic terrorism by the 1993 World Trade Center attack and the 1995 Oklahoma City bombing. Both of these events signaled at least the possibility of mass casualties. One prefigured the site of 9/11. In response to Oklahoma City, Congress even enacted major antiterrorism legislation in

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289. For some evidence of rational updating as well, see Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28, 35–36 (2004) (reporting statistically significant decline in support for civil liberties correlating with perceptions of sociotropic threat). By in-groups, I mean communities with which a person identifies on, say, religious, racial, or national grounds.

290. DONALD R. KINDER & CINDY D. KAM, *US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION* 31, 44–52 (2009).

291. *Id.*

292. *Id.* at 83, 81–89; see also Cindy D. Kam & Donald R. Kinder, *Terror and Ethnocentrism: Foundations of American Support for the War on Terrorism*, 69 J. POL. SCI. 320, 328 (2007) (providing evidence to the same effect).

293. See Leonie Huddy et al., *Threat, Anxiety, and Support of Antiterrorism Policies*, 49 AM. J. POL. SCI. 593, 599 (2005).

294. Neal Feigenson et al., *Perceptions of Terrorism and Disease Risks: A Cross-National Comparison*, 69 MO. L. REV. 991, 995 (2004). The study broadly confirms the “security panic” thesis. It identified overevaluation of terrorism risk and found that both fear and anger were “correlated with increased perceptions of risk to both self and others.” *Id.* at 996–97, 1003.

1996.<sup>295</sup> And after the highly publicized 1998 attacks on African embassies and the 2000 attack on the USS *Cole* in Aden, al-Qaeda became known to the U.S. public. In short, the public had ample reason to be concerned about terrorism before 9/11. To explain post-9/11 changes in policy preferences as pure rational updating implies that Americans did not update at all based on pre-9/11 events such as the USS *Cole* bombing and the 1993 World Trade Center attacks, but then had a precisely calibrated response to 9/11.<sup>296</sup> This combination of “hot irrationality then” and “cold rationality now” is implausible.

Furthermore, distaste for out-groups is not a merely abstract possibility. Levels of animus directed at out-groups perceived as being especially responsible for terrorism risk—i.e., Muslims, South Asians, and Middle Easterners—has risen since 2009 in the United States after falling from a post-9/11 peak.<sup>297</sup> Reported levels of employment discrimination and bias attacks have increased at a similar rate.<sup>298</sup> A “steady drip” of pejorative images of Muslims remains “a serious and ongoing feature of contemporary life.”<sup>299</sup> TMT theory not only explains these trends, but also supplies a reason for explaining why it is that policy makers and the public seem to be slow to perceive in them a problem worth addressing.

These findings, in sum, demonstrate that a democratic public will systematically impose pressure on its elected representatives in both Congress and the White House to adopt inefficient policies, to suppress the mistakes of national leaders, and to target out-groups for harsh treatment. To the extent that the Separation of Powers is offered as a response to these problems, it will fail.

### *C. Summary*

This Part has argued that the external environment of democratic politics does not conduce to optimal responses to terrorism because of collective action problems, agency costs, and the disequilibrating effect of socially motivated cognition. Such powerful forces buffet both elected branches alike. The Separation of Powers, conceived as an endorsement of bilateralism, provides no solution to any of these external distortions. The arguments developed in this Part also supply a reason why structural constitutional presumptions cannot be

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295. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of the U.S.C.).

296. The “rational updating” explanation cannot be redeemed by arguing that pre-2001 incidents were lower profile: the basic assumption of rational explanations is that even lower profile events influence expectations of terrorist violence at the margin in a way that yields net rational responses.

297. See Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL’Y REV. 347, 350–57 (2011) (collecting data showing trends in discrimination and examining possible explanations).

298. *Id.* at 351–52.

299. PETER MOREY & AMINA YAQIN, *FRAMING MUSLIMS: STEREOTYPING AND REPRESENTATION AFTER 9/11*, at 208 (2011).

repackaged as merely *comparative* claims of institutional competence.<sup>300</sup> When the political branches err, they will often do so in lockstep as a consequence of exogenous forces. There is thus no reason to think that one branch will systematically do better than the other, or that joint political branch action will be optimal given the distortive effect of political psychology.

The claim developed in this Part should not be overstated. I am not contending that there is an entity other than Congress or the executive branch that is best suited to determine or execute security policy. Policy responses necessarily will involve actors within one or both branches. My narrow claim here is rather that when it comes to the exercise of otherwise proper judicial review, presumptions founded on an idealized theory of the Separation of Powers will be systematically inadequate as proxies for the soundness of counterterrorism policy making. That is, there is no panacea in the writings of Hamilton or Madison to the serious and difficult problems of responding to threats such as al-Qaeda today.

#### IV.

##### ADJUDICATION WITHOUT STRUCTURAL CONSTITUTIONAL PRESUMPTIONS

In Parts II and III, I have challenged the judicial use of structural constitutional presumptions as heuristics in counterterrorism cases. I have offered evidence that the logic of structural constitutionalism fails to account for two significant complicating factors: (1) the internal structures of each political branch, and (2) the external political environment that predictably distorts both of the political branches' choices. Bringing the internal and external ecologies of political action back into the picture casts doubt on the empirical generalizations that underwrite commonly used structural constitutional presumptions. As a result, it is not safe to assume that a policy option is effective and appropriately targeted within the bounds of statutory authority simply because it has the executive's imprimatur. Nor is it plausible to assume that policies close to the optimum are necessarily achieved simply by insisting on bilateral consideration and endorsement by the two political branches. In our second-best world, neither of the heuristics drawn from eighteenth-century ideas about the Separation of Powers is a reliable guide. Neither is sufficiently sensitive to the effects of today's internal institutional fragmentation and external political distortion.

But if federal judges should not rely on the Separation of Powers as a crutch for thinking about hard questions of statutory meaning and individual rights, how should they resolve hard cases involving counterterrorism policy? Put simply, they should decide counterterrorism cases using the ordinary tools of legal reasoning and fact finding.

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300. See, e.g., POSNER & VERMEULE, *supra* note 23, at 30–31.

As a threshold matter, it is worth stressing how the context of adjudication inflects the analysis. Courts are almost never first movers in making policy. Rather, they review discrete actions for their compliance with statutory or constitutional commands based on both the evidentiary record developed in a specific case at hand and also the larger factual record developed by the government in enacting the policy. To the extent federal judges fashion constitutional rules on a moving-forward basis through adjudication, they do so only after being informed by the briefing of all concerned parties (including the government) and with the benefit of some evidence of how a policy works on the ground. That is, in those instances in which adjudication produces a downstream effect on the primary conduct rules limiting government action, the government has almost always been heavily involved in shaping that litigation by determining the larger policy environment (e.g., by deciding whether or not to seek legislative support), by informing (or propagandizing) the public, and by educating the courts through its briefs and verbal presentations.

Taking the use of structural constitutional presumptions off the table does not change any of these elementary parameters of adjudication. Rather, it means that courts will look directly at the relationship between the facts generated by the government in a given case and the applicable statutory or constitutional command. In so doing, the evidentiary records and policy arguments developed by Congress and the executive necessarily assume large relevance. Hence, it will almost always be the case that the executive will have an opportunity to leverage its expertise and insight both directly in briefing the case and indirectly in setting the judicial agenda.

In the course of adjudication, the court should engage in a familiar pattern of fact finding and legal reasoning to ascertain whether a policy is justified and compatible with applicable legal norms. It should not ask whether the right branch(es) was (or were) involved as a heuristic for resolving the case. At the end of the day, it is quite plausible to think the ordinary process of litigation, informed by the government and its adversaries, is more likely to yield a correct answer to legal questions than the abbreviating punctuation of a structural constitutional presumption. In other words, the addition of after-the-fact judicial supervision will plausibly generate superior outcomes to government action without such *ex post* supervision in cases that are otherwise within the proper jurisdiction of the federal courts.

To be more concrete, it may help to examine what this would mean in the cases delineated in Part I. Start with the *HLP* case in which the Court upheld the application of the material support law to speech acts that on their face implicated no risk of violence.<sup>301</sup> In that case, the Court would have

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301. *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705 (2010); *see also supra* text accompanying notes 30–37.

evaluated the conformity of the material support statute with the First Amendment without a presumption of executive competence. That is, it would use the ordinary tools of judicial inquiry pursuant to the First Amendment to reach a judgment on this question. Applying strict scrutiny, and without a structural constitutional crutch, it is plausible to think that the Court would have had to strike down some applications of the material support provision on First Amendment grounds.

But there is no reason to think a retreat from structural presumptions would always disadvantage the government. In a case such as *Hamdan v. Rumsfeld*,<sup>302</sup> for example, the Court would examine the question of statutory authorization for military commissions without any particular presumption either for or against the government. That is, it would examine the statutory question there without stacking the deck with a clear statement rule favoring legislative involvement. Ordinary principles of statutory interpretation would drive the analysis, just as they do whenever the executive argues in any other area of law that a regulation or policy falls within the permissible scope of an existing statute.<sup>303</sup> There should be no thumb on the scales in favor of either more or less deference to the executive than would ordinarily be the case.<sup>304</sup> It is quite plausible to think that the outcome of *Hamdan* would have been different under those conditions.

Similarly, in the two “enemy combatant” detention cases discussed in Part I, *Munaf*<sup>305</sup> and *Hamdi*,<sup>306</sup> the Court would resolve the statutory and individual rights questions relating to detention authority at issue without a bias in favor of executive competence or the need for bilateralism. In *Hamdi*, this would rule out Justice Souter’s argument that the executive’s position on a statute required especially clear proof of congressional endorsement. In *Munaf*, it would mean that structural constitutional presumptions would likely not entirely oust the factual review normally at the heart of the Great Writ. Whether this would result in a judgment against the executive in *Munaf* is, of course, something

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302. 548 U.S. 557 (2006); *see supra* text accompanying notes 65–70.

303. Debates about the appropriate posture of courts to agency interpretations of statutes would continue unabated and unaffected between those who favor strong deference and those who prefer weak deference to the executive. These concern the application of the two-step process of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), where it was determined that the government’s interpretive action had the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (applying the two-step process outlined in *Chevron* to hold that the United States Customs Agency was not entitled deference in determining a tariff classification).

304. Some commentators have suggested judicial review of agency action should be more accommodating of political considerations. *See, e.g.*, Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) (“[W]hat count as ‘valid’ reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency’s rulemaking record.”). For the reasons developed in Part III, I am skeptical this would be wise in the counterterrorism domain.

305. 553 U.S. 674 (2008).

306. 542 U.S. 507 (2004).

that turns on the facts of the particular case. Abandoning the Separation of Powers as a heuristic, in short, would sometimes favor the executive and sometimes would cut against claims of government power. Issues of statutory interpretation and individual rights, however, would turn on the application of traditional judicial tools, not claims of comparative institutional competence that are conjured, spirit-like, from the texts of the Founders.

Whatever its ultimate ideological valence on the ground, the argument developed in this Article would remove a series of imprecise and misleading generalizations from the judge's tool kit in counterterrorism cases. As a result of such a change, judicial examination of counterterrorism policies for statutory conflicts or violations of individual rights would start to look much more like judicial regulation of other policy areas than it currently does. Judges would need to pay the same attention to factual predicates and specific details about policies as they do in cases involving campaign finance, affirmative action, or telecommunications policy. This means that judges must resolve specific questions of fact raised by the application of a policy to particular plaintiffs or defendants.

How would judges fare in this enterprise? Experience suggests that federal judges are capable of making granular empirical judgments in the national security context despite secrecy concerns.<sup>307</sup> Federal judges have long employed tools such as in camera, ex parte examinations,<sup>308</sup> as well as the established statutory instruments employed now to handle classified evidence in criminal cases without compromising national security.<sup>309</sup> In some domains of constitutional law, there is reason to believe courts are legally *compelled* to make fine-grained empirical judgments.<sup>310</sup> As to the success rate of judicial handling of factual questions in this context, a recent review of the courts' treatment of "national security fact[s]" plausibly rejects a "one-size-fits-all solution" to the problem.<sup>311</sup> That analysis contends that judges should "account separately for the possibility that the executive has superior access to information and to expertise, and should require a showing that the executive

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307. *But see* John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 431 (2003) (arguing against judicial involvement in national security cases in abstract terms).

308. *See, e.g.*, *United States v. Rosen*, 447 F. Supp. 2d 538, 546 (E.D. Va. 2006) (using in camera, ex parte review of evidence behind a surveillance warrant in order to ascertain whether defendants' Fourth Amendment rights had been violated); *see also* *United States v. Hammoud*, 381 F.3d 316, 332 (4th Cir. 2004) (en banc) (endorsing same procedure and also reviewing the evidence de novo); *United States v. Squillacote*, 221 F.3d 542 (4th Cir. 2000) (rejecting Confrontation Clause challenge to this kind of procedure).

309. *See* Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16 (2006); *United States v. Lee*, 90 F. Supp. 2d 1324, 1325–26 (D.N.M. 2000) (describing statute's operation).

310. This is particularly the case in the First Amendment domain. *See, e.g.*, *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 505 (1984); *Speiser v. Randall*, 357 U.S. 513, 520 (1958).

311. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1435 (2009).

actually and reliably exploited such advantages.”<sup>312</sup> That is, much as in other fields, record evidence of demonstrated expertise by the government in the case at bar would be accounted for and rewarded in the court’s reasoning. Put to the proof, the analysis in Part II suggests that the executive may well be found wanting in a nontrivial number of occasions. In those cases, litigation of factual questions should proceed in the same way it would in any other policy domain—resting upon the facts and upon specific showings or expertise or epistemic advantage. By contrast, where the government or Congress has exercised their considerable investigative and analytic authorities in a meaningful way, there is no reason to ignore the fruits of that labor.

It is not simply that there is no reason to presume ordinary tools of statutory interpretation and fact finding will go awry more often in counterterrorism than in any other policy domain. There is some ground to believe that federal judges (to the extent they are willing to take up the role<sup>313</sup>) are capable of reaching more or less reliable outcomes. As a consequence of Article III, federal courts typically intervene in controversies after the fact, or at least after some facts have become available. Thus, they benefit from a more developed empirical record than legislators and executive officials. Courts also gain from the adversarial process, in which both the government and those directly affected by a policy have an opportunity to present evidence of the justifications and costs of a policy. That adversarial presentation, in addition, presents a possible opportunity to cure potential hindsight bias.

Compounding the courts’ timing-related advantages, there is a familiar point about relative political insulation. On the one hand, there is much reason to fear that external political pressures will lead the political branches to leave uncorrected gross errors by elected leaders and instead to target out-groups for particularly harsh or intrusive treatment. By contrast, it is plausible to think that federal judges are constrained, at least on the margin, by strong disciplinary norms of legal craftsmanship and fidelity to precedent, not to mention the obligation to supply reasons.<sup>314</sup> Moreover, to the extent that critics of judicial review more generally worry about the possible downstream costs of errors by courts, it is worth recalling that Congress has proved itself quite capable of intervening after a judicial decision, even on constitutional grounds, to rectify

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312. *Id.* at 1365. In his rich analysis, Professor Chesney concludes that judges “should require a showing that the executive actually and reliably exploited [epistemic or expertise] advantages.” *Id.* To the extent this entails case-by-case judgments of specific claims, rather than any blanket approach to categories of cases, I am in accord with Professor Chesney’s analysis.

313. Over time, presidents might stock the bench with judges committed on ideological grounds against fulfilling this role—a risk in any politically appointed judiciary.

314. For a cogent statement of this basic fact from a prominent jurist, see Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 28 (1993) (“The pleasure of judging is bound up with compliance with certain self-limiting rules that define the ‘game’ of judging.”).



perceived errors.<sup>315</sup> In sum, without being too dewy-eyed about the judiciary—which is surely also a flawed institution amenable to criticism for its biases and ingrained habits—there is no reason to think that a process involving the political branches alone will necessarily yield better results than a process that begins in the political branches but that is also characterized by a public airing through serious judicial review unhindered by structural constitutional presumptions.

#### CONCLUSION

The Separation of Powers has loomed large as a resolving optic for judicial and scholarly thinking about new terrorism-related policies. The wide shadow cast by structural constitutionalism sets litigation about counterterrorism policies apart from case law arising from other policy areas. Scholarship in the field runs along parallel tracks. I have aimed to show in this Article that structural constitutional presumptions provide only shaky guidance in the counterterrorism domain. The internal structure and external political ecology of the political branches in tandem render such presumptions highly unreliable proxies to judge the wisdom of specific policies. The analysis developed here cashes out in terms of a call for a different judicial approach to counterterrorism cases. To return to the hypothetical with which I began, a judge faced with a moratorium on social messaging services should not ask which branch made the shut-off decision; she should instead look directly to the factual and legal merits of the decision without structural constitutional blinders, informed by government lawyers and private litigants who could no longer lazily lean on *The Federalist* and other lawyerly forms of structural constitutional folk wisdom.

The lesson here has a more general implication. A decade after 9/11, terrorism is but one of many public policy challenges facing the nation. Its shadow will not recede soon, even with the death of Osama bin Laden. Just as the government and the public must learn to accommodate and integrate that uncomfortable fact into their daily routines and labors, so too must the judiciary. The jurisprudence of counterterrorism should cease to be an extraordinary exercise in as-applied structural constitutionalism. It must become just another part of the ordinary business of the federal courts.

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315. See *supra* notes 170–179 and accompanying text.



Readers with comments may address them to:

Professor Aziz Z. Huq  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
[Huq@uchicago.edu](mailto:Huq@uchicago.edu)

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