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ARTICLE

THE PRESIDENT AND THE DETAINEES

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Entering the White House in 2009, President Barack Obama committed to closing the military detention facility at Guantánamo Bay in Cuba. Eight years later, the facility remains open. This Article uses the puzzle of why Obama's goal proved so recalcitrant

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as a case study of separation-of-powers constraints upon presidential power. Deploying a combination of empirical, doctrinal, and positive political science tools, it isolates the salient actors and dynamics that impeded Obama's goal. Its core descriptive finding is that a bureaucratic-legislative alliance was pivotal in blocking the White House's agenda. This alliance leveraged its asymmetrical access to information to generate constraints on the President. The most significant of these constraints operated through political channels; statutory prohibitions with the force of law were of distinctly secondary importance. The analysis, furthermore, sheds light on why individualized judicial review, secured through the mechanism of habeas petitions under the Constitution's Suspension Clause, had scant effect. Contrary to standard approaches to the Constitution's separation of powers, the case study developed here points to the value of granular, retail analysis that accounts for internally heterogeneous incentives and agendas instead of abstract theory that reifies branches as unitary and ahistorical entities.

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INTRODUCTION

On January 20, 2009, Barack Obama was sworn into office as the 44th President of the United States. His campaign platform included a pledge to shutter the detention facility at Guantánamo Bay. A century-old U.S. military facility on the southeastern littoral of Cuba's Oriente Province,¹ Guantánamo had been used to house individuals seized in extraterritorial counterterrorism operations since January 2002.² As early as August 2007, then-candidate Obama committed himself to dispersing those individuals and winding up detention operations at the Cuban base.³ In the wake of his November 2008 victory, his campaign team reiterated that goal, signaling the President's ambition of making a "sharp break" with the George W. Bush Administration.⁴ Yet on his departure from office, forty-one individuals remained in custody at Guantánamo.⁵ Far from achieving its ambition, by 2016 the Obama Administration had downgraded its aspirations to a goal it had already achieved: a detainee population in the double digits.⁶ A policy

¹ See JONATHAN M. HANSEN, *GUANTÁNAMO: AN AMERICAN HISTORY* 12-15, 50 (2011) (describing the geography and location of Guantánamo Bay).

² See generally KAREN GREENBERG, *THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS* (2009) (providing a narrative account of the start of detention operations at Guantánamo).

³ Malathi Nayak, *Factbox: Has Obama Delivered on His 2008 Campaign Promises?*, REUTERS (Oct. 28, 2011, 11:08 AM), <http://www.reuters.com/article/2011/10/28/us-usa-campaign-obama-promises-idUSTRE79R3M920111028> [<https://perma.cc/T58N-9HF6>].

⁴ Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST (Nov. 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/11/AR2008111102865.html> [<https://perma.cc/L6J2-SPNP>]. The President's policy was effectuated through an executive order issued days after his inauguration. See Exec. Order No. 13,492 § 3, 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009).

⁵ See N.Y. TIMES: *THE GUANTÁNAMO DOCKET*, <http://projects.nytimes.com/guantanamo> [<https://perma.cc/HU9H-FFTT>] (last updated Jan. 23, 2017).

⁶ See Hannah Fairfield et al., *How Will Obama's Plan to Close Guantánamo Work?*, N.Y. TIMES (Aug. 16, 2016), <http://www.nytimes.com/interactive/2016/02/23/us/guantanamo-bay-obama.html> [<https://perma.cc/5JRL-UN59>] (describing the decline in detainee population from 242 to sixty-one during Obama's presidency); see also Charlie Savage, *Frustrated in Efforts to Close Guantánamo Prison*,

once perceived as a signature legacy of the George W. Bush Administration had become a keystone of the Obama legacy.⁷

The persistence of the Guantánamo detentions ought by rights to be a puzzle for constitutional law. A common theme in recent public-law scholarship is the increasing, even “unbound[ed],” power of the executive branch,⁸ in contrast to a polarized and “gridlocked” Congress.⁹ As a matter of constitutional structure, Presidents’ unified and hierarchical control over the executive branch ought by rights to enable efficient and rational policymaking of a kind that can easily elude the multitudinous and disputative Congress.¹⁰ In the Guantánamo case, it is also a result of the substantive law at issue. Discretionary executive legal and policy authority is customarily thought to be at its zenith in the national security domain.¹¹ Correspondingly, the case for judicial and congressional deference to the Executive is commonly thought stronger on security matters than on ordinary regulatory issues.¹²

Officials Look to Reduce Population, N.Y. TIMES (Dec. 2, 2015), <http://www.nytimes.com/2015/12/03/us/politics/president-obama-guantanamo-bay-closing-plans-detainees.html> [<https://perma.cc/MD92-9BAR>] (describing the Administration’s efforts to reduce the detainee population at Guantánamo Bay after encountering difficulties with shutting it down completely).

⁷ Charlie Savage, *President’s Plan for Guantánamo Is Seen Faltering*, N.Y. TIMES, July 22, 2015, at A1. A recently edited collection evocatively makes the same point through its title. See OBAMA’S GUANTÁNAMO: STORIES FROM AN ENDURING PRISON (Jonathan Hafetz ed., 2016) [hereinafter OBAMA’S GUANTÁNAMO].

⁸ ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4-5 (2010); see also BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 141, 184-85 (2010) (describing an “institutional presidency . . . on the march” and positing that “[t]he Constitution is now governing a system in which an institutionalized presidency rules through a politicized White House that dominates the cabinet secretaries and sets the agenda for Congress”).

⁹ See Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1772 (2015); see *id.* at 1762-72 (describing congressional polarization and its effects on the policy opportunities available to administrative agencies); see also Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2076-77 n.66 (2013) (discussing how party concentration in a branch affects institutional checks).

¹⁰ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339 (2001) (concluding that structural features of the executive branch enable “cost-effectiveness, consistency, and rational priority-setting”).

¹¹ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 682 (2006) (Thomas, J., dissenting) (arguing that the Court’s “duty to defer to the Executive’s military and foreign policy judgment is at its zenith” in conducting war, especially with congressional authorization). Some commentators have discerned few legal limits to the President’s authority in this context. See John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1184 (2004) (arguing that “the authority to determine the handling of military detainees is conferred on the President by the Commander in Chief Clause, which is located in Article II of the Constitution”). But this is a minority position.

¹² See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CAL. L. REV. 887, 895-99 (2012) [hereinafter Huq, *Structural Constitutionalism*] (collecting sources that posit that view). In other work, I have challenged this conventional wisdom. See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 236-40 (pointing to evidence of continuity in judicial deference levels between security matters and other matters).

And even apart from the presidency's structural and legal advantages, the White House has a demonstrated capacity to shape the policy environment through informal "rhetorical" strategies that "'go over the heads' of Congress to the people at large."¹³ Whether assessed in terms of institutional structure, law, or politics, the White House would seem at a distinct advantage to other political actors.

The Guantánamo detentions themselves illustrate each of these advantages. To begin with, the executive branch under President Bush undertook a series of swift and unilateral policy decisions about how to process and detain individuals captured in the Afghanistan–Pakistan theater with little input from Congress or the courts. Those policy decisions were reached in a context uncluttered by perceived legal constraints.¹⁴ And just as the White House was shaping facts on the ground and contouring the legal landscape, it was also molding the public narrative about detainees on the basis of its lopsided access to information about what was happening at the Cuban base.¹⁵

But if one President could unilaterally create a prison at Guantánamo, why couldn't a subsequent Chief Executive end it? This question cuts to the

¹³ JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 4 (1987); see also SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* 10–47 (4th ed. 2007) (describing the incentive for Presidents to shun bargaining with Congress and instead influence Congress by appealing directly to the public).

¹⁴ See Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys Gen., to William J. Haynes II, Gen. Counsel, Dep't of Def., Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001), <http://nsarchive.gwu.edu/torturingdemocracy/documents/20011228.pdf> [<https://perma.cc/J2X2-C9JW>] [hereinafter Philbin/Yoo Memorandum] (concluding that federal district courts could not properly exercise federal habeas jurisdiction over an alien detained at Guantánamo Bay); Memorandum from John Yoo, Deputy Assistant Attorney Gen., and Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), <http://nsarchive.gwu.edu/torturingdemocracy/documents/20020109.pdf> [<https://perma.cc/CW8D-MLXS>] [hereinafter Yoo/Delahunty Memorandum] (concluding that international treaties regarding the treatment of individuals detained by U.S. forces do not apply to members of al Qaeda).

¹⁵ For some examples of shaping the political narrative from different points in time, see Katharine Q. Seelye, *Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 27, 2002, at A6 (reporting the Vice President and Defense Secretary of the Bush Administration positing that the Geneva Convention does not apply to Guantánamo detainees); Joby Warrick, *A Blind Eye to Guantanamo?; Book Says White House Ignored CIA on Detainees' Innocence*, WASH. POST (July 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/11/AR2008071102954.html> [<https://perma.cc/666N-ZF52>] (reflecting on new information that the Bush Administration ignored CIA evidence that up to a third of detainees at Guantánamo may have been mistakenly imprisoned); Margot Williams et al., *Voices Baffled, Brash and Irate in Guantánamo*, N.Y. TIMES, Mar. 6, 2006, at A1 (noting that the executive branch has withheld voluminous amounts of information regarding the detainees—including the names of detainees and the evidence against them). To identify this asymmetry is not to imply that executive branch conduct was necessarily improper. It is standard fare for officials to use their privileged access to information to shape political debate. In the national security context, the asymmetry between officials and the general public is much wider than on other matters.

heart of the idea of the separation of powers. Whereas the establishment of the Guantánamo detentions was characterized by swift and unilateral executive action, the subsequent phase of Guantánamo's operation was characterized by increasing levels of interbranch involvement. First courts, and then Congress, intervened. Between 2004 and 2008, the Supreme Court issued several opinions regulating military detention in ways that increasingly pinched on executive branch discretion.¹⁶ These rulings culminated in 2008 in *Boumediene v. Bush*, which extended the Suspension Clause of Article I, Section 9¹⁷ to Guantánamo.¹⁸ As a result of *Boumediene*, federal judges in the District of Columbia began adjudicating individual challenges to detention. In doing so, they exercised retail superintendence of a policy that until then had been under near-exclusive executive branch suzerainty. Further, they started to fill gaps and ambiguities in what until then had been a skeletal statutory definition of lawful detention authority.¹⁹ In 2009, Congress too entered the fray by enacting restrictions on detainees' transfers²⁰ and by refining the lawful bounds of detention authority.²¹

Until now, neither the causes nor the consequences that these judicial and legislative interventions have had for presidential discretion have been carefully studied. A body of existing scholarship, to be sure, focuses on the early role played by private and public-interest lawyers who challenged detentions. In a 2010 article, for example, I presented data on changes in the overall detention population, and argued that habeas suits from 2004 onwards operated as "shots across the bow," pushing the executive to adopt policies characterized by "professionalism and reliability" rather than ad hoc and unreliable decisionmaking.²² Subsequently, commentators from divergent

¹⁶ See *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (extending the constitutional writ of habeas corpus to Guantánamo Bay detainees); *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006) (invalidating first-generation military commissions and requiring that Guantánamo detainees are tried before a "regularly constituted court affording all of the judicial guarantees which are recognized as indispensable by civilized peoples"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536-38 (2004) (holding that a U.S. citizen detained as an enemy combatant has a due process right to judicial review of grounds for his military detention); *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004) (extending statutory habeas jurisdiction to Guantánamo Bay detentions).

¹⁷ U.S. CONST. art. I, § 9, cl. 2.

¹⁸ 553 U.S. at 798.

¹⁹ See *infra* subsections II.C.1-3 (describing post-*Boumediene* jurisprudence in federal courts).

²⁰ See, e.g., Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920 (2009) (barring the use of federal funds for the transfer of prisoners from Guantánamo unless certain conditions are met); see also *infra* text accompanying notes 67-70 (discussing statutory limitations on transfer enacted by Congress beginning in 2009).

²¹ See National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (affirming that the President has the authority to detain those involved in certain terrorist activities).

²² For an early account of post-*Boumediene* judicial review, see Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 422-23, 426-27 (2010) [hereinafter Huq, *What Good Is Habeas?*]. For an argument that an expectation of litigation influences outcomes in the national security

political and policy perspectives have argued that legal challenges from civil society can motivate changes to security policy. In 2012, for example, Jack Goldsmith characterized civil litigation as an element of a larger ecosystem of transparency that constrains the presidency.²³ From the other side of the political spectrum, David Cole in 2016 enthusiastically celebrated “[t]he Power of Citizen Activists to Make Constitutional Law.”²⁴ These encomiums to civil society as an effectual and needful friction on governmental power, however accurately they may depict Guantánamo’s early years, do not explain—and, indeed, do not purport to explain—the persistence of Guantánamo’s prison in the context of an active separation of powers. It is necessary to look beyond the invisible hand of Toquevillian civil society to explain why the detentions persisted as long as they did.

My aim in this Article is to cast light on that puzzle with a close empirical study of the effects of interbranch dynamics upon Guantánamo policy. First, the Guantánamo prison is, for better or worse, a synecdoche for a much larger constellation of controversial counterterrorism policies associated with President George W. Bush. Celebrating the mobilizations that sought to apply constitutional limits to those operations—and thus to end practices that many believe to be immoral and unwarranted—is surely worthwhile, especially given the seeming risk today that many of those policies will be revived. But it is also important to understand how and why this particular cluster of controversial policies persisted long after being roundly rejected as inconsistent with shared legal and normative commitments. Why Guantánamo persisted, in short, is an intensely specific question—but one that should matter to us not only as scholars, but also as citizens. Second, the case study of the Guantánamo detentions casts light on how our separation of powers works in practice. Although I do not develop here a new theory of the separation of powers,²⁵ I do identify several important causal mechanisms

context, see Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 *FORDHAM L. REV.* 827, 843-49 (2013).

²³ See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, 161-77 (2012) (describing how the “ecology of transparency ensured that the clashes between military and civilian lawyers spilled into the public realm”). Goldsmith’s book is trenchantly critiqued both for its factual errors and flawed arguments. See generally Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith’s Power and Constraint*, 45 *CASE W. RES. J. INT’L L.* 23 (2012).

²⁴ See generally DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016).

²⁵ In separate works, I have developed more stylized “theories” of the separation of powers that focus on (1) the dynamic, consensual character of many of our national institutional arrangements and (2) the key role of institutional and normative pluralism for thinking about our separated branches. See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 *COLUM. L. REV.* 1595, 1618-44 (2014) [hereinafter Huq, *Negotiated Separation of Powers*] (articulating a bargaining-based model of interbranch and federal–state interaction); see also Aziz Z. Huq & Jon D. Michaels, *The Cycles of*

through which interbranch interactions flow—mechanisms that have received insufficient attention in legal scholarship. I also hope to drill down on a quite specific policy question for which precise quantitative data is available. I do so in order to see if anything can be learned about how the three branches of the federal government interact and about what elements of interbranch behavior might predict the effect of such interaction.

This exercise yields two complementary payoffs. The first is discrete and historical in nature; the other is normative and doctrinal. This Article's threshold contribution is a new and more fulsome positive account of the persistence of the Guantánamo prison. This descriptive effort snaps into focus causal mechanisms that until now have been largely ignored. Conventional wisdom blames the persistence of Guantánamo on growing concern about detainee recidivism during President Obama's first term²⁶ and ensuing public opposition to President Obama's closure plan.²⁷ This opposition is typically understood as a freestanding dynamic that arose exogenously to derail White House plans. More careful empirical analysis, however, suggests that opposition based on recidivism-related fears cannot be explained by external events. There was no change in the risk posed by the marginal detainee slated for transfer from the lame-duck Bush Administration to the Obama Administration. And there was no external shock, such as a high-profile act of violence by a former Guantánamo detainee, that justified the pivot in public or congressional mood.

This Article offers a different explanation. President Obama's agenda, I argue, was derailed by an interbranch alliance between the military bureaucracy

Separation-of-Powers Jurisprudence, 126 YALE L.J. 346, 407-16 (2016) (developing a theoretical account of the separation of powers that seeks to justify doctrinal cycling between rules and standards). I draw upon these more stylized and abstract approaches as relevant here since both underscore the dynamic and multitudinous character of national institutional arrangements in the same way that the current study does. Nevertheless, the ambition of this Article is not to "prove" in some mechanical way the claims proffered in that theoretical work.

26 For illustrative versions of this argument, see, for example, HOUSE ARMED SERVS. COMM., LEAVING GUANTANAMO: POLICIES, PRESSURES, AND DETAINEES RETURNING TO THE FIGHT 11-12, 64 (Jan. 2012), https://armedservices.house.gov/sites/republicans.armedservices.house.gov/themes/rep_armed_services/largedocs/leaving_guantanamo_web_3_27.pdf [<https://perma.cc/G5D8-RW7Q>], noting that the threat of detainee recidivism would continue if President Obama's closure plan was implemented.

27 For illustrative versions of this argument, see, for example, Jennifer Daskal & Steve Vladeck, *Where Did Things Go Wrong? Three Key Moments that Shaped Obama's Failed Guantánamo Policy*, JUST SECURITY (Nov. 11, 2015), <https://www.justsecurity.org/27514/wrong-key-moments-shaped-obamas-failed-guantanamo-policy/> [<https://perma.cc/25FD-2LZ6>], which discusses how several key decisions on Guantánamo policy early in the Obama Administration fueled political opposition to closing the prison, and Marty Lederman, *The Insoluble Guantánamo Problem (Part One: The President's Successful Transformation of U.S. Detention Practices . . . and the GTMO Exception)*, JUST SECURITY (Nov. 12, 2015), <https://www.justsecurity.org/27549/guantanamo-problem-remains-insoluble-part-one-presidents-successful-transformation-u-s-detention-practices-gtmo-exception/> [<https://perma.cc/76PU-TLVQ>], which presents the Obama Administration's detainee policy as successfully transformative and limited only by "the strong opposition of important national security critics in the Republican Party."

and a legislative faction hostile to the new President's agenda. The alliance was catalyzed by dynamics internal to the executive. That is, a conflict between the President and his putative subordinates diffused out from Article II into a larger separation-of-powers context to become an interbranch affair. That military-legislative alliance then injected the recidivism question into public discourse via strategic disclosures, asymmetrical leaks, and elite-level policy entrepreneurship. The alliance's effort to change the politics of detainee transfers succeeded in precipitating legislative limits on transfer. But the efficacy of these statutory limits did not rest on any law-like constraining element. Instead, their causal force hinged on the extent to which they provided leverage for the bureaucracy to resist the White House's agenda.²⁸ External politics fostered to maximize concern about detainee transfers thus enabled an internal politics inimical to President Obama's aims. In stark contrast to the robust effect of bureaucratic-legislative alliances, post-*Boumediene* federal courts played a minor role aiding the President—and arguably did more to entrench rather than to dissolve the prison doors at Guantánamo. Motivated by institutional concerns, the judiciary conspicuously declined invitations to use law to salve frictions generated by the bureaucratic-legislative alliance. To the contrary, while discrete judicial review was playing a role in a de minimis proportion of detainee transfers, federal judges' pronouncements on the substance of detention law exceeded the government's positions and practice in their hostility to detainees. The internal logic of Article III thus led judges to exhort confinement while eschewing even the tender drams of mercy titrated out by the executive. In brief then, this account aims to render lucidly and in granular detail what others have pitched only in abstracted and theoretical terms: in the national security domain, the political branches' authorities "overlap" and "the freedom with which each branch may exercise its constitutional authority is affected by the existence and employment of the other branch's powers."²⁹

This Article's second contribution leverages the distinctive separation-of-powers context of the Guantánamo detentions—a trajectory from unilateral

²⁸ This element of my account is underscored by a recent article by Connie Bruck. See Connie Bruck, *The Guantánamo Failure: Who's Really to Blame?*, NEW YORKER, Aug. 1, 2016, at 34. Bruck emphasizes "a highly charged series of political maneuvers, involving nearly every part of the Administration" in explaining why Guantánamo remains open. *Id.* In particular, she emphasizes the Pentagon's resistance to releases. *Id.* My account is consistent with her findings, although I identify a distinct set of causal mechanisms, including strategic leaks, political entrepreneurship, and judicial self-defense.

²⁹ H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 542 (1999); see also *id.* at 529 (arguing for an "executive primary" view of the separation of powers in which the President has "primary constitutional authority" over national security). Powell's point is about the law, however, whereas my argument here concerns the operation of the branches in practice—i.e., the law on the ground rather than the law on the books.

executive branch policymaking to three-branch contestation. It asks whether lessons can be drawn about how interbranch engagement impinges on presidential power from this trajectory.

Consider three inferences with potentially wider and more generative consequences that might be extracted from my descriptive account, each of which clash or contrast with some leading account of the separation of powers.

First, the descriptive account cultivated here points toward the need to understand the separation of powers, and its constraining effect upon presidential authority, in terms of actors both within and outside the branches. There is a dense, and systematically significant, ecosystem of internal and external interest groups, ideological factions, and institutional actors that Jon Michaels and I elsewhere label the “thick political surround.”³⁰ Dynamic interactions between diverse elements of the thick political surround (such as bureaucrats and legislative factions) can check presidential initiatives even when bilateral interbranch interactions (between the executive branch and Congress) cannot. The account offered here thus draws attention to the institutionally granular determinants of interbranch relations. These help explain how Presidents can be thwarted even absent divided government. It also identifies *endogenous* political dynamics—as distinct from the civil-society actors championed by Goldsmith and Cole—as pivotal.³¹ If anything, actors internal to the government exercise a distorting influence upon the substance of public preferences through a selective, and arguably misleading, stream of disclosures. Accounts of civil society as a molding force in structural constitutional law should account for this possibility.

Second, the persistence of Guantánamo has implications for our understanding of how legal constraints on the presidency are produced in the first instance, as well as why they are efficacious. Once again, it is worth drawing attention to the endogenous, as opposed to the external, nature of legal constraints on executive power. The observed constraints on President Obama did not obtain their purchase through any coercive potentiality.³² Rather, the limiting force of legal rules depended on the availability of political costs to the presidency. Law enabled internal bureaucratic political actors to impose political costs,

³⁰ See Huq & Michaels, *supra* note 25, at 391.

³¹ The claim advanced here is descriptive, rather than normative. In contrast, Gillian Metzger has recently argued that there is a “duty to supervise . . . based on Article II [that] demands supervision by and within the executive branch [as] . . . a basic precept of our federal constitutional structure.” Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1842 (2015) [hereinafter Metzger, *Constitutional Duty*]. The thrust of my descriptive claim is that this duty to supervise is difficult for the President to carry out, even when his or her formal and informal powers might seem at their zenith.

³² Cf. FREDERICK SCHAUER, *THE FORCE OF LAW* 52 (2015) (arguing that “coercion resurfaces as the likely most significant source of law’s widespread effectiveness”).

depending on what the White House did. By exploiting this leverage, those internal actors placed effective barriers on the realization of a presidential goal.

Third, leading analyses of the separation of powers focus on the deflating effect of partisan dynamics upon the separation of powers.³³ My descriptive account contains space for the congressional Republican opponents of President Obama, supporting these claims about the theoretical importance of partisan dynamics. But an exclusive focus on partisan incentives does not illuminate why national security bureaucrats contrived to undermine the White House. Equally, it fails to explain and elucidate observed judicial frailty. When the *Boumediene* Court extended the reach of the Suspension Clause to Guantánamo, tasking district courts with the management of retail habeas litigation, it forcefully underscored the federal bench's role in serving as a beneficial separation-of-powers check on executive discretion and a shield of individual liberty.³⁴ By supplementing arguments about partisan effects, therefore, this study highlights the role of institutional incentives in determining the consequences of interbranch engagement. Attention to the institutional incentives of the federal judiciary, and not partisan motives, helps us understand the gap between *Boumediene's* soaring rhetoric and the more ambiguous legacy of judicial intervention on the ground. More ambitiously, my account might be understood to suggest that institutional incentives can induce officials to engage in political entrepreneurship that has the effect of accelerating partisan competition. Acting to pursue their own narrow institutional agendas, officials can deepen polarization across a wider political landscape.³⁵

These three claims—the decisive influence of a thick political surround; the contingency of legal constraints upon political dynamics; and the independent effects of institutional incentives—all concern the mechanisms

³³ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312-16, 2326-37 (2006) (emphasizing the possibility of convergence in policy preferences of the executive branch and the legislature during periods of unified government).

³⁴ See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (“The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.”); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (“[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”); *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (citation omitted) (noting that “[e]xecutive imprisonment” without judicial review is “oppressive and lawless” and that “th[e] Court has recognized the federal courts’ power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace”).

³⁵ This vector of polarization is distinct from (and indeed almost the mirror of) “the partisan genealogy of executive federalism” described in recent scholarship. See Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 975 (2016). The two phenomena, though, are complementary.

through which the separation of powers affects policy outcomes. They gesture toward the value of case studies as a way to better grapple with, and understand, the diverse, conflictive, heterogeneous, and well-lived-in landscape of our national political institutions. They are a reminder that the separation of powers ought not to be reduced exclusively to tracteries of texts or to palimpsests of practice with “historical gloss,”³⁶ shorn of the unpredictable, heterogeneous, and dynamic *system* that one observes in practice.³⁷ There is a value instead in disentangling the role of more granular institutional actors.

The case study developed in this Article employs a mixed-methods approach that blends different strands of qualitative and quantitative analysis.³⁸ Drawing upon doctrinal exegesis, positive political science tools, and econometric instruments, it develops a fine-grained account of how policy decisions unfurled over time. Most importantly, I exploit here an archive of 765 classified “detainee assessments”—one for all but fourteen detainees released by the Wikileaks organization, which documents the conclusions reached by the government about individual detainees, and which allows for a quite granular trajectory of detainee policy over time to be mapped. The Wikileaks archive, as well as other data sources, are explained in the Appendix. By using econometric as well as doctrinal and institutional tools, I hope not only to show that Guantánamo need not be treated as a “black hole,”³⁹ but also that understandings of interbranch dynamics can be built on surer foundations than anecdote and a priori theory.

My argument proceeds in three steps. Part I of the Article develops a richly textured historical account of policymaking concerning the Guantánamo prison over time, placing President Obama’s ultimately unavailing efforts at closure into a wider historical context. In Part II, I dive deeper by offering more precise estimates of the effects of bureaucratic, legislative, and judicial interventions upon the White House’s ambitions. By combining different analytic threads, my aim here is to offer a new causal account of the persistence of Guantánamo as a policy conundrum. Picking up threads intimated in this account, Part III then explores the central role of interbranch alliances, the interaction of political and legal checks, and the powerful effects of institutional incentives. While briefly touching upon the specific legal options available to an

³⁶ On the concept of “historical gloss,” see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 419-20 (2012).

³⁷ I do not mean to suggest that scholars uniformly fail to attend to observed institutional practice. For a useful study of institutional practice of decisionmaking process in the national security field, see Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT’L L. 359, 377-403 (2013).

³⁸ On mixed-method approaches more generally, see JOHN W. CRESWELL & VICKI L. PLANO CLARK, *DESIGNING AND CONDUCTING MIXED METHODS RESEARCH* 1-18 (2007).

³⁹ Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1, 13 (2004).

administration wishing to draw down the Guantánamo detentions, this Part concentrates on the considerations necessary for a nuanced, more accurate understanding of the separation of powers in the trenches.

I. ANATOMIZING A BLACK HOLE: THE TRAJECTORY OF THE GUANTÁNAMO PRISON

In January 2002, the U.S. government began transferring roughly 640 men, most of whom were captured in Afghanistan or Pakistan, to a U.S. military base on the southeastern littoral of Cuba's Oriente Province called Guantánamo Bay.⁴⁰ The ensuing Guantánamo detainees comprise only a scintilla of the United States' domestic incarcerated population.⁴¹ And they also proved to be only a small proportion of those held in U.S. detentions across the Iraqi, Afghan, and other theaters of the 9/11 Wars.⁴² Despite their dearth of numerosity, the Cuban detentions quickly became a cynosure of political and legal controversy.⁴³ As a result, the Guantánamo detentions are of interest not simply because of the legal puzzles they generated or the moral quandaries they raised, but also because they were a public focal point, crystallizing and refracting expectations, anxieties, and aspirations about presidential power, the Constitution, and the separation of powers.⁴⁴

This Part develops a novel, empirically grounded narrative of the prison's development. I aim principally to illustrate the ebb and flow of overall detainee population over time, as different branches adopted multifarious postures toward the prison. As a methodological matter, this means collecting and analyzing data for the whole population of detainees. Until now, much leading legal scholarship on military detention has relied upon evidence often

⁴⁰ *Rasul v. Bush*, 542 U.S. 466, 471 (2004).

⁴¹ See BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 39 (2006) (reporting the significant increase in the American incarceration rate over time).

⁴² On the Afghan detentions, see *Al Maqaleh v. Gates*, 605 F.3d 84, 87-88 (D.C. Cir. 2010); on the Iraqi detentions, see Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549, 553 (2011).

⁴³ See Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 353-54 (2010) (stating that the Court's rulings "drew broad attention" whenever they concerned "cases involving the habeas corpus rights of citizens and noncitizens detained by the Executive Branch without judicial trials as terrorist suspects").

⁴⁴ My focus in this Article is on the legal and institutional implications of the Guantánamo detentions. There are also vital moral questions raised by the fact that many of those detained had no connection to terrorism and were tortured while in custody. See LAUREL E. FLETCHER & ERIC STOVER, *THE GUANTÁNAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES* 62-68 (2009) (reporting a study that interviewed fifty-five former detainees and found thirty-one alleging abusive interrogations); see also MOHAMEDOU OULD SLAHI, *GUANTÁNAMO DIARY* 191-263 (Larry Siems ed., 2015) (describing, with redactions but still in harrowing detail, a litany of coercive interrogation methods used at Guantánamo against one detainee).

derived from litigation.⁴⁵ But inferences drawn from litigation outcomes are a perilous foundation for legal and institutional analysis. Only sixty-eight of 780 detainees litigated a habeas petition to a final district court order. The selection of litigated cases, which is less than ten percent of the whole population, is unlikely to reflect the population as a whole. At a minimum, it excludes detainees who were released earlier and detainees who anticipated they would lose their habeas action.⁴⁶ Stepping away from the familiar pages of the Federal Reporter gets us some illuminating distance on policy in the large.

To orient the reader, I begin by roughly periodizing detention policy into three slices, each of which reflects a different separation-of-powers arrangement. I then present evidence of how policy changed across those distinct institutional dispensations. Finally, I ask how the rate of detainee transfers and releases fluctuated between different partisan administrations and institutional dispensations. In effect, my inquiry homes in on the puzzle of which constellation of interbranch dynamics is most conducive to individual liberty.

A. *The Phases of Detention Policy*

Since 2002, control over policy decisions touching on the Guantánamo detentions has moved through three phases. Each corresponds to a different separation-of-powers permutation: exclusive executive branch control; executive branch control with judicial supervision; and three-branch policymaking.

⁴⁵ For scholarship focusing on the courts, see, for example, Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 805-48 (2011) [hereinafter Chesney, *Military Detention*], evaluating detention standards by analyzing post-9/11 habeas litigation; Jonathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. 326, 344 (2014), addressing the “overlap between military detention and [criminal] prosecution”; and Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1446-48 (2012), discussing jurisdictional redundancy by examining the cases where the line between Article III proceedings and military detentions is not strict. There are contrasting views of the case law. Compare William R. Payne, Note, *Cleaning Up “The Mess”: The D.C. Circuit Court of Appeals and the Burden of Proof in the Guantanamo Habeas Cases*, 36 HARV. J.L. & PUB. POL’Y 873, 874 (2013) (describing the Circuit Court’s work as “admirable”), and Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention Is Changing the Battlefield*, 6 HARV. NAT’L SECURITY J. 255, 274-79 (2015) (providing a generally positive summary on how the D.C. Circuit helped shape the government’s detention policy), with Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1488 (2011) (criticizing the D.C. Circuit for failing to “take seriously *Boumediene*’s effect”).

⁴⁶ Another factor that generates selection bias in litigation is the manner in which detainees secured lawyers. Lacking the ability to contact counsel directly, detainees often depended on relatives, frequently in the Middle East, or other detainees to act as “next friends” to secure representation. See, e.g., *Rasul v. Bush*, 215 F. Supp. 2d 55, 55-57 (D.D.C. 2002) (discussing how petitioner’s mother joined the suit to request that a court order the government to allow counsel, among other requests); see also JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 44-48 (2006) (describing the process of identifying petitioners in early habeas cases). The haphazard quality of this process renders the basis for selection into litigation even more opaque.

1. Exclusive Executive Branch Control

The first period of Guantánamo detention policy ran from early 2002 to the first part of 2008. It was characterized by an executive branch near-monopoly on policy. To begin with, the detentions rested only notionally on a statutory footing. Congress enacted what proved ultimately to be Guantánamo's legislative basis seven days after the September 11, 2001 attacks—a general authorization of military force.⁴⁷ That authorization lacked a specific textual reference to detention.⁴⁸ A more detailed legal foundation for detention operations had to await a presidential executive order dated November 13, 2001.⁴⁹

The executive initially styled policy so as to minimize other branches' influence. On December 28, 2001, the Justice Department's Office of Legal Counsel (OLC) issued a legal opinion concluding that federal court jurisdiction in habeas corpus did not extend to the Cuban base.⁵⁰ Government lawyers vigorously defended this jurisdictional Maginot line until 2008's *Boumediene* decision. Their resistance to judicial supervision guaranteed Article II control of the terms and scope of the detentions until then. The Justice Department's Office of Legal Counsel also calibrated the terms upon which prisoners could exit custody at the Cuban base through a March 2002 memorandum endorsing forcible transfers of prisoners to other sovereign states.⁵¹ Similarly, questions of detainee treatment fell within exclusive executive branch control. In December 2002, then-Secretary of Defense Donald Rumsfeld famously authorized a suite of novel tactics for interrogations at Guantánamo, including sleep deprivation, stress positions, and sexualized humiliation.⁵² These measures—including what is properly described as torture, whether that term is used in either a colloquial or a legal sense—neither rested upon nor subsequently secured Congress's approval.

⁴⁷ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) [hereinafter 2001 AUMF].

⁴⁸ Some have argued that the measure implicitly referenced detention authority. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2094 (2005) (arguing that the 2001 AUMF should be interpreted in light of “international laws of war [which] permit the detention of enemy combatants without trial until the end of hostilities”).

⁴⁹ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2001).

⁵⁰ Philbin/Yoo Memorandum, *supra* note 14.

⁵¹ Memorandum from Jay S. Bybee, Assistant Att’y Gen., to William J. Haynes, II, Gen. Counsel, Dep’t of Def., The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations 1-2 (Mar. 13, 2002), <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/04/memorandumpresidentpower03132002.pdf> [<https://perma.cc/367Q-52H9>].

⁵² Lt. Gen. Randall M. Schmidt & Brig. Gen. John T. Furlow, Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility 4, 18-19 (June 2005), https://www.the-torturedatabase.org/files/foia_subsite/pdfs/schmidt_furlow_report.pdf [<https://perma.cc/WS6Y-C73R>].

Over this period, to be sure, Congress did enact legislation touching on the Guantánamo prison. But the ensuing statutes' net effect was to insulate executive policymaking from external oversight. For example, in 2005, Congress eliminated federal-court jurisdiction over detention-related claims arising in Guantánamo, instead channeling review into a narrow appellate forum without factfinding authority.⁵³ A year later, it withdrew Article III forums for criminal adjudication in favor of Article I military tribunals with tightly constrained federal-court oversight.⁵⁴ A single provision in the 2005 intervention purported to reign in coercive interrogation measures.⁵⁵ But this prohibition was undermined by subsequent executive branch interpretation.⁵⁶ Between 2001 and 2009, no statutory text spoke to the scope of detention authority, the manner of processing detainees, or the triggers for release.

2. The Emergence of Judicial Supervision

In the second period of Guantánamo policymaking, the Supreme Court added a layer of judicial review via habeas actions in D.C. district courts. Individual detainees had filed habeas corpus petitions as early as 2002. But it was not until 2004 that the Supreme Court ruled on the Guantánamo detainees' statutory access to the federal courts in *Rasul v. Bush*.⁵⁷ Parrying *Rasul*, Congress enacted jurisdiction-stripping legislation in 2005 and again in 2006.⁵⁸ It was not until 2008 that a federal appellate court reached the substantive merits of a detention decision.⁵⁹ The Court of Appeals for the D.C. Circuit issued a ruling in *Parhat v. Gates*, a challenge to detention filed under the streamlined jurisdictional alternative to habeas created in 2005, rejecting

⁵³ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (codified as amended at 28 U.S.C. § 2241(e) (2006)) [hereinafter DTA] (eliminating habeas jurisdiction and allowing review only in the D.C. Circuit for a limited suite of issues).

⁵⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 28 U.S.C. § 2241 note (2006)) [hereinafter MCA].

⁵⁵ DTA, *supra* note 53, § 1005(e).

⁵⁶ Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to John A. Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency, Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees 21-23 (July 20, 2007), http://www.washingtonpost.com/wp-srv/nation/documents/2007_07_20_OLC_memo_warcrimesact.pdf [<https://perma.cc/48UB-KFTH>].

⁵⁷ See 542 U.S. 466, 483-85 (2004) (extending statutory habeas jurisdiction to Guantánamo Bay detainees).

⁵⁸ See MCA, *supra* note 54; DTA, *supra* note 53.

⁵⁹ The litigation culminating in *Boumediene*, however, included earlier district court cases discussing the scope of detention authority. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (holding that detainees stated claims for violations of Fifth Amendment due process rights); *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-23 (D.D.C. 2005) (holding that nonresident detainees outside the United States had no cognizable constitutional rights).

the government's claim to detain lawfully a group of Chinese nationals held at the Cuban base.⁶⁰ But *Parhat* proved a false start. It was followed, a mere eight days later, by the Supreme Court's *Boumediene* holding that detainees at Guantánamo benefited from the privilege of habeas corpus under the Suspension Clause of Article I, Section 9. *Boumediene* invited case-by-case adjudication of individual liberty claims in federal district court. In effect, it also instructed trial judges to start limning the metes and bounds of substantive detention authority as a legal matter. Judge Richard J. Leon published the first district court decision on the merits of a habeas petition about six months later, on December 30, 2008.⁶¹ This decision came almost seven years after the first habeas petition was filed, and more than four years after *Rasul*. The glacial pace of judicial intervention, in other words, hardly bespeaks an activist court champing at the bit of Article III's furthest bounds. Rather, the incremental and hesitant involvement of federal courts hints at a reluctant "judicial passivity"⁶² in the teeth of a problem that might seem politically and practically resilient to judicial superintendence. We shall see, in due course, more evidence of this passivity in regard to the Guantánamo problem.

The *Boumediene* litigation, of course, did not occur in a political vacuum. Rather, it occurred in the context of a presidential election in which both candidates committed to closing the Cuban prison.⁶³ Two days after his inauguration, President Obama promulgated an executive order requiring "a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held."⁶⁴ The order envisaged that

⁶⁰ 532 F.3d 834, 853-54 (D.C. Cir. 2008).

⁶¹ See *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008) (discussing the merits and ruling on a Guantánamo detainee's habeas corpus petition); see also *Al Alwi v. Bush*, 593 F. Supp. 2d 24 (D.D.C. 2008) (assessing another habeas case on December 30, 2008). An earlier decision issued by Judge Ricardo Urbina did not address the scope of detention authority, in part due to concessions by the government responding to the want of lawful authority to detain. *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 42-43 (D.D.C. 2008), *vacated*, *Kiyemba v. Obama*, 559 U.S. 131 (2010).

⁶² Daniel Meltzer invokes the term to describe the Court's "refus[al] to take responsibility for shaping a workable legal system in the everyday disputes that come before the judiciary without great fanfare." Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343. I adapt and expand on his usage.

⁶³ See Kate Zernike, *McCain and Obama Split on Justices' Guantánamo Ruling*, N.Y. TIMES (June 13, 2008), <http://www.nytimes.com/2008/06/13/us/politics/13candidates.html> [<https://perma.cc/7EDS-K6HV>] (noting this shared goal). The candidates, nevertheless markedly diverged in their responses to *Boumediene*. See John Bentley, *McCain Rips Supreme Court Decision on Guantanamo*, CBS NEWS (June 13, 2008, 6:42 PM), <http://www.cbsnews.com/news/mccain-rips-supreme-court-decision-on-guantanamo/> [<https://perma.cc/GA59-5M7H>] (quoting McCain's statement that *Boumediene* is "one of the worst decisions in the history of this country" and Obama as stating that *Boumediene* "is an important step toward reestablishing our credibility as a nation committed to the rule of law, and rejecting a false choice between fighting terrorism and respecting habeas corpus").

⁶⁴ Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4897-98 (Jan. 22, 2009); see also *id.* (calling for closure of the Guantanamo detention facilities).

detentions would end “as soon as practicable, and no later than 1 year from the date of this order.”⁶⁵ That was January 2009.

3. Guantánamo as a Three-Branch Problem

The third phase of the Guantánamo detentions was marked by Congress’s return to the fray. To be sure, as I have already noted, Congress had not previously been silent; it had intervened to curb habeas review in 2005 and 2006.⁶⁶ But these statutes merely buttressed exclusive executive branch control of detention operations at Guantánamo. They offered little by way of specific policy guidance concerning the scope of detention authority or the appropriate rate of releases. It was only in 2009, in the wake of Obama’s election, that Congress began to express preferences in respect to the law. From that time on, it attached riders to each of the annual omnibus military authorization statutes—all essential to keep funding flowing for the Pentagon—that regulated executive options for transfer and release. The precise impact of these riders varied from year to year. Some limited transfers of detainees from Guantánamo to the U.S. mainland; others outright banned such transfers.⁶⁷ Most of the riders limited transfers to third countries,⁶⁸ or installed per se bars on transfers to countries, such as Yemen, thought to be

⁶⁵ *Id.*

⁶⁶ *See supra* text accompanying notes 53–54.

⁶⁷ *See* Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(b), 123 Stat. 1859, 1920 (2009) (stating that available funds may not be used to transfer Guantánamo detainees to the United States); *see also* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 511, 125 Stat. 786, 833-36 (2011) (limiting funds for building facilities for detainees in the United States); Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 532, 125 Stat. 552, 637-38 (2011) (prohibiting funds for transferring detainees to the United States); Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1032–1034, 124 Stat. 4137, 4351-54 (2011) (codified in scattered sections of the U.S. Code) (imposing restrictions on transfers of Guantánamo detainees to the United States); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3466-68 (2009) (disallowing funds for transferring detainees to the United States). Congress also enacted restrictions on the use of funds to refurbish a prison facility in downstate Illinois to house detainees. *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1034(a)–(b), 124 Stat. 4137, 4353-54 (2011) (prohibiting the use of appropriations to create facilities to house detainees in the United States); *see also* Charlie Savage, *House Panel Rejects a Plan to Shift Detainees to Illinois*, N.Y. TIMES, May 21, 2010, at A18 (discussing this prohibition in the context of the Obama Administration’s plan to buy and renovate a prison in Illinois for this purpose).

⁶⁸ *See, e.g.*, Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(e), 123 Stat. 1859, 1921 (2009) (allowing transfers to third countries if the President submits to a report regarding risk and terms of transfer fifteen days prior); *see also* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1033, 124 Stat. 4137, 4351-52 (2011) (codified in scattered sections of the U.S. Code); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028, 125 Stat. 1298, 1567-69 (2011) (delineating requirements for certifications to transfer detainees to foreign countries).

incapable of managing transferred detainees⁶⁹ (a prohibition that, it should be noted, points toward legislators' belief that transfers often would not be, and should not be, an end to detention). In 2012, moreover, Congress installed a revised, newly explicit definition of detention authority to supplement the sparse text of the 2001 AUMF.⁷⁰ Whereas Congress had previously secured executive branch control, in short, from 2009 onward it cabined and channeled Article II discretion.

In summary, the institutional history of Guantánamo policy falls into three periods. There have been eras of exclusive executive control, judicial supervision of executive policymaking, and three branch interaction. The precision of my periodization should not be overstated. Federal courts did not abruptly pivot from noninvolvement to deep engagement: they drifted into engagement over a period of years in a way that suggests antipathy toward entanglement in a controversial and difficult policy domain. Substantial congressional involvement might be traced back to 2005 (when the first jurisdiction-stripping legislation was enacted) or 2006 (when a first iteration of military commission legislation was passed into law). I have treated these measures differently from post-*Boumediene* regulation of transfers and redefinitions of the scope of detention authority.⁷¹ The latter are distinct, in my view, because they reflect legislators' preferences about detention, rather than merely an expiating effort to shunt matters into the President's hands.⁷² Despite these complications, a general trend emerges: what began as a matter of exclusive executive suzerainty over time became increasingly entangled in judicial and congressional interventions to the point where today it seems fair to describe Guantánamo as the responsibility of all three branches.

B. *Detention Policy on the Ground*

As the locus of control over policymaking shifted, so too did the substance of that policy. A simple measure of that substance is the rate of transfers or releases from Guantánamo. Subject to some caveats,⁷³ the rate of transfers

⁶⁹ National Defense Authorization Act For Fiscal Year 2012, Pub. L. No. 112-81, §§ 1027–1028; 125 Stat. 1298, 1566–69 (2011). On the subsequent termination of transfers to Yemen, see Peter Finn, *Return of Yemeni Detainees at Guantanamo Bay Is Suspended*, WASH. POST (Jan. 5, 2010, 5:25 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/05/AR2010010502850.html> [https://perma.cc/74AQ-TYE3].

⁷⁰ Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (codified at 10 U.S.C. § 801 note); see also *Hedges v. Obama*, 724 F.3d 170, 173 (2d Cir. 2013) (“Section 1021 of that statute, which fits on a single page, is Congress’ first—and, to date, only—foray into providing further clarity on that question [of the scope of detention authority].”).

⁷¹ See *supra* text accompanying notes 53–54.

⁷² See *supra* text accompanying notes 67–70 (citing and discussing post-*Boumediene* legislation limiting transfers).

⁷³ See *infra* text accompanying notes 101–04.

can be taken as a rough proxy of detention policy. Most detainees were brought to the Cuban prison in 2002 and 2003. Hence, by 2004, transfers and releases were the dominant determinant of changes to the aggregate population. Of course, each detainee transfer raises a different set of risks and costs. Nevertheless, in order to understand why and how President Obama's ambition of closing the prison faltered, it is still useful to isolate a single, simple parameter (transfer rate) and to examine how its value ebbs and flows as the institutional context of detention policy changes.

I therefore present here an empirical overview of detention policy from its inception in 2002 to early 2016. This overview highlights the *timing* of pivotal shifts in transfer/release policy. In turn, this temporal focus invites further consideration of how these shifts related to changing separation-of-powers dynamics. I start by presenting three different empirical analyses, each providing a slightly different perspective on the problem. On the basis of this accumulated evidence, I then offer some threshold inferences about how changes at the separation-of-powers level correlated with, or diverged from, changes in policy on the ground.

To start with, Figures 1a and 1b capture the long arc of detention policy. Each figure presents changes over time in aggregate levels of detention at Guantánamo and the marginal probability of transfer/release. Both flag four watersheds of judicial and legislative involvement with vertical lines. The first is June 28, 2004, when the Supreme Court handed down *Rasul v. Bush*.⁷⁴ This was the first colorable signal that judicial superintendence of the Guantánamo detentions might be in the offing. The second is June 29, 2007, the date the *Boumediene* detainees' petition for rehearing was granted after an initial certiorari filing had been rejected.⁷⁵ The third is June 12, 2008, when *Boumediene* was handed down.⁷⁶ The majority opinion left open many important questions.⁷⁷ But it plainly resolved any question about the existence of judicial review.⁷⁸ The fourth is June 24, 2009, when the first legislative limit on transfers was enacted.⁷⁹ Once again, this is surely not a precise marker of the exogenous shock to executive branch control. The White House no doubt anticipated the restrictive legislation long before it reached the President's desk. Still, it provides a useful, if concededly rough, benchmark for analysis of such effects, whether observed before final enactment or in its wake.

⁷⁴ 542 U.S. 466 (2004).

⁷⁵ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 551 U.S. 1161 (June 29, 2007).

⁷⁶ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁷⁷ *See, e.g., id.* at 787 ("The extent of the showing required of the Government in these cases is a matter to be determined.").

⁷⁸ *See id.* at 798 ("The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error.").

⁷⁹ Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920-21 (2009).

Figure 1a shows how three parameters changed over time. These parameters are *first*, the overall detainee population at Guantánamo, net of entrants and transfers, at a given point in time; *second*, the aggregate number of detainee entries up to a point in time; and *third*, the aggregate number of detainee releases up to a point in time. Figure 1b presents a parameter that is often used for understanding population change over time: the Kaplan–Meier survival function. The Kaplan–Meier measure is commonly used to understand the temporal dimensions of a treatment in medical studies, where treatment and control populations are characterized by different rates of survival or death across a bounded study period.⁸⁰ The shape⁸¹ of the Kaplan–Meier curve represents the proclivity of the government at any given instance to release further detainees. It thus precisely captures the government’s evolving attitude toward detainee transfers.

⁸⁰ The Kaplan–Meier function is used in studies with censored data—i.e., where subjects are only observed for a certain time and the event of interest (e.g., death or recovery) might occur after the end of the study. It is a step function with jumps at the observed event times, where the size of jumps depends on the number of events (here, releases) observed at each event time t_i , and also on the pattern of censored observations prior to t_i . See E.L. Kaplan & Paul Meier, *Nonparametric Estimation from Incomplete Observations*, 53 AM. STAT. ASS’N J. 457, 458 (1958). For an example of the use of Kaplan–Meier curves in legal scholarship, see, for example, Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1454–60 (2012), which utilizes the Kaplan–Meier function to estimate survival time in days from the proposal of a federal rule to the issuance of the final rule.

⁸¹ I use the term “shape” here because, strictly speaking, a Kaplan–Meier curve does not have a gradient. As a step-function, its derivation is either zero (between observations) or undefined (at observations).

Figure 1a: Population Change and Institutional Dispensations in the Guantánamo Detentions (2002–2015)⁸²

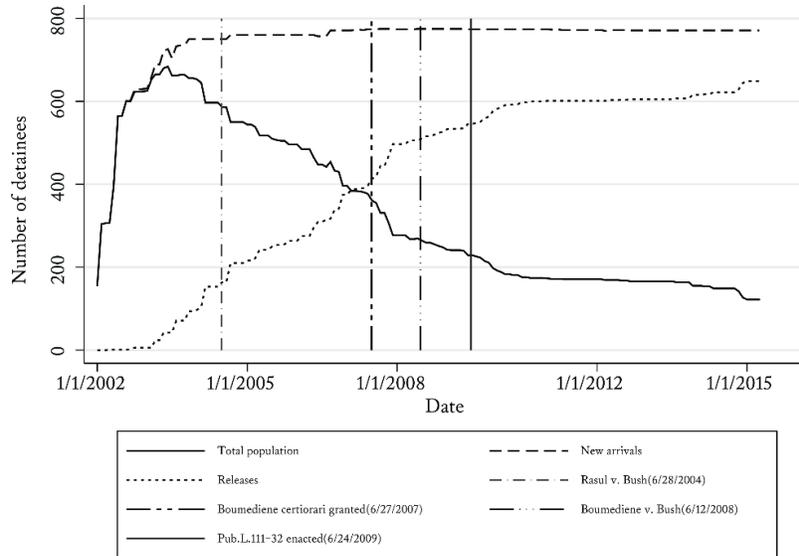
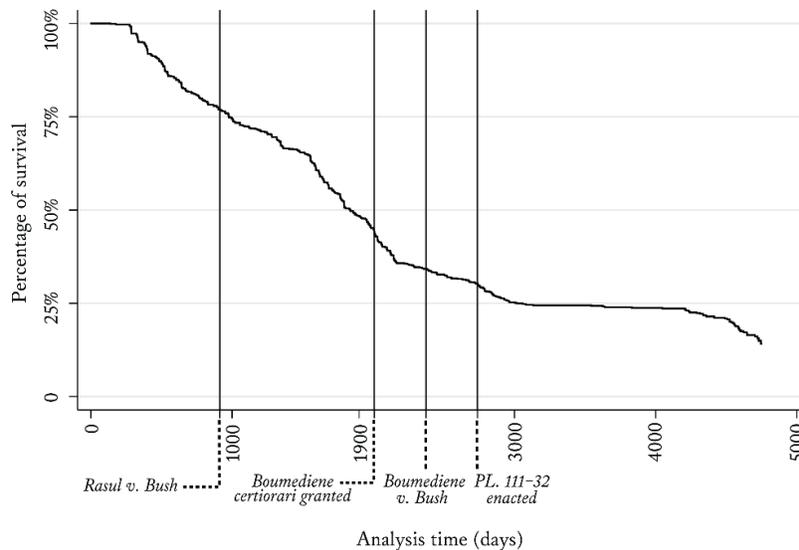


Figure 1b: Kaplan–Meier Curve for Guantánamo Detentions (2002–2015)⁸³



82 The data for Figure 1a was gathered as follows: The *New York Times*' archive of pages on individual detainees was scraped with a Python script to acquire data associated with individual data, including the dates of transfer in and (where available) out of custody at the Cuban base. See *infra* Appendix.

83 The Kaplan–Meier functions presented were created using data aggregated from Wikileaks and the individual-level data of the *New York Times*.

The second snapshot isolates the timing of discrete decisions to add or subtract to the net population of the Cuban base. Then, Figures 2a and 2b isolate respectively the timing of government decisions to bring new detainees to the base and to move detainees out of custody at the base. Each bar represents the number of releases in a three-month period.

Figure 2a: Dates of Detainees' Transfer into Custody at Guantánamo

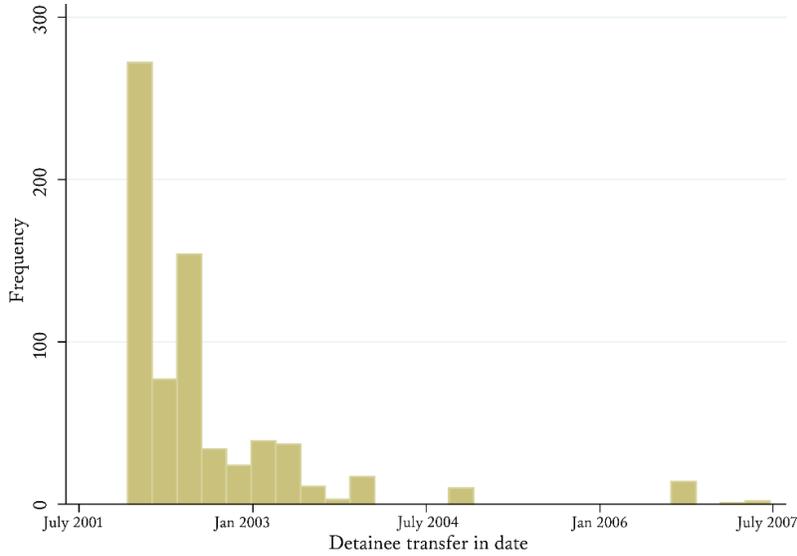
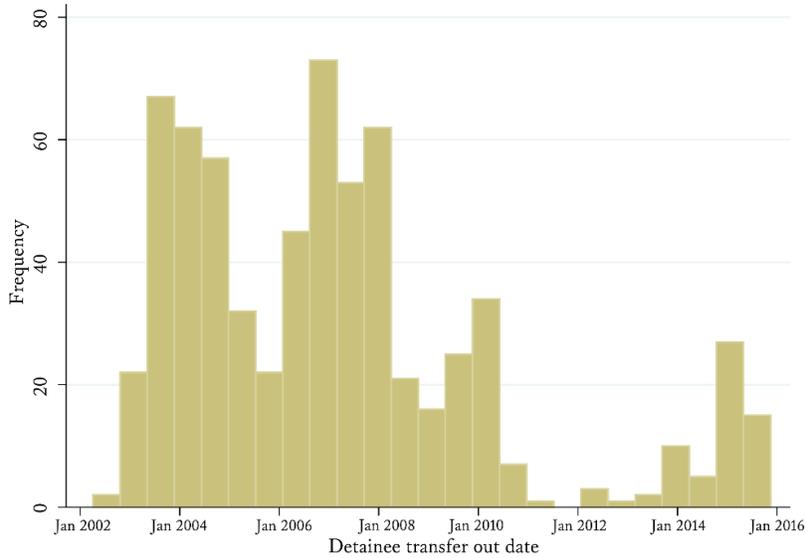


Figure 2b: Detainees' Transfer Out of Custody at Guantánamo



This data, as I have already cautioned, should be taken with a pinch of salt. The dates captured in Figures 1 and 2 do not necessarily reflect either the absolute beginnings or definitive ends of detention. At the front end, many detainees were in the custody of the United States or one of its allies prior to their arrival at Guantánamo. In the Afghan theater, the process of triaging detainees to the Cuban facility was institutionalized. From 2002, a dedicated Detainee Review Board comprising ten officials rendered decisions about whether individuals seized in that theater should be held in Afghanistan or transferred to the Cuban base.⁸⁴ Of course, such triaging is not instantaneous. Detainees are thus necessarily in U.S. custody for some time before transfer from the theater of battle.

At the back end, the decision to move an individual out of custody does not quite equate to a decision that a detainee should not or cannot be held. The government's consistent practice during both the Bush and Obama Administrations was to designate a person released from Guantánamo as "no longer [an] enemy combatant[]." ⁸⁵ This is, I suppose, by definition not someone who had been erroneously detained or someone whose detention could never be justified as a matter of law. Obviously, such nomenclature has the advantage of never having to concede error. Perhaps as a collateral benefit (from the government's perspective), it invites the further detention of an individual by a receiving state. Indeed, some detainees were transferred to the custody of another sovereign and moved immediately into further detention (and in some instances harsh treatment).⁸⁶ Saudi Arabia, for example, created the Prince Muhammad bin Nayif Center for Counseling and Care, a custodial facility at which at least 120 former Guantánamo detainees have been held.⁸⁷ Other

⁸⁴ See Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, 2010 ARMY LAW. 9, 9, 16 (2010) ("As a detainee's case was presented, the members of the [Detainee Review Board] would form a consensus regarding whether the detainee met the criteria of an enemy combatant If the detainee was determined to be an enemy combatant, the next question was whether the detainee met the criteria to be sent to GTMO.").

⁸⁵ See *Qassim v. Bush*, 382 F. Supp. 2d. 126, 127-28, 127 n.3 (D.D.C. 2005) (describing the operative nomenclature of release).

⁸⁶ See Ken Silverstein, *Pentagon Memo on Torture-Motivated Transfer Cited*, L.A. TIMES (Dec. 8, 2005), <http://articles.latimes.com/print/2005/dec/08/nation/na-torture8> [<https://perma.cc/L9UV-A8M6>] (noting that the United States has delivered detainees to countries that are believed to still practice torture).

⁸⁷ See Charles E. Berger, *A Rehab Model for Gitmo Detainees*, L.A. TIMES (Nov. 20, 2013), <http://articles.latimes.com/2013/nov/20/opinion/la-oe-berger-closing-gitmo-yemen-20131120> [<https://perma.cc/83RN-EL6N>] (reporting that 120 Saudis formerly detained at Guantánamo were later held in Saudi Arabia); see also Ellen Knickmeyer, *Saudi Center Aims for 'Life After Jihad'*, WALL ST. J.: MIDDLE EAST (Apr. 24, 2013, 6:08 AM), <http://blogs.wsj.com/middleeast/2013/04/24/saudi-rehab-center-aims-to-shape-life-after-jihad/> [<https://perma.cc/5XLA-43XX>] (describing conditions in that rehabilitation facility). Of the first 146 detainees released, one report asserts that only seventeen were transferred to the continuing custody of their own governments. Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 661-62 (2006).

states notorious for their harsh and arbitrary penal systems, such as Gadhafi-era Libya, also received detainees and proceeded to detain them further under onerous conditions.⁸⁸ Yet there is no public data on these periods of custody. As a result, the information presented here is the best available account of detention policy in a specific location.

A third snapshot provides a tighter temporal focus on the period from January 2007 to December 2009. During this three-year window, the executive's control over Guantánamo policy eroded with the addition of retail judicial supervision and then congressional intervention.⁸⁹ It was thus a pivotal moment for President Obama's ambition, as well as a key opportunity to understand the policy-level effects of the separation of powers. Mindful of the heterogeneity of the prison population, it is useful to begin a closer assessment of the evolution of detention policy at this key point by distinguishing between detainees in terms of their perceived dangerousness. Each of the classified detainee assessments released by Wikileaks contains an evaluation of a detainee's "risk" on a four-tier scale of none, low, medium, and high.⁹⁰ Whatever their underlying accuracy, these classifications plausibly reflect the government's own internal assessments of the security-related risk presented by a detainee. They also contain important information on the perceived *relative* riskiness of different detainees. To provide a context in which the subsequent analyses can be better understood, Table 1a breaks down the distribution of risk values by nationality across the whole detainee population.

⁸⁸ See Ron Nordland & Scott Shane, *Libyan, Once a Detainee, Is Now a U.S. Ally of Sorts*, N.Y. TIMES: THE GUANTÁNAMO FILES (Apr. 24, 2011), <http://www.nytimes.com/2011/04/25/world/guantanamo-files-libyan-detainee-now-us-ally-of-sorts.html> [<https://perma.cc/4KNA-QKHY>] (reporting on the transfer of Abu Sufian Ibrahim Ahmed Hamuda bin Qumu, who was transferred to Libya in 2007).

⁸⁹ See *supra* Section I.A.

⁹⁰ For more details, see *infra* Appendix.

Table 1a: Risk and Nationality Correlations

	None	Low	Medium	High	Missing Data	Total
Afghanistan	52	39	75	45	8	219
Saudi Arabia	4	1	59	68	2	134
Yemen	0	3	36	76	0	115
Pakistan	21	7	29	14	1	72
Algeria	0	1	8	17	0	26
China	0	2	19	1	0	22
Other Citizenship	10	12	51	106	13	192
Total	87	65	277	327	24	780

My analysis below uses those risk values, but it is important to flag two reasons for caution. First, a careful reading of the 765 assessments released by Wikileaks suggests that the risk assessments relied upon a plurality of sources, including interrogations of the detainee being evaluated,⁹¹ other detainees' inculpatory statements, physical evidence obtained during the capture of detainees, and other nations' intelligence agencies. Although the accuracy of information from these sources may vary greatly, the assessments do not reflect overt weighting or discounting of evidence. In particular, the assessments are consistently silent as to when evidence was obtained by either American⁹² or foreign⁹³ interrogators through coercion or torture.

Second, there is sometimes a large disconnect between the narrative account of a detainee's history and an ultimate risk assessment. For example, the detainee assessment for Abd al Rahim Janko concludes that he may have been a spy recruited by the United Arab Emirates to penetrate al Qaeda; that he was certainly imprisoned and tortured by al Qaeda for two years; and that he had been "substantially exploited" by the time the assessment was written. Nevertheless, the assessment finds he "remains an enemy combatant," a "medium" risk to the "US, its interests, and allies," and a "[high] threat from

⁹¹ Indeed, most assessments contain a section describing the detainee's own version of the events leading to his detention. Table 1a uses data from the *New York Times* on detainees for whom no assessment is available.

⁹² See, e.g., William Glaberson, *Detainee Was Tortured, a Bush Official Confirms*, N.Y. TIMES, Jan. 14, 2009, at A22 (describing interrogations of Mohammed al-Qahtani at Guantánamo in 2002 and 2003).

⁹³ See, e.g., David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantánamo*, 74 U. PITT. L. REV. 179, 210-13 (2012) (describing the use of evidence supplied by Binyam Mohammed, who was interrogated under torture in Moroccan custody before being moved to Guantánamo).

a detention perspective.”⁹⁴ It is hard to reconcile this conclusion with the government’s own account of Janko’s history. Indeed, Janko later sought judicial review, and in 2009 the district court ordered his release based on the “inescapable” conclusion that he was no longer an enemy combatant.⁹⁵ This suggests that even when the facts in an assessment are uncontested, the document’s ultimate taxonomical conclusion may not logically follow.

With these caveats in mind, Table 1b breaks down the three-year period into six-month increments to highlight how release policy modulated over time. For each six-month period, I report the number of detainees released. I also show how the composition of released pools of detainees changed over time in terms of perceived riskiness. I do not include figures for 2010 because those quarters would contain a surfeit of empty cells. This Table thus provides a snapshot into how the volume and composition of outflow from the Cuban base changed during a crucial period. This then sets the stage for the more granular analysis of the ‘why’ of detention policy in the next subsection.

Table 1b: The Elements of Detainee Release Policy Between 2007 and 2009

	1/1/2007– 6/30/2007	7/1/2007– 12/31/2007	1/1/2008– 6/30/2008	7/1/2008– 12/31/2008	1/1/2009– 6/30/2009	7/1/2009– 12/31/2009
Detainees released	38	84	14	22	12	37
Change (%) from initial population	-8.84	-23.27	-4.69	-8.33	-5.37	-13.54
Percent of Detainees in Each Risk Value Category						
No risk	0	0	0	0	0	0
Low risk	0.84	0.76	0.79	0.85	0.91	0
Medium risk	27.56	23.57	22.83	22.13	22.27	22.16
High risk	71.51	76.43	76.38	77.02	77.27	77.84

⁹⁴ See Detainee Assessment for Abd al Rahim Janko 2 (on file with author); see also Memorandum from D.M. Thomas, Jr., Rear Admiral, U.S. Navy, to Commander, U.S. Southern Command, Detainee Assessment Brief ICO Guantanamo Detainee, ISN US9SY-000489DP (S) (June 30, 2008), <https://wikileaks.org/gitmo/pdf/sy/us9sy-000489dp.pdf> [<https://perma.cc/YW2G-24H6>] (reporting the detainee assessment brief for Abd al Rahim Janko).

⁹⁵ *Al Gingo v. Obama*, 626 F. Supp. 2d 123, 125-30 (D.D.C. 2009). Janko was not the only detainee allegedly held as a spy by the Taliban before his transfer to the Cuban base. See Tim Golden, *Expecting U.S. Help, Sent to Guantánamo*, N.Y. TIMES (Oct. 15, 2006), <http://www.nytimes.com/2006/10/15/us/15gitmo.html> [<https://perma.cc/6X5N-NNJK>] (detailing the 2011 detention of former-Taliban prisoner Abdul Rahim Al Gingo in Guantánamo).

C. *The Implications of Detention Policy's Trajectory*

With these analyses in hand, it is appropriate to consider what inferences can be drawn about the effect separation-of-powers shifts had on granular policy decisions (here, the rate of transfers or releases) on the ground. I draw four somewhat disparate inferences from this population-level data related to the separation of powers, partisan change, and underlying policy-based constraints in shaping detention policy. Although heterogeneous, these inferences provide some insight into different causal elements of policy changes.

First, Guantánamo policy was characterized by a rapid intake of prisoners followed by a long, drawn-out process of releases. More than 740 of the 780 detainees known to have passed through Guantánamo were brought to the Cuban base in the camp's first two years of operation.⁹⁶ But by the end of 2004, the Bush Administration had largely ceased using Guantánamo as a facility for newly seized detainees.⁹⁷ The one exception to this policy occurred in 2006, when a group of twelve so-called "high value detainees" were moved to Guantánamo from secret CIA facilities known as black sites.⁹⁸ This late burst of activity, however, is best understood as a shuffling of existing custodial arrangements catalyzed by the Supreme Court's 2006 decision to extend minimal international humanitarian law coverage to all detainees.⁹⁹ It is not evidence of Guantánamo's use to house new captures after 2004. In effect, the in-flow to Guantánamo had ceased at least four years *before* partisan change came to the White House. This is somewhat in tension with celebratory accounts of the Obama Administration as an agent of policy change.¹⁰⁰ Rather, after 2004, the central policy choice facing both the Bush and Obama Administrations was instead whether or when to release existing detainees.

Second, neither partisan change in the White House nor the instigation of post-*Boumediene* judicial review had an immediate catalytic effect on the rate of transfers and releases. Contrary to liberal criticism, the data shows that the Bush Administration took a relatively aggressive stance toward detainee-release policy. In three of the four years of Bush's second term, upwards of one hundred detainees were released. At least initially, the Obama Administration followed the Bush Administration's approach by persevering in a relatively robust

⁹⁶ See *supra* Figure 1a.

⁹⁷ See *supra* Figure 1a.

⁹⁸ See Morris D. Davis, *Historical Perspective on Guantánamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT'L L. 115, 119 (2009) (detailing the transfer of detainees from the CIA to the DOD in Guantánamo).

⁹⁹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006) (holding that Common Article 3 of the 1949 Geneva Conventions applies to military operations against al Qaeda).

¹⁰⁰ See Lederman, *supra* note 27. In addition, Lederman gives the Obama Administration credit for formalizing changes to interrogation policy that had been, in fact, made on the ground several years earlier by the Bush Administration. *Id.*

release policy.¹⁰¹ This once more suggests that—notwithstanding presidential campaign promises—the partisan transition from a Republican to a Democratic White House was characterized by continuity rather than change.¹⁰²

Moreover, it is very hard to discern any *instantaneous* effect of judicial or congressional intervention upon detention policy. The key watersheds of judicial and legislative change, that is, are not associated with sharp changes in the rate of transfers. Instead, Figures 1a and 1b illustrate a more subtle and gradual change in the rate of transfers, which gradually diminishes over 2009 and falls to zero in 2010. Hence, if anything, the beginning of the Obama presidency marked a *slowdown* in efforts to disperse the detainee population, although not quite a sudden halt.

Third, Figure 2b and Table 1b together permit more precise identification of one important and puzzling inflection point in detention policy. Only in the first quarter of 2010—almost one year into President Obama’s tenure in the Oval Office—did the rate of transfers and releases drop precipitously to almost zero. This collapse in departures from Guantánamo is plainly attributable to the Obama Administration—not the Bush Administration. Furthermore, it occurred some time after judicial and legislative intervention.

This collapse also presents a puzzle that is critical to my analysis: Why did the flow of releases and transfers collapse at that time? This question is at the heart of the puzzle identified at the Article’s outset, and is a focal point for much of what follows.

Fourth, and related to the last point, the data presented above allows us to rule out one potential theory about the policy change. This alternative theory would proceed as follows: prior to early 2010, the government faced a pool of detainees who, by its own determination, presented a low risk of recidivism. In 2010, following years of low-risk detainees being transferred or released, that pool of lower-risk detainees dried up. The marginal detainee was perceived as far more risky. Hence, the rate of transfers necessarily shifted into a lower gear, despite the Obama Administration’s contrary intentions.

Yet this theory does not stand up to scrutiny. In particular, Table 1b suggests that the collapse in releases and transfers cannot be attributed to changes in the perceived characteristics of the marginal detainee next in line

¹⁰¹ See *supra* Figure 1a.

¹⁰² This continuity is stressed by many. See CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 35 (2015) [hereinafter SAVAGE, POWER WARS] (“[A] range of people across the ideological spectrum would voice, with increasing intensity, what became a defining accusation not just of the moment, but of the entire presidency: *Obama was acting like Bush.*”); see also James P. Pfiffner, *The Constitutional Legacy of George W. Bush*, 45 PRESIDENTIAL STUD. Q. 727, 728, 733-38 (2015) (“As senator, Obama often criticized Bush on constitutional and policy grounds. But when he became president, although he curbed some of President Bush’s excesses, he adopted similar policies and extended some of them regarding indefinite detention, electronic surveillance, and signing statements.”).

for release over time. Consider the bottom half of Table 1b, which illustrates the relative composition of the released detainees by their assigned risk values in their classified detainee assessments. These rows show that from the beginning of 2007 onward, high-risk individuals comprised an overwhelming majority of the released detainees. By 2006, almost all the no-risk and low-risk detainees had already been transferred out.¹⁰³ Thereafter, the proportions of medium- and high-risk detainees in each batch of transferred or released detainees remained quite stable. Rather, across all periods, the modal transferee had been classified by the government as presenting a “high-risk.” Although it is at least possible that other unobserved detainee characteristics might have caused a sudden contraction of releases in 2010, a threshold examination of the government’s own data belies the suggestion that there was a shift in the characteristics of the marginal detainee that explains the collapsed release rate in 2010.

Anecdotal evidence also confirms that the shift in release patterns in early 2010 did not result from a change in detainee characteristics. Soon after entering the White House, President Obama established an interagency taskforce to reanalyze evidence respecting each detainee and to recommend appropriate individual dispositions. In its final report, issued in mid-2009, the Obama Task Force identified 126 of the 240 detainees then in custody as “approved for transfer.”¹⁰⁴ The Task Force indicated that “for most of the detainees approved for transfer, there were varying degrees of evidence indicating that they were low-level foreign fighters affiliated with al-Qaida or other groups operating in Afghanistan.”¹⁰⁵ But almost six years later, in December 2015, forty-eight of the 107 detainees still in custody were cleared for transfer.¹⁰⁶ While a decision to transfer is not an admission of erroneous detention, as previously noted,¹⁰⁷ the persistence of significant numbers of individuals identified as amenable to release in late December 2015 once more implies that earlier shifts in the rate of transfers cannot be attributed to a dearth of eligible candidates.

¹⁰³ See *supra* Table 1b.

¹⁰⁴ DEP’T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 2-3 (2010) [hereinafter TASK FORCE REPORT].

¹⁰⁵ *Id.* at 16.

¹⁰⁶ Charlie Savage, *17 Guantánamo Prisoner Transfers Said to Be Pending*, N.Y. TIMES, Dec. 17, 2015, at A25. The tally of 107 detainees is derived from the data presented in Figure 1. *Accord Timeline*, N.Y. TIMES: THE GUANTANAMO DOCKET (Oct. 20, 2016), <http://projects.nytimes.com/guantanamo> [<https://perma.cc/YE84-2TDV>].

¹⁰⁷ Clearances for transfer, however, are treated as “protected” information that cannot be disclosed, or discussed by, detainees’ counsel. See, e.g., *Ameziane v. Obama*, 699 F.3d 488, 498 (D.C. Cir. 2012) (explaining that even foreign governments must obtain this information through official U.S. government channels and, as a result, counsel for detainees were barred by law from pointing out that, even if there was a legal justification for their client’s detention, the government itself identified no compelling policy justification to that end).

In summary, an analysis of population-level data concerning the Guantánamo detentions provides an important threshold insight about the policy effects of the separation of powers. Surprisingly, partisan change within the executive was associated with fewer, rather than more, releases. Perhaps more surprisingly, the involvement of multiple branches was not associated with any easing of release policy. And the collapse of the detainee outflow in 2010 cannot be explained by changes in the marginal detainee's characteristics. Understanding why President Obama's agenda failed must be determined through a more granular examination of interbranch dynamics in the critical period between 2009 and 2010.

II. DETENTION POLICY WITHIN AND BETWEEN THE BRANCHES

This Part analyzes in detail the behavior of each branch in order to evaluate how each one influenced the marginal rate of releases from Guantánamo between 2009 and 2010. The ultimate aim of this analysis is to illuminate the effect of interbranch dynamics on presidential power. Three lines of inquiry are developed. These concern, respectively, the roles of the executive (and, in particular, the military bureaucracy responsible for detention policy), Congress, and the judiciary.

The central claims advanced in this Part can be summarized briefly at the outset. I demonstrate that the military bureaucracy engaged in a rational triaging of detainees with transfers and releases through early 2010. Partisan change in the White House precipitated a departure from this trajectory, even though, as Part I suggested, the substance of detainee policy and relative detainee characteristics next in line for transfer remained largely unchanged. The ensuing collapse in transfers is also poorly explained by the diplomatic difficulty of obtaining agreement from a potential transferee country. Rather, that collapse was propelled by an alliance between the military bureaucracy and Congress—one initiated, importantly, by the former rather than the latter. On the one hand, the bureaucracy catalyzed legislators' policy entrepreneurship by stoking public fears of detainee recidivism through strategic epistemic disclosures. On the other hand, Congress responded to military bureaucratic concern about detainee recidivism by legislating platforms for further resistance within the executive. Elites within Congress and the bureaucracy at the same time fueled public concern about recidivism. Finally, the Article III courts consistently resisted any large checking function. Rather, they drew up a substantive law of detention more capacious than what was sought by Department of Justice litigators or implemented by military bureaucrats.

This account suggests that interbranch dynamics *can* impede a high-profile presidential agenda—albeit not in the way the *Boumediene* Court and sympathetic commentators seemed to anticipate. It further highlights the need

to account for not only the legal effects of the separation of powers—which here are meager—but also to consider closely the specific institutional channels through which interbranch dynamics unfold. In particular, my analysis suggests that Article II cannot usefully be viewed as creating a unitary entity. Rather, it has engendered an internally heterogeneous institution comprised of factions capable of allying with other branches to successfully resist presidential agendas. It demonstrates that *interbranch* conflict, though not inherent to the separation of powers, can emerge organically from *intra*branch politicking.

Correlatively, my analysis points toward the limits of social action as a catalyst of constitutional and legal change. To the extent habeas litigation provided the most apparent lever for civil society to extract policy change, insiders in the government were able to defang external critics. As a result, change and continuity in this period flowed from dynamics internal to the state rather than the external political surround.¹⁰⁸

A. *The Executive and the Rate of Detainee Transfers*

Judicial and congressional influences on detention policy arose against a background of unilateral executive decisions. Understanding their effects requires a baseline account of that executive decisionmaking. To that end, this subsection explores a series of alternative explanations for the dynamics mapped in Part I. I begin by rejecting two potential explanations. First, I present an empirical analysis of how military decisionmakers' transfer decisions were shaped by concerns about recidivism risk and diplomatic constraints—two forms of “private” information that might explain how and why the rate of transfers changed over time. This empirical analysis strongly suggests a baseline rationality in transfer and release decisions that informed policy through 2010. Given my baseline findings about bureaucratic rationality and efficiency, it is implausible to explain the Guantánamo prison's persistence by suggesting that military commanders responsible for the Cuban base's operation consistently dragged their heels. Moreover, I consider and reject the possibility that the decline in transfers under President Obama was driven by diplomatic constraints, in the sense of growing difficulties in finding countries that would accept transferred detainees. Something more is needed to explain the volte-face of 2009 and 2010.

Finally, I draw on both theoretical and secondary sources to posit a more promising explanation. A pivotal explanatory factor appears to be a sharp uptick in resistance to transfers *from the military bureaucracy*. This attitudinal shift within the bureaucracy was precipitated not by a shift in underlying

¹⁰⁸ In contrast, social forces may have been more effective earlier in the evolution of Guantánamo policy. *See supra* text accompanying notes 17–22.

operational policy. Rather, the most plausible explanation links it to partisan rotation at the executive branch's summit. This internal shift provides a first element of the larger account I aim to assemble in this Article.

1. Determinants of Executive Release Decisions

A central argument for executive control of policymaking, and national security policy decisions more generally, is the executive's comparative institutional advantage in gathering and analyzing information.¹⁰⁹ Arguments from epistemic superiority assume that the executive not only has access to information that other branches lack, but also that it employs such information in an unbiased and effective fashion to make discrete policy decisions. Whether separation-of-powers constraints on executive initiatives are warranted depends on whether such presumptions are accurate or misleading.

In the detention context, the executive has privileged access to two kinds of information not generally available to other branches or external actors. First, it has information about the risk a given detainee poses based on his past actions, his statements during custody, and his behavior in custody. Second, it possesses information obtained via diplomatic channels about the willingness, or lack thereof, of other nations to receive a potential transferred detainee and engage in whatever further custodial or surveillance measures U.S. officials believe to be appropriate. The classified detainee assessments reflect, in part, the executive's epistemic stocks, since they contain nationality data (which relates to the possibility of transfer) and risk values. So the question arises: Did the executive use this information to pursue a rational transfer policy?

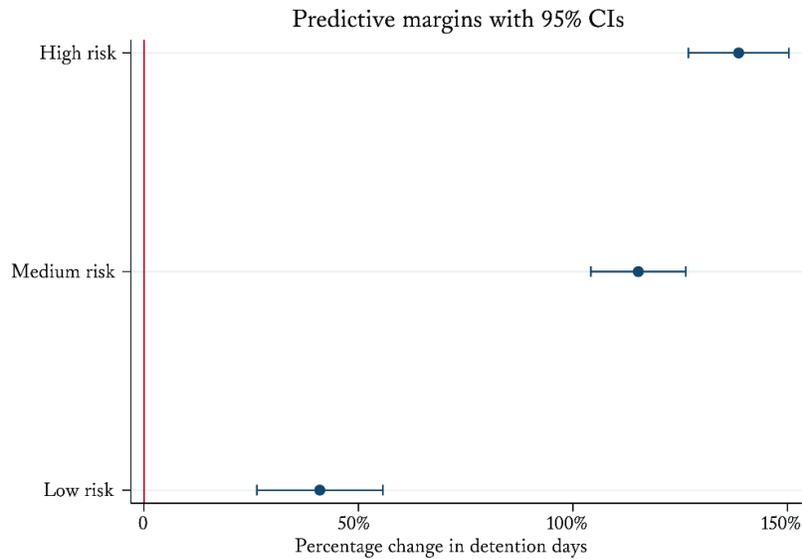
Figures 3a and 3b provide snapshots, respectively, of how recidivism risk and diplomatic constraints influenced detention decisions. Both figures report results from the same ordinary least squares (OLS) regression analysis. The population analyzed in this regression comprises all detainees who have been released through 2015; it excludes detainees remaining in custody at the close of the study period (December 2015).¹¹⁰ The dependent variable (i.e., what is being explained) is the time in detention until release for the subset of the population who have, in fact, been released. The OLS regression specification that was used measures the correlation between a former detainee's prior time in detention and dummy variables for risk assessments

¹⁰⁹ For arguments from comparative epistemic competence, see, for example, Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 62, summarizing "noteworthy" judicial opinions offering "broad pronouncements about the need to defer to the executive" on matters of national security, and Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204 (2007), arguing that the executive is "in the best position" to weigh competing interests, thus warranting significant deference to executive decisions.

¹¹⁰ Analyses of the complete population do not generate meaningfully different results.

and nationality. For ease of interpretation, I do not present the full regression specification or results here. Rather, Figures 3a and 3b present the *marginal* effect of each covariate on the duration of time before release in percentage terms. Stated in plain English, the dot in each line presents the average percentage change in the duration of detention when a specific trait is attached to a detainee, holding all other traits constant.¹¹¹ The bars around each dot represent the ninety-five percent confidence interval for that estimate.¹¹² A confidence interval containing zero (marked with a vertical line on Figures 3a and 3b) implies that the effect of that trait is statistically insignificant.

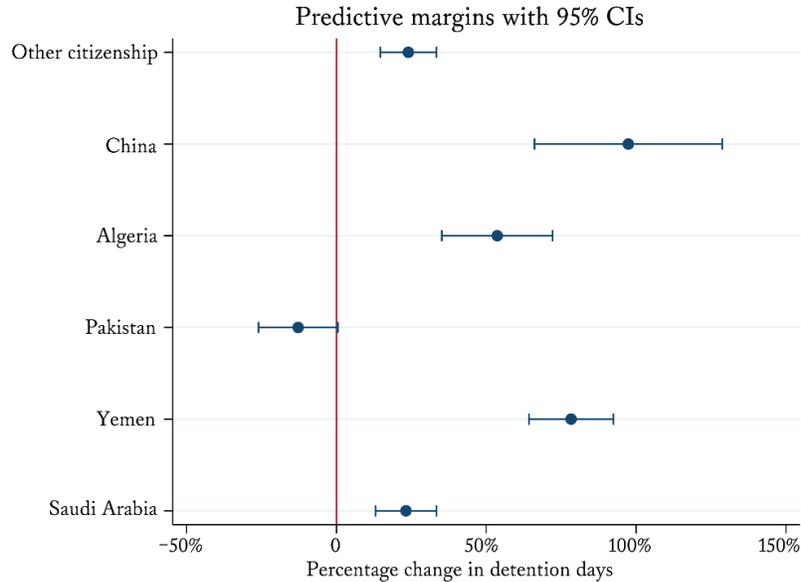
Figure 3a: Marginal Effect of Risk Assessments on the Duration of Time Before Release (in percentage terms)



¹¹¹ I use a baseline of no-risk and Afghan nationality. I use Afghan nationality as a baseline because it is the most frequently encountered nationality, and Afghan detainees tended to be released quicker than other nationalities.

¹¹² There is, in effect, only a one-in-twenty chance that the true effect of a trait lies outside those bounds.

Figure 3b: Marginal Effect of Detainee Nationality on the Duration of Time Before Release (in percentage terms)



Consider each analysis in turn. Figure 3a shows how the assignment of low-, medium-, and high-risk values within a detainee's assessment correlates with the expected duration of detention. In each case, the effect of moving a detainee from no-risk (holding all else constant) is statistically significant. The assignment of medium- and high-risk values to a detainee, indeed, both have quite large effects on extending custody: both are associated with more than a doubling of the time before release. This suggests—not surprisingly—that the government's internal evaluations of security risk had a large effect on its decisions to release or detain individual detainees.

Figure 3b in turn suggests that risk evaluations are not the only determinants of release—nationality matters too.¹¹³ The largest statistically significant effects are associated with Chinese nationality (which in practice comprises a group of ethnic Uighurs) and Yemenis. Other nationalities do not evince as large effects on detention duration. Although leading journalistic accounts of detention stress the difficulties in resettlement posed by detainees of these nationalities above all else,¹¹⁴ the Yemeni and Uighur detainees comprise but a small fraction (fifteen percent and three percent, respectively) of the overall

¹¹³ Together, risk values and nationality on release suggests that the former predicts about sixty percent of the variance in outcomes, while the latter predicts about thirty-five percent of the variance.

¹¹⁴ See SAVAGE, *POWER WARS*, *supra* note 102, at 104, 300 (describing the White House's reluctance to transfer Yemeni detainees in 2010 due to troubling security conditions in their home country).

detainee population. All but seven of the Uighurs, moreover, had been transferred from the Cuban base before the end of 2009.¹¹⁵ For the remaining eighty-two percent of the detainee population, nationality seems to matter much less, if at all, to the duration of detention.

It is possible to dig a bit deeper on the contours of bureaucratic rationality. In that vein, Figure 4 decomposes the detainee assessments produced each year based on the organizational affiliations identified in those assessments.¹¹⁶ I use data on three categories of affiliations: Taliban; al Qaeda and its affiliates; and no affiliation at all.¹¹⁷

Figure 4: Detainee Assessment Production and the Mix of Affiliations (2002–2009)

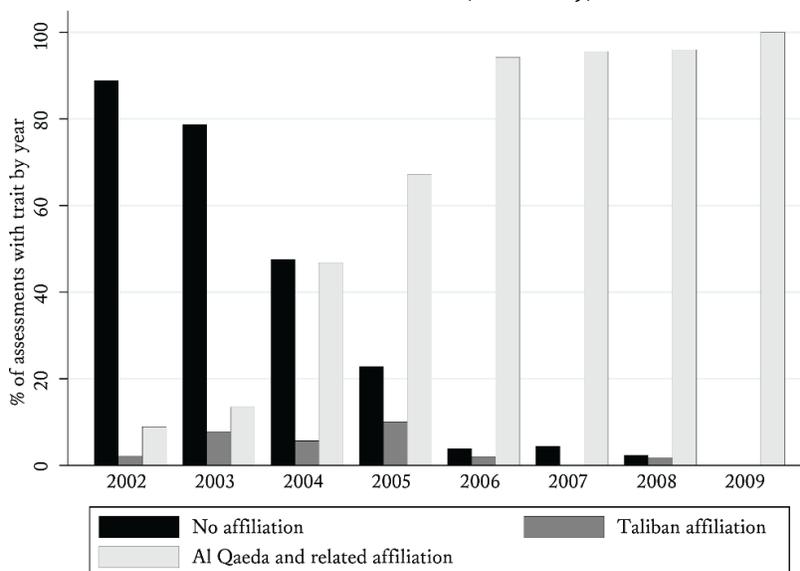


Figure 4 provides some evidence of risk-based triaging of detainees for bureaucratic processing between 2002 and 2009. It seems reasonable to presume that al Qaeda was generally viewed as a more dangerous affiliation than a Taliban affiliation, and that either affiliation signaled a greater risk than the absence of any affiliation. Applying that presumption to Figure 4 suggests

¹¹⁵ David Johnston, *6 Uighurs Leave Guantánamo for Palau*, N.Y. TIMES, Nov. 1, 2009, at A22.

¹¹⁶ This information was obtained by parallel machine-coding and human-coding all 765 assessments for the affiliations and actions assigned therein to the individual detainee. For more details, see *infra* Appendix.

¹¹⁷ To put these categories in perspective, seventy-six assessments identified a Taliban affiliation; 402 identified an al Qaeda affiliation; and 146 identified an affiliation with another organization covered by the AUMF. In contrast, 205 assessments contained no affiliation at all.

that, prior to either judicial or legislative involvement, the military prioritized the triage of detainees who presented the best case for release. Individuals with no discerned affiliation to al Qaeda or the Taliban were moved out of custody first.¹¹⁸ Those associated with al Qaeda and its affiliates were kept in custody longer.

The data presented in Figures 3a, 3b, and 4 point toward two conclusions about the quality of executive action even prior to legislative or judicial intervention. First, military decisionmaking on detention was characterized by a baseline rationality evident both in the way individuals were triaged for processing and also based on overall patterns of observed releases.¹¹⁹ Such rationing may have reflected an effort to better allocate detention-related resources by weeding out detainees without a compelling case for continued custody. Further, this rationing also reflects the significant fiscal burden of detention. Each year an individual is in detention at the Cuban base costs the government roughly \$800,000.¹²⁰ Between 2011 and 2013, during a period of fiscal austerity across the federal government, the Cuban detentions cost taxpayers \$1.42 billion.¹²¹ In short, even a bureaucracy with no interest in the identification of false positives may have felt constrained to transfer or release detainees who posed no risk.

Second, this data undermines yet another alternative explanation for the drop in the transfer rate identified in Part I.C. Recall that I have considered and rejected the hypothesis that transfers fell in frequency because of a change in the marginal detainee's recidivism-related risk. An alternative possibility is that the shift observed in 2009 and 2010 flowed from a change in the diplomatic costs of transfer. Diplomatic frictions might arise because countries to which detainees would be transferred based on their nationality (e.g., Pakistan, Afghanistan) are either unwilling to receive their nationals or are perceived by the United States as unable to take appropriate precautions.

The data, however, does not support this hypothesis. There are two nationalities—Yemeni and Chinese (i.e., Uighur)—for which nationality does

¹¹⁸ Of note, 169 assessments identify no affiliation and no action by the detainee that could warrant detention. These detainees were still held between 137 and 2925 days, for an average of 733 days.

¹¹⁹ Cf. THOMAS O. MCGARITY, REINVENTING RATIONALITY 5-6 (1991) (identifying “techno-bureaucratic rationality” as a method of rationality “that recognized the limitations [posed by] inadequate data, unquantifiable values, mixed societal goals, and potential realities”).

¹²⁰ See Carol Rosenberg, *Guantánamo: The Most Expensive Prison on Earth*, MIAMI HERALD (Nov. 8, 2011, 5:00 AM), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1938974.html> [<https://perma.cc/4EJU-RZEN>] (explaining that the average annual cost of \$800,000 for each of the 171 detainees makes Guantánamo the most expensive prison in the world).

¹²¹ See Ken Gude, *Guantanamo: America's \$5 Billion Folly*, CENTER FOR AM. PROGRESS (Dec. 3, 2013, 8:57 AM), <https://www.americanprogress.org/issues/security/report/2013/12/03/80270/guantanamo-americas-5-billion-folly-2/> [<https://perma.cc/Z4NH-ULZE>] (describing the total cost of Guantánamo over a three-year period).

large work in explaining changes in the timing of release. But, as I have noted, neither Yemenis nor Uighurs comprised a large fraction of the residual detainee population at the beginning of 2009. By that time, all but seven of the Uighurs had been transferred from the Cuban base.¹²² Of the remaining population, only thirty had Yemeni nationality, which implicated severe diplomatic constraints because of their nationality and the perceived deterioration in the Yemeni security situation.¹²³

Another explanation related to changing costs of transfer might be hypothesized. This alternative explanation would focus on the possibility that transfers in 2009 and 2010 required the cooperation of third countries—i.e., countries besides the United States that did not have nationals at Guantánamo, which might have cooled to the prospect of housing Guantánamo detainees in late 2009 to 2010. Traces of this dynamic appear in press accounts of efforts to relocate Uighur detainees at Guantánamo. But there are reasons to doubt that it supplies a persuasive explanation for the more global slow-down in transfers. To start, it is puzzling that third countries would increase diplomatic resistance to transfers in the wake of the unilateralist President Bush's departure and the arrival of the more multilateralist President Obama. It seems more plausible to think that failures in diplomacy flowed from shifts in U.S. behavior—such as increased internecine conflict within the bureaucracy, or a waning of diplomatic efforts—than to external changes. Finally, recall that Figures 1a and 1b showed that the rate of transfers picks up slowly in 2014. It is hard to understand why third countries' views on Guantánamo would calcify in 2009 (as the soon-to-be-Nobel-winning President Obama came to office) and then soften in 2014 (absent any external stimulus).

In summary, neither changes in the riskiness of the marginal detainee nor rising diplomatic costs well explains the collapse in transfers in 2009 and 2010. The empirical data, instead, is consistent with a body of anecdotal evidence—presented below—that attributes significance to the military bureaucracy's attitude toward President Obama's project of closing Guantánamo.

2. Bureaucratic Incentives in Times of Partisan Change

The empirical portrait developed so far presents a puzzle: if transfer policy reflected a risk-based triaging, constrained by diplomatic concerns in a handful of cases, and neither risk nor diplomatic barriers explain the decline in transfers, what can explain the collapse in observed transfers from Guantánamo? I develop a tentative answer to that question here by going

¹²² See *supra* text accompanying notes 113–15.

¹²³ See TASK FORCE REPORT, *supra* note 104, at 18 (recognizing the difficulties of transfers to Yemen given the country's unstable security situation).

beyond the limited stock of empirical data to explore the shifting tenor of bureaucratic behavior during the political transition between the Bush and Obama Administrations.

A body of evidence points toward a shift in bureaucratic dynamics within the executive branch after the partisan transition of 2009, which played a critical role in slowing the rate of transfers. According to multiple independently sourced news reports during that period, the diplomats tasked by the Obama White House with arranging and expediting transfers encountered new internal resistance. “Since Obama took office in 2009,” those officials encountered a pattern of delays and obstructions by the military bureaucracy that hindered transfers.¹²⁴ That bureaucracy, as Connie Bruck has elaborated in a detailed journalistic account, was driven by a belief that the prison was “an asset too important to lose.”¹²⁵ The special envoy responsible for negotiating such transfers between 2009 and 2012 sought and was reassigned to another position “because the Pentagon was not permitting any [transfers].”¹²⁶ His successor from 2013 to 2015 also reported that his diplomatic efforts remained focused on those cleared for release in 2009, at the very beginning of the Obama Administration.¹²⁷

In some instances, it appears the resistance to certain transfers did not rest on any colorable policy justification. For example, the high-profile transfer of detainee Shaker Aamer was arranged with the United Kingdom in 2013 but remained in limbo for more than two years because the Pentagon blocked “the return of Aamer and two longtime Guantánamo Bay detainees.”¹²⁸ Similar efforts to release a Mauritanian detainee, Ahmed Ould Abdel Aziz, were blocked by military bureaucrats wielding a “shifting array of objections.”¹²⁹ Ultimately, in November 2013, the President had to personally promise to “help” diplomats in “bureaucratic fights” to get transfers moving again.¹³⁰ In short, conflict between agencies undermined the President’s agenda.¹³¹ And

¹²⁴ See Charles Levinson & David Rohde, *Special Report: Pentagon Thwarts Obama’s Effort to Close Guantánamo*, REUTERS (Dec. 29, 2015, 5:19 AM), <http://www.reuters.com/article/us-usa-gitmo-release-special-report-idUSKBN0UB1B020151229> [<https://perma.cc/3347-WYUL>] (noting how officials at the Pentagon used bureaucracy to interfere with President Obama’s aspiration to close Guantánamo).

¹²⁵ Bruck, *supra* note 28, at 36.

¹²⁶ SAVAGE, POWER WARS, *supra* note 102, at 495.

¹²⁷ Janet Reitman, *Inside Gitmo: America’s Shame*, ROLLING STONE (Dec. 30, 2015), <http://www.rollingstone.com/politics/news/inside-gitmo-americas-shame-20151230> [<https://perma.cc/5T4F-NEG4>].

¹²⁸ Spencer Ackerman, *Pentagon Blocking Guantánamo Deals to Return Shaker Aamer and Other Cleared Detainees*, GUARDIAN (Aug. 13, 2015, 1:30 PM), <http://www.theguardian.com/us-news/2015/aug/13/pentagon-blocking-guantanamo-transfer-shaker-aamer> [<https://perma.cc/79TH-QBSC>].

¹²⁹ Bruck, *supra* note 28, at 43.

¹³⁰ SAVAGE, POWER WARS, *supra* note 102, at 511-12. Tellingly, Savage also asserts that the reappointment of a transfer envoy “blindsided” relevant Pentagon officials. *Id.*

¹³¹ In the international affairs literature, scholars have posited that “differences in bureaucratic culture” may have undermined the possibility of a coherent policy agenda. Daniel W. Drezner, *Ideas*,

while the available evidence does not permit more fine-grained identification of which entities within the sprawling military apparatus engendered this resistance, it at least provides a threshold reason for identifying the military bureaucracy writ large as a source of resistance to Guantánamo's closure.

President Obama faced bureaucratic resistance from within the military with respect to a number of other counterterrorism policies. Anecdotal evidence also identifies bureaucratic resistance as a friction on his efforts to manage the military campaign in Afghanistan.¹³² Interestingly, the leading account of this campaign isolates leaks as a key tool employed by bureaucrats to undermine the President.¹³³ Similarly, security studies scholars Conor Keane and Steve Wood have identified disabling bureaucratic conflict in other parts of the counterterrorism mission at roughly the same moment that transfers from Guantánamo came to a halt.¹³⁴ In their penetrating empirical study, Keane and Wood show that the military's post-conflict reconstruction efforts in Afghanistan were undermined by conflict between "several practically incompatible conceptions predominating within disparate agency silos."¹³⁵ In addition to documenting pervasive coordination problems, Keane and Wood underscore the persistence of a "war fighting rather than a whole-of-government strategy," which led to unsustainable and often counterproductive reconstruction efforts.¹³⁶ In a similar vein, Keane has charted the conflict between military and civilian agencies over counternarcotics efforts in Afghanistan, with Pentagon officials treating what was to become the Taliban's principal income source as "an unwelcome diversion from eliminating the remnants of al-Qaeda's leadership."¹³⁷

The possibility of bureaucratic resistance as a constraint on presidential power is also consistent with both historical and theoretical accounts of an entrenched and occasionally recalcitrant national security bureaucracy that has developed in path-dependent ways—occasionally at odds with the preferences of its executive branch overseers.¹³⁸ These accounts diagnose the

Bureaucratic Politics, and the Crafting of Foreign Policy, 44 AM. J. POL. SCI. 733, 737 (2000). For the classical account of the relation between interagency conflict and foreign policy, see generally GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

¹³² See, e.g., BOB WOODWARD, *OBAMA'S WARS 192-95* (2010) (describing Obama's frustration that the "White House was losing control of the public narrative" on the Afghan campaign due to military officials' leaks).

¹³³ *Id.*

¹³⁴ Conor Keane & Steve Wood, *Bureaucratic Politics, Role Conflict, and the Internal Dynamics of Provincial Reconstruction Teams in Afghanistan*, 42 ARMED FORCES & SOC'Y. 99, 103 (2016).

¹³⁵ *Id.*

¹³⁶ *Id.* at 105.

¹³⁷ Conor Keane, *The Impact of Bureaucratic Conflict on US Counternarcotics Efforts in Afghanistan*, 12 FOREIGN POL'Y ANALYSIS 295, 302 (2016).

¹³⁸ See generally AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JSC, AND NSC* (1999) (identifying the path-dependent historical development of key national security agencies as an explanation for their limited capacities and reach).

divergence in preferences between the White House and the military in terms of a principal–agent problem that afflicts the regulatory state more generally.¹³⁹ Samuel Huntington famously sketched a model of civilian and military leadership driven by conflicting imperatives, by an internal competition for control, and by diverse interactions with each other and with society.¹⁴⁰ He also anticipated the possibility that elements of the military bureaucracy dissatisfied with presidential leadership might try to obtain a more favorable audience in Congress.¹⁴¹ As I shall develop below, it is precisely this sort of “divide and conquer” strategy that elements of the military bureaucracy appear to have played here.

To be sure, the two-principal problem is endemic across the regulatory state. But it is plausible to posit that the degree of agency slack in the military and national security contexts is especially acute. Military leaders have their own sources of public prestige—and thus can more effectively resist presidential initiatives by appealing directly to the public.¹⁴² As the example of detention amply shows, military bureaucracies also have access to distinctive epistemic resources that political actors lack. As a result, “[b]ureaucratically sophisticated mid-level officers inside the Pentagon are able to effect the adoption of their policy judgments in the Executive Branch and Congress ‘against the wishes of civilian leaders to the contrary.’”¹⁴³ Additionally, the effective domain of military-bureaucratic independence has expanded over time. Writing in 2002, the distinguished military historian Richard Kohn worried that “the American military has grown in influence to the point of being able to impose its own perspective on many policies and decisions.”¹⁴⁴ At least in the detention context, Kohn’s words seem prescient.

¹³⁹ See Huq, *Structural Constitutionalism*, *supra* note 12, at 911–16 (describing bureaucratic constraints on presidential control of national security matters); see also Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1816 (2012) (“Agencies are disciplined not solely by the constraints of rationality, legal doctrine, and political power, but also by the social and institutional environments in which they are embedded.”). See generally Kagan, *supra* note 10, at 2299 (noting that “agency resistance to presidential preferences [in] . . . the form of inertia” has been recognized as a basic fact of the federal regulatory state).

¹⁴⁰ See SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 80–97 (1957) (outlining how civilian control can be defined vis-à-vis its essential role with the military).

¹⁴¹ See *id.* at 182–83; see also *id.* at 415–16 (criticizing the National Security Act of 1949 for allowing direct bureaucratic access to Congress).

¹⁴² See, e.g., Russell F. Weigley, *The American Military and the Principle of Civilian Control From McClellan to Powell*, 57 J. MIL. HIST., Oct. 1993, at 28 (referring to General Powell writing a *New York Times* op-ed piece and directly appealing to the public about his opposition to the Bosnian intervention).

¹⁴³ Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 798 (2012).

¹⁴⁴ Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 55 NAVAL WAR C. REV., Summer 2002, at 9; see also PETER D. FEAVER, *ARMED SERVANTS: AGENCY*,

3. The Causes of Bureaucratic Resistance

Neither the aforementioned news sources nor these accounts of contemporaneous internecine institutional conflicts that disabled a counterterrorism mission explain the reasons for the sudden spike in bureaucratic “intransigence.”¹⁴⁵ This section offers hypotheses about why bureaucratic attitudes toward Guantánamo shifted so abruptly. Given the available evidentiary record, it is not possible to adjudicate fully between these hypotheses, even though the key role of certain elements within the military bureaucracy seems clear. Moreover, it is important to flag once more that the available data does not conduce to more fine-grained parsing of exactly which elements within the Pentagon bureaucracy played a pivotal role in shifting bureaucratic attitudes. With these caveats, it is still possible to isolate three hypotheses about the specific causal mechanism at work.

First, it is striking that the rupture in bureaucratic behavior described here arose in the wake of partisan change in the White House, rather than in response to some immediate change in policy (i.e., the presidentially required rate of releases).¹⁴⁶ I focus here on partisan change within the executive in part because the anecdotal evidence points in that direction, and in part because the shift in bureaucratic behavior appears unrelated to other changes to the separation-of-powers environment.¹⁴⁷ Further, as I explore below, the evidence suggests that this internal change led to shifts in legislative behavior rather than vice versa.¹⁴⁸ As Part I demonstrated, the Bush and Obama Administrations pursued substantially similar policies, with the former overseeing a higher rate of detainee releases. It seems unlikely, therefore, that simple “ideological opposition”¹⁴⁹ at the discrete policy level alone explains the bureaucratic opposition. After all, military officials were being tasked with roughly the same task of identifying detainees for release both before and after the 2008 election.¹⁵⁰ Instead, one way of interpreting the time trends illustrated in Figure 1a is that partisan change at the presidential leadership level was

OVERSIGHT, AND CIVIL-MILITARY RELATIONS 58-68 (2003) (describing principal-agent dynamics in the military context).

¹⁴⁵ See Ackerman, *supra* note 128. Bruck identifies the Defense Department’s concern with casualty risk as the reason for its recalcitrance. Bruck, *supra* note 28. But this does not explain why the Pentagon’s resistance to transfer *changed* with Obama’s entry into office.

¹⁴⁶ Cf. Kohn, *supra* note 144, at 33 (documenting military resistance to institutional reform during the Bush and Clinton Administrations).

¹⁴⁷ See *supra* Section I.A.

¹⁴⁸ See *infra* text accompanying notes 168–74.

¹⁴⁹ See Reitman, *supra* note 127 (quoting an unnamed Administration official to the effect that “there are people working on this issue within the government who are ideologically opposed to closing the facility”).

¹⁵⁰ See *supra* Figure 1a (showing that the number of releases remained consistent before and after the 2008 election).

associated with different levels of cooperation within agencies *even holding roughly constant the pro-release orientation of policy both before and after 2008*. If the substance of detention policy seems not to be a dispositive influence, this leaves open the possibility that the identity of the commander-in-chief may have influenced the degree of bureaucratic resistance to detainee transfers.

The available data does not directly explain why the identity of the President might have altered bureaucratic preferences, even though granular policymaking did not evince change in the expected direction. Two mechanisms, which may be complementary rather than mutually exclusive, merit serious consideration. The first possibility is that relevant military bureaucrats anticipated *ex ante* a lower degree of across-the-board cooperation and support from a Democratic rather than a Republican President given the Republican Party's historical association with more robust support for the armed services.¹⁵¹ That the senior ranks of the military are also "more conservative" than their historical predecessors¹⁵² could only have exacerbated worries about the divergence of interest that partisan change would bring. Anticipating conflict with the White House—say, over staffing, funding, or prosecutions in alleged torture cases—military bureaucrats might treat the President's detention-related agenda item as a valuable bargaining chip, not to be frittered away lightly.

Another possibility builds on the "Nixon goes to China" effect described by political scientist Robert Goodin.¹⁵³ Goodin pointed out that when "an action is somehow out of character for a particular politician, then, for that very reason there are fewer external obstacles to that politician's performing it."¹⁵⁴ Although Goodin did not explain why this might happen, one possible causal mechanism turns on credibility. A politician taking a counterintuitive position can more credibly claim to be pursuing a position based on its intrinsic merits rather than ideological grounds. On this logic, it was the very fact that President Obama might have been expected to take liberal positions on Guantánamo that rendered his embrace of those positions less credible and less persuasive than President Bush's. President Obama's credibility problem, moreover, may have been exacerbated by the fact that his 2008 agenda took the categorical position that Guantánamo had to be emptied completely.¹⁵⁵ Coming from a Democratic President, an unqualified declaration

¹⁵¹ See Michael T. Koch & Skyler Cranmer, *Testing the "Dick Cheney" Hypothesis: Do Governments of the Left Attract More Terrorism than Governments of the Right?*, 24 CONFLICT MGMT. & PEACE SCI. 311, 312 (2007) (noting that Republicans tend to be associated with greater support for the military).

¹⁵² Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATLANTIC MONTHLY, July 1997, at 66, 70.

¹⁵³ Robert E. Goodin, *Voting Through the Looking Glass*, 77 AM. POL. SCI. REV. 420, 421 (1983).

¹⁵⁴ *Id.*

¹⁵⁵ See *supra* text accompanying notes 3–4.

that the military had lost control over a policy's pace and structure may have been especially galling to elements within the Pentagon.¹⁵⁶

This highlights a rather ironic possibility: had Obama muffled or obscured his intended position on the Guantánamo detentions—had he lauded the Bush Administration's approach and signaled his intention to hew to that course—it is possible that he would have faced *less* internal resistance from the military bureaucracy in pursuing the same goal that he in fact explicitly endorsed. There is some evidence of this at the retail level. The case of Shaker Aamer, for example, demonstrates that the very fact that a specific case was high profile might engender more—rather than less—resistance from bureaucratic actors.¹⁵⁷ By taking a salient position, President Obama may have engendered greater internal friction. This dynamic contrasts with recent studies of administrative agency resistance, where the salience of an issue seems to increase presidential power.¹⁵⁸ The dynamic of detention policy points to the alternative possibility that an issue's salience can undermine a President's ability to steer the bureaucracy.

The second possible explanation for the bureaucratic turn focuses on the preferences of specific Cabinet-level officials. For example, some evidence suggests that the Secretary of Defense's resistance to personally certifying the legality of transfers, as required under legislative restrictions on detainee transfers, has played a role in generating delays.¹⁵⁹ At the same time, the wide range of

¹⁵⁶ I have focused here on Obama's partisan identity. What, though, of his race? For example, "dozens of studies show that out-group antagonisms—measured by racial resentment, anti-Black stereotypes [and] . . . anti-Muslim attitudes, and even living in areas with many racist google searches—were [significant] . . . predictors of opposition to Obama in 2008." Michael Tesler, *The Conditions Ripe for Racial Spillover Effects*, 36 *ADVANCES POL. PSYCHOL.* 101, 101 (2015). Moreover, the President's race influences judgments on specific policies. Opposition to a healthcare policy innovation rises substantially in experimental studies when it is associated with President Obama rather than President Clinton. Michael Tesler, *The Spillover of Racial Attitudes into Health Care: How President Obama Polarized Public Opinion by Racial Attitudes and Race*, 56 *AM. J. POL. SCI.* 690, 690-91 (2012). We lack studies of bureaucratic personnel necessary to test the hypothesis that bureaucratic opposition to President Obama's Guantánamo policies was in part a reaction to his race. And the likelihood that post hoc interviews with agency officials would yield falsifiable results is vanishingly small. Hence, no firm evidence exists to confirm or reject this possibility. All that can be said here is that the homology between these race effects associated with Obama and the dynamics of Guantánamo policymaking over time is rather striking.

¹⁵⁷ See Ackerman, *supra* note 128 and accompanying text.

¹⁵⁸ See Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 *HARV. L. REV.* 1755, 1761 (2013) ("[Agency] [s]elf-insulation may thus be most prevalent for the broad set of regulatory actions that are not clearly salient or high profile; actions that are already high profile are likely to come to the attention of the White House through other means.").

¹⁵⁹ See Richard Bernstein, *A Detainee Freed, but Not Released*, *N.Y. TIMES* (Sept. 23, 2009), <http://www.nytimes.com/2009/09/24/us/24iht-letter.html> [<https://perma.cc/A7V7-PCBA>] (documenting delays in the release of a detainee even after a judge found his continued detention at Guantánamo unlawful); Adam Goldman, *Once Deemed Too Dangerous to Release, Saudi Detainee at Guantanamo Bay Prison Has Been Repatriated*, *WASH. POST* (Sept. 22, 2015), <https://www.washingtonpost.com/world/>

delaying tactics that has been observed at several levels of the bureaucracy—e.g., resisting the release of medical records necessary for a transfer by citing the privacy interests of the still-detained custodial subject—suggests that the preferences of specific individual officials cannot supply a full explanation for the bureaucratic attitude.¹⁶⁰

Finally, military resistance to transferring Guantánamo detainees arose at a time when the prosecution of detainees in Article III courts was becoming a more remote possibility. Although one detainee from the Cuban base had been transferred to the United States mainland for criminal trial,¹⁶¹ other proposed transfers foundered due to bipartisan opposition.¹⁶² The elimination of an Article III trial as a practical option might have raised the expected cost of closing Guantánamo—a policy that would necessarily have entailed the dispersion beyond U.S. control of some detainees perceived as being extremely dangerous. Rather than hazard this outcome, elements of the military bureaucracy may have applied the brakes.

4. Conclusion

The evidence presented here suggests that bureaucratic processing, triaging, and transferring detainees from the Cuban base was characterized initially by a measure of rationality. Those individuals who presented the least threat seemed to have been prioritized for release, at least where diplomatically feasible. That rationality, however, foundered after President Obama came into office—but not because the marginal detainee suddenly became too risky

national-security/saudi-detainee-at-guantanamo-bay-prison-has-been-repatriated/2015/09/22/b28c28cc-6156-11e5-b38e-06883aacba64_story.html [https://perma.cc/8ZKF-B6ND] (noting that Defense Secretary Ashton B. Carter has been criticized for the pace at which he approves detainee transfers); Tim Mak & Nancy A. Youssef, *The Pentagon Is Keeping Half of Gitmo Locked Up—Against the White House’s Wishes*, DAILY BEAST (Aug. 9, 2015), <http://www.thedailybeast.com/articles/2015/08/09/he-s-keeping-half-of-gitmo-locked-up-against-the-white-house-s-wishes.html> [https://perma.cc/A795-6DXV] (observing that then-Secretary of Defense Carter was under political pressure to approve detainee transfers and reduce the number of detainees held at Guantánamo Bay); see also SAVAGE, POWER WARS, *supra* note 102, at 516-17 (commenting that detainee transfers were also delayed during former Defense Secretary Chuck Hagel’s time in office).

¹⁶⁰ See Reitman, *supra* note 127 (citing an unnamed official as stating that “there are a thousand ways that you can thwart policy through bureaucratic cunning or inaction, like when transfer packages just sit there on the defense secretary’s desk and don’t move. Or that the people in the building don’t get it to him”).

¹⁶¹ See Peter Finn, *Terror Suspect Ghailani Brought from Guantánamo Bay to U.S. for Trial*, WASH. POST (June 10, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/09/AR200906090401.html> [https://perma.cc/9PYL-RFFY] (noting that Ahmed Ghailani, a Guantánamo detainee, was flown to New York to face a federal trial).

¹⁶² See Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES (Apr. 5, 2011), <http://www.nytimes.com/2011/04/05/us/05gitmo.html> [https://perma.cc/F4BQ-HMNS] (observing that Congress imposed restrictions that “banned the military from using its funds to transfer detainees to domestic soil, even for trials”).

to release or because of a sharp rise in the diplomatic difficulties of release. I have offered evidence of that bureaucratic turn, and, more tentatively, suggested a number of distinct explanations for this turn. The most persuasive, in my view, hinges on a breakdown in intrabranched bargaining and President Obama's distinctive credibility problem with the military.¹⁶³

Finally, the account developed here gestures toward the possibility—to be amplified in subsequent sections—that the ultimate effect of bureaucratic resistance to presidential agendas will be a function of the behavior of other branches. For instance, bureaucratic resistance to Guantánamo transfers took advantage of the procedures that Congress had legislated for such actions.¹⁶⁴ This suggests that understanding the checking effect of the separation of powers requires attention to the interaction between the internal elements of each branch with coordinate actors in other branches. It is this possibility of unexpected interbranch alliances that I explore next.

B. *The Causes and Consequences of Legislative Intervention*

Between 2002 and 2009, Congress imposed few constraints on detention policy.¹⁶⁵ Its main innovations either reinforced executive branch autonomy (i.e., by eliminating federal court jurisdiction to hear challenges to executive decisions) or created new, lower-cost options for processing detainees for more credible long-term detentions (i.e., by setting statutory foundations for military commissions).¹⁶⁶ But in June 2009, legislators changed tack. Congress for the first time interposed itself into the heartland of Guantánamo policy regarding when and how detainees could be transferred or released.¹⁶⁷ Why? And to what effect?

This subsection explores the causes and consequences of Congress's 2009 and 2010 statutory interventions as a way of better understanding why and how legislative interventions constrain presidential policy options. I focus on these legislative interventions because they coincide in time with the dramatic shift in transfer rates identified in Part I. Using a mix of empirical and doctrinal evidence, I first argue that legislative intervention cannot be ascribed to an exogenous policy shock: there was no singular incident or series of incidents involving a former detainee that catalyzed recidivism-related concerns. Rather, the change in legislative attitudes toward detainee transfers is best

¹⁶³ It is not clear whether qualitative research would do better: several of the theories I have developed are unlikely to be confirmed by participants (e.g., the bargaining-chip theory and the race theory). Hence, it is not clear if any definitive answer is possible.

¹⁶⁴ See *supra* Section I.A.3 (discussing the institutional history of Guantánamo policy).

¹⁶⁵ See *supra* Section I.A.3.

¹⁶⁶ See *supra* Section I.A.3.

¹⁶⁷ See *infra* note 209 and accompanying text.

explained by an intragovernmental dynamic. This dynamic is squarely at odds with the traditional separation-of-powers story, in which the legislature acts as a brake on executive initiatives. Instead, it seems that public concern and, in the end, statutory intervention to limit transfers and releases were the result of an interbranch alliance between the military bureaucracy and Congress. A disconsolate bureaucracy, in short, effectively turned Congress against the White House.

Yet another piece of this dynamic merits emphasis up front. When Congress responded to an uptick in public concern about recidivism risk, its intervention did not depend on the force of law for its efficacy. Instead, the ensuing regulation vested the military bureaucracy with discretion to resist presidential initiatives by imposing political frictions on discrete release decisions. It was thus an internal dynamic nested within bureaucratic politics, rather than the sheer force of law, that hindered the White House. Just as the *causes* of separation-of-powers constraints on presidential power cannot be understood by looking exclusively at the actions of the branches as discrete, monolithic entities, so too the *consequences* of those constraints cannot be gauged without decomposing the branches into their discrete components.

1. The Roots of Legislative Intervention

Decisions whether or not to transfer or release detainees from Guantánamo became a “hot-button” question for Congress in 2009.¹⁶⁸ Why? As Part I demonstrated, releases had been occurring at a vigorous pace for at least three years by then; if anything, the rate of releases and transfers fell under the new presidential dispensation. Standard accounts posit that legislative attention was driven by a worry about detainee “recidivism.”¹⁶⁹ Concern on that score “soar[ed]” between 2008 and 2010.¹⁷⁰ To understand the role of separation-of-powers dynamics in checking presidential power, it is necessary first to reject the hypothesis that it was these extrinsic concerns motivated by an exogenous shock—i.e., a vivid attack involving a recidivist from Guantánamo—that derailed the White House’s agenda. Having rejected this extrinsic explanation for policy change, I then demonstrate that a bureaucratic–legislative alliance catalyzed public concern about recidivism and, in turn, restrictive legislation from June 2009 onward. I focus on the key role

¹⁶⁸ See Payne, *supra* note 45, at 883 (stating that post-*Boumediene* legislation has focused on issues such as detainee transfer authority, rather than substantive changes or clarifications to habeas proceedings).

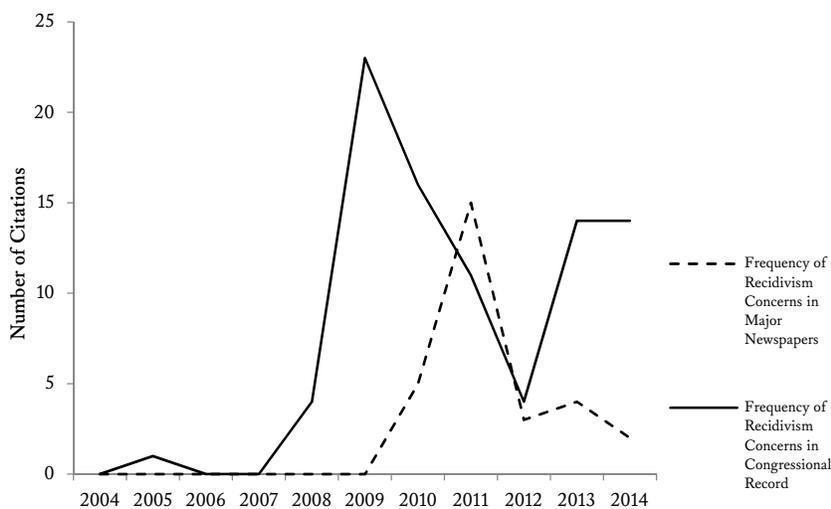
¹⁶⁹ See *supra* notes 26–27 and accompanying text (discussing the standard narrative regarding recidivism).

¹⁷⁰ See Thomas Joscelyn, *Gitmo Recidivism Rate Soars*, WKLY. STANDARD (Dec. 7, 2010, 4:12 PM), http://www.weeklystandard.com/blogs/gitmo-recidivism-rate-soars_521965.html [<https://perma.cc/FPY5-W6PU>] (noting that in 2010 the U.S. government considered twenty-five percent of all transferred former detainees to be confirmed or suspected recidivists).

of strategic bureaucratic disclosure in shaping perceptions of recidivism-related threats. Finally, I discuss the pivotal function of elite policy entrepreneurs, in both Congress and the executive branch, in shaping public sentiments.

To assess the causes of legislative intervention on transfer policy, it is useful to explore first the relative timing of legislative and public concern about recidivism-related risk. To that end, Figure 5 reports the frequency of invocations of Guantánamo recidivism in both major newspapers (as compiled in Westlaw's Major Newspapers Database) and the Congressional Record between 2004 and 2015. It is important to note that the latter search does not capture hearing transcripts. Between April and June 2011, the House Committee on Armed Services Subcommittee on Oversight and Investigations convened three public hearings and one closed hearing on Guantánamo recidivism.¹⁷¹ Because it is not clear how to aggregate a tally that relies on mentions in the Congressional Record and a tally of committee hearings, Figure 5 only reports the former.

Figure 5: Frequency of Invocation of Guantánamo Recidivism in Major Newspapers and the Congressional Record (2004–2014)



¹⁷¹ See HOUSE ARMED SERVS. COMM., *Leaving Guantanamo: Policies, Pressures, and Detainees Returning to the Fight 2* (Jan. 2012), https://armedservices.house.gov/sites/republicans.armedservices.house.gov/themes/rep_armed_services/largedocs/leaving_guantanamo_web_3_27.pdf [<https://perma.cc/G5D8-RW7Q>] (discussing the steps taken by the Oversight and Investigations Subcommittee during its “in-depth, comprehensive bipartisan investigation of procedures to dispatch detainees from the Guantánamo Bay detention facility (GTMO) over the past decade”).

The data presented in Figure 5, read in light of the available extrinsic evidence of congressional motivations, does not support the hypothesis that Congress responded to an exogenous shock, such as a terrorism-related event, in moving aggressively to mitigate perceived recidivism risk. Rather, it suggests that the public demand to which the June 2009 uptick in coverage responded was a product of endogenous dynamics, i.e., the bureaucratic–legislative alliance seeking to constrain the President.¹⁷²

As Figure 5 shows, scant legislative or public concern about detainee recidivism existed until late 2008. This was so despite some earlier reports of former detainees engaging in insurgency or violence.¹⁷³ The 2007 to 2009 news reports extracted from Westlaw, as well as government statements about recidivism, moreover, do not tend to single out a particular incident involving a former detainee returning to the fight that could have sparked the increase in legislative and public concern. The most likely catalyzing incident that occurred in this period—a suicide attack in Baghdad allegedly executed by a former Guantánamo detainee¹⁷⁴—is not extensively cited in either news reports¹⁷⁵ or legislative or executive branch statements.¹⁷⁶ The range of alleged recidivism, even involving violence, is also quite heterogeneous. Some recidivists, for example, are identified by the government as affiliated with forces fighting

¹⁷² Some observers cite a December 2009 incident on an international flight that almost exploded over Chicago as catalyzing a shift in the White House's preferences. See, e.g., SAVAGE, POWER WARS, *supra* note 102, at 11-17 (recounting the details of a foiled airplane bombing and the Obama Administration's initial stance on the "war on terror"). I do not think that event can be relied on to explain the dynamics observed here for two reasons. First, it simply comes too late to explain the spike in congressional attention documented in this Article. Even the increase in public attention to the recidivism issue precedes rather than follows the incident. Second, the December 2009 incident did not involve a former Guantánamo detainee, but a Nigerian tasked by al Qaeda. At best, an explanation that focused on this incident would have to explain why this incident, or all other successful and foiled terrorism plots, led to a change in views on Guantánamo. The incident itself pointed to a new geographic source of terrorism. It requires an effort of imagination and political entrepreneurship to link it to Guantánamo. But then, it is necessary to explain why and how that effort came about.

¹⁷³ See, e.g., C.J. Chivers, *Russian Freed from Guantánamo is Killed by Police Near Chechnya*, N.Y. TIMES (June 28, 2007), <http://www.nytimes.com/2007/06/28/world/europe/28russia.html> [https://perma.cc/Y5X4-J8MU] (describing evidence of recidivism dating back to 2005).

¹⁷⁴ See Alissa J. Rubin, *Bomber's Final Messages Exhort Fighters Against U.S.*, N.Y. TIMES (May 9, 2008), <http://www.nytimes.com/2008/05/09/world/middleeast/09mosul.html> [https://perma.cc/EAP4-USLH] (describing the possibility that the prolonged detention of certain prisoners at Guantánamo was the cause of their subsequent radicalization).

¹⁷⁵ Indeed, the detainee alleged to have perpetrated the bombing, Abdallah Salih al-Ajmi, is not mentioned in the other reports about recidivism in the data set.

¹⁷⁶ For a useful collection of such statements, see Mark P. Denbeaux et al., *Recidivism Revisionism: An Analysis of the Government's Representations of Alleged "Recidivism" of the Guantánamo Detainees 11-17* (June 2009) (unpublished manuscript), http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/GTMO_Final_Final_Recidivist_6-5-09-3.pdf [https://perma.cc/R89T-Q443].

foes of the United States, such as Syria, rather than attacking either American or allied interests.¹⁷⁷

Instead of focusing on specific instances of recidivism, early news reports and legislative statements are dominated by references to the recidivism statistics produced by the military bureaucracy.¹⁷⁸ The large role played by bureaucratic statistics suggests that legislative and public perceptions of recidivism were, at a minimum, mediated through the positions advanced by the military bureaucracy.¹⁷⁹ Beginning in July 2006, the Director of National Intelligence (DNI) began issuing informal periodic statements about detainee reengagement or recidivism.¹⁸⁰ From 2007 onward, the frequency of these official statements increased. Their contents were framed, moreover, in increasingly alarmist terms. Their drumbeat was amplified by other government agencies.

The first two formal Pentagon statements about detainee recidivism were promulgated in December 2007 and May 2008.¹⁸¹ Thereafter, the military bureaucracy issued formal reports in January 2009, April 2009, October 2010, December 2011, and July 2012.¹⁸² In short, the acceleration of bureaucratic reporting on recidivism is tightly correlated to the arc of legislative attention to the issue.

Further, both the content and the form of military-bureaucratic statements on recidivism shifted dramatically in this period. Consider first the changing content of bureaucratic statements. The recidivism rate reported by the DNI

¹⁷⁷ See *Ex-Guantanamo Prisoner Killed in Syria*, AL JAZEERA (Sept. 18, 2013, 8:16 PM), <http://america.aljazeera.com/articles/2013/9/18/ex-guantanamo-prisoner-killed-in-syria.html> [https://perma.cc/WW49-JKW6] (noting that a former detainee died fighting for an antigovernment rebel group in Syria).

¹⁷⁸ A key question, therefore, in allocating causal roles within the military bureaucracy is the source of these leaks. Publicly available information does not disclose these sources.

¹⁷⁹ For evidence of the effect of governmental frames on public perceptions of terrorism threats, see Brigitte L. Nacos, Yaeli Bloch-Elkon, & Robert Y. Shapiro, *Post-9/11 Terrorism Threats, News Coverage, and Public Perceptions in the United States*, 1 INT'L J. CONFLICT & VIOLENCE 105, 110-11 (2007) (documenting effects of government statements on perceptions of terrorism threat).

¹⁸⁰ See, e.g., DEF. INTELLIGENCE AGENCY, TRANSNATIONAL: GUANTANAMO BAY DETAINEES RETURNING TO TERRORISM UPDATE (July 10, 2006), <http://www.dia.mil/Portals/27/Documents/FOIA/5%20USC%20C2%A7%20552%28A%29%282%29%28D%29%20Records/Detainee%20Recidivism%20Reports/TRANSNATIONAL%20GUANTANAMO%20BAY%20DETAINEES%20RETURNING%20TO%20TERRORIS.pdf> [https://perma.cc/MX4P-MJLP] (reporting that a small percentage of former Guantánamo detainees have returned to terrorism). A variety of terms were employed by governmental spokespersons, seemingly interchangeably, for the same concept. See THE REPORT OF THE CONSTITUTION PROJECT'S TASK FORCE ON DETAINEE TREATMENT 295 (2013), <http://detainee-taskforce.org/read/> [https://perma.cc/9EAX-Q4DB] [hereinafter DETAINEE TREATMENT REPORT] (noting the interchangeable use of the terms “re-engaging [in terrorism]” “re-engaging in terrorist or insurgent activities” and “anti-coalition militant activities”).

¹⁸¹ See Katherine Tiedemann & Peter Bergen, *Guantanamo: Who Really 'Returned to the Battlefield'?*, NEW AM. (July 20, 2009), <https://www.newamerica.org/fellows/guantanamo-who-really-returned-to-the-battlefield-2009> [https://perma.cc/3T3M-RU7L].

¹⁸² See DETAINEE TREATMENT REPORT, *supra* note 180, at 297-98 (listing the number of released detainees confirmed or suspected of reengaging in terrorism).

increased from thirty-six confirmed or suspected cases in May 2008 to eighteen confirmed and forty-three suspected cases in January 2009, and then further up to twenty-seven confirmed and forty-seven suspected recidivists in April 2009.¹⁸³ The reported rate of recidivism changed from three percent at one point in 2008 to eleven percent in 2009 to twenty-seven percent in 2012.¹⁸⁴ In addition, the form and style of military-bureaucratic statements on recidivism evolved between 2008 and 2009. On my reading, their tone sharpened, increasingly conveying a sense of urgency. Consider one example: information about the sharpest uptick in alleged recidivism was disseminated not through a formal release, but instead through a March 2009 leak to news media organizations of an enlarged list of purportedly classified recidivism data.¹⁸⁵ This “unreleased report” became front-page news, under banner headlines proclaiming that “1 in 7” of the formerly detained “are engaged in terrorism or militant activity.”¹⁸⁶ This phrasing likely had more emotional punch than talk of an eleven-percent recidivism rate. Yet, however framed, this statistic was too high—even by the military’s own interpretation. Two weeks after running a front-page report featuring the purported “1 in 7” recidivism rate, the *New York Times* clarified that the report conflated the Pentagon’s categories of suspected and confirmed cases.¹⁸⁷ But it is hopelessly optimistic to think this clarification, buried far within the newspaper, had any discernable effect on public opinion.

Further, the use of a leak—rather than a more regularized form of disclosure—is instructive: the news media leaks reflect greater salience since the information is by definition new and noteworthy.¹⁸⁸ Mid-level bureaucrats

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 298.

¹⁸⁵ See *Fact Sheet: Former Guantanamo Detainee Terrorism Trends*, ABC NEWS (Apr. 7, 2009), http://abcnews.go.com/images/Politics/guantanamo_recidivism_list_090526.pdf [https://perma.cc/9HNN-SCA2] (providing names and personal details of former detainees confirmed or suspected of reengaging in terrorism).

¹⁸⁶ See, e.g., Elisabeth Bumiller, *Later Terror Link Cited in 1 in 7 Freed Detainees*, N.Y. TIMES (May 20, 2009), <http://www.nytimes.com/2009/05/21/us/politics/21gitmo.html> [https://perma.cc/M6XT-KJMQ].

¹⁸⁷ See *id.* (admitting that the original report mistakenly assumed—without proof—that “all the former prisoners had been engaged in terrorism before their detention,” and also failed to distinguish between the twenty-seven confirmed post-detention terrorists/militants and the forty-seven suspected post-detention terrorists/militants).

¹⁸⁸ See David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 574 (2013) (“Leaks are often taken to be unique sources of insight into the inner workings of power.”). *But cf.* LEON V. SIGAL, REPORTERS AND OFFICIALS 120-21 (1973) (finding that between 1949 and 1969, 2.3% of the front-page stories in the *New York Times* and *Washington Post* about national or foreign news relied primarily on leaks for the information reported).

often use leaks as a weapon¹⁸⁹ to thwart the ambitions of elected supervisors. Consistent with this political economy, early reports of the March 2009 recidivism leak focused on the ammunition it supplied to “critics . . . of President Obama’s plan to shut down the prison.”¹⁹⁰ One leading critic of that plan, former Vice President Dick Cheney, immediately seized upon the leaked “1 in 7” statistic as a partisan cudgel.¹⁹¹ Critiques of the Obama position on detainee transfers, quite naturally, did not flag the military bureaucracy’s own caveats and cautions about such statistics. Nor, unsurprisingly, did these critics—or even the military bureaucracy itself—acknowledge the growing body of evidence suggesting that even the confirmed instances of recidivism were in fact much more ambiguous in quality.¹⁹² And of course, none reflected on how unlikely it would have been if no instances of violence against the United States had occurred: after all, this was a population of several hundred men who had been swept up without legal process, detained for months or years, subjected to coercive interrogation and torture, and then released without explanation or apology. Even if none of the detainees had any initial

¹⁸⁹ See SIGAL, *supra* note 188, at 140 (noting that leaks and other press tactics “can be employed to get officials into the game, or keep them on the sidelines”).

¹⁹⁰ Bumiller, *supra* note 186.

¹⁹¹ Peter Bergen & Katherine Tiedemann, *Commentary: How Many Gitmo Prisoners Return to Fight*, CNN (July 21, 2009, 9:40 AM), <http://www.cnn.com/2009/POLITICS/07/20/bergen.guantanamo/index.html> [<https://perma.cc/S245-6MBF>]; see also Jim Rutenberg, *A ‘Freer’ Cheney Makes Case (With Dual Focus)*, N.Y. TIMES (May 21, 2009), <http://www.nytimes.com/2009/05/22/us/politics/22cheney.html> [<https://perma.cc/8QKC-EXWK>].

¹⁹² Criticism of the military’s recidivism numbers rested on two grounds. First, a review of publicly available evidence of recidivism in 2009 found a rate of “about half” that reported by the DNI. Bergen & Tiedemann, *supra* note 191. Subsequent updates of this study continued to find rates substantially lower than the figure proffered by the DNI. See Peter Bergen et al., *How Many Gitmo Alumni Take Up Arms?*, FOREIGN POL’Y (Jan. 11, 2011), <http://foreignpolicy.com/2011/01/11/how-many-gitmo-alumni-take-up-arms/> [<https://perma.cc/AEW2-AL54>] (finding that only six percent of released detainees were confirmed or suspected recidivists). The striking and persistent divergence between independent and government assessments of recidivism rates raises a serious question of how government data should be evaluated. Second, the term “recidivism” was borrowed from the criminal law and imported into the national security context. See Jonathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. 326, 344 (2014) (stating that recidivism is a concept borrowed from criminal law and contributes a stigma associated with a criminal penalty—even when the prisoner was never convicted of an offense). But unlike criminal defendants, Guantánamo detainees have never been found guilty of a specific offense. Thus, to use the term recidivism is to assume that the false positive rate for initial seizures and transfers to custody at the base was zero. This seems unlikely. Moreover, the term obscures the possibility that individual detainees may have had no connection to terrorism until they were confined in close quarters to many members of al Qaeda and the Taliban, in addition to being subject to what at best were onerous conditions of detention. See, e.g., Rajiv Chandrasekaran, *From Captive to Suicide Bomber*, WASH. POST (Feb. 22, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/21/AR2009022101234_pf.html [<https://perma.cc/WD7Z-EDA5>]. The possibility that Guantánamo had a criminogenic effect is erased by the use of the term “recidivism.”

connections to terrorist groups, their subsequent animosity against the United States might well be anticipated.

And this was not the only leak. Legislators also received information directly from the military bureaucracy, which they then used to embarrass and contradict the White House. In July 2010, for example, Senator Kit Bond, the Republican vice chair of the Senate Intelligence Committee, revealed in a Senate hearing that the Central Intelligence Agency and Defense Intelligence Agency “did not concur” in certain detainee releases endorsed by the White House.¹⁹³ Leveraging putatively classified information that had leaked from the national security bureaucracy, a partisan foe of the White House thus made political capital out of internal bureaucratic strife.

This timing, framing, and partiality of pivotal disclosures about recidivism suggests an attempt by the military bureaucracy to influence national policy in a fashion antithetical to the White House’s interests and agenda. This ambition is consistent with, and corroborated by, the military bureaucracy’s resistance to diplomatic efforts to facilitate detainee transfers.¹⁹⁴ These dynamics suggest that congressional intervention into detention policy was precipitated as much by forces endogenous to the three branches, including discontent within the bureaucracy and partisan opposition to a new President. The “thick political surround,” in short, was a catalytic part of the interbranch dynamic usually labeled as our separation of powers.¹⁹⁵

This tight functional nexus between Congress and the military bureaucracy reflects a deeper set of institutional relationships. These are plausibly understood as grounded upon the long-term political economy of military spending and the ensuing network of connections between legislators and the military. As the political scientist Rebecca Thorpe has demonstrated, many representatives from the House are elected by districts heavily reliant on military expenditures.¹⁹⁶ They hence tend to support military initiatives notwithstanding “partisan and ideological divisions.”¹⁹⁷ Robust, and even bipartisan, support for the military bureaucracy—and a concomitant sensitivity to its policy concerns—rests on a foundation of convergent economic and electoral interests. While these economic interests might not be directly engaged by detainee policy, they may help illuminate the tight nexus between the military bureaucracy and the legislature.

Moreover, there is an intriguing relationship between elite expressions of concern about recidivism and more general public awareness. In contrast to

¹⁹³ SAVAGE, *POWER WARS*, *supra* note 102, at 312-13.

¹⁹⁴ See *supra* text accompanying notes 127-44.

¹⁹⁵ For a fuller exposition of this concept, see Huq & Michaels, *supra* note 25, at 391.

¹⁹⁶ See REBECCA U. THORPE, *THE AMERICAN WARFARE STATE: THE DOMESTIC POLITICS OF MILITARY SPENDING* 95 (2014) (characterizing such representatives as prioritizing military spending more than representatives from more economically diverse districts).

¹⁹⁷ *Id.*

legislative concern, the broader public's awareness of recidivism (at least insofar as it can be measured by the frequency of media hits) begins in 2009 and peaks in 2011.¹⁹⁸ It was seemingly catalyzed by the March 2009 leak and the resulting media coverage it sparked. Public awareness lagged roughly two years behind the congressional cycle of attention. Mobilization among political elites on the recidivism question, in other words, seems to have *anticipated* public concern. This is consistent with an emergent political science literature finding elite cuing effects on public opinion.¹⁹⁹

The findings presented here, however, are distinctive in one regard. Much of the literature of elite cuing effects focuses on interplay between legislators (or other elected actors) and public opinion. The causal arrow hypothesized here, though, runs from the military bureaucracy through Congress to the general public. In other words, executive actors within the military engaged in highly effective policy entrepreneurship through leaks and other forms of backroom communications in ways that hypothetically exacerbated rifts in the political landscape. These rifts do not exactly track partisan lines. Nevertheless, the partisan coloration of the fight between Congress and the presidency is hard to miss. Political polarization, which has been identified as a motivating cause of bureaucratic authority,²⁰⁰ here is a consequence of mid-level administrative freelancing.

That politics—as opposed to events—drives security-related policies should not be a surprise. To the contrary, the gap between the security threat on the ground and the level of public concern has been well documented in other domains where public safety is at stake. In one of the most incisive political-economy accounts of the criminal justice system offered to date, Katherine Beckett demonstrated that public concern about crime was not driven by shifting crime rates, but rather by political entrepreneurship on crime.²⁰¹ Crime rates nationally were rising “for almost a decade before it was defined as a problem in the machinery of politics.”²⁰² And public concern about crime has

¹⁹⁸ See *supra* Figure 5.

¹⁹⁹ For a recent, methodologically rigorous study examining the relationship between elite consensus and public opinion within the context of European integration, see Matthew Gabel & Kenneth Scheve, *Estimating the Effect of Elite Communications on Public Opinion Using Instrumental Variables*, 51 AM. J. POL. SCI. 1013, 1013-14 (2007).

²⁰⁰ See Bulman-Pozen, *supra* note 35, at 971-74 (describing the partisan roots of executive authority with respect to certain forms of policymaking).

²⁰¹ See KATHERINE BECKETT, *MAKING CRIME PAY* 15 (2000) (noting that public concern about crime did not precede policymaking, but rather is shaped by political initiatives targeting these concerns).

²⁰² Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 235 (2007); see *id.* (“[T]he historical record is replete with cases when crime rose but was not followed by punitive legislation or a national campaign, including rising crime in the post WWII period.”).

endured long past the sharp drop in crime rates first recorded in the mid-1990s.²⁰³ The disconnect between external threat levels and public perceptions of threat has also been documented on a smaller scale in Stuart Hall's 1978 study of "the moral panic" over muggings in the United Kingdom. In that case, the public's fear could be traced back to changes in police procedures—and not exogenous policy shocks.²⁰⁴ These findings in other contexts of security policy suggest that the existence of elevated crime rates is not a sufficient, and perhaps not even a necessary, condition for public concern about criminal-victimization risk. Analogously, in this national security context, public concern about recidivism risk (at least as reflected in media coverage) follows rather than leads political elites' mobilization on those questions. It also does not depend on the actual magnitude of that threat. To the contrary, given the contested and fragile empirical foundations of the government's own assessments,²⁰⁵ and the surprising paucity of specific incidents of recidivism targeting U.S. interests, it is quite possible to conclude that the extent of the recidivism concern was not always accurately presented by bureaucratic statements on the subject. Accuracy, perhaps unsurprisingly, is not a necessary precondition of effective elite mobilization.

To summarize, the available evidence suggests that Guantánamo recidivism became an object of legislative attention not because of an external shock (such as an extraordinary terrorism attack) or public concern about the detainees. Rather, political elites within both Article I and Article II bodies expended valuable political and professional capital—through leaks, through the framing of recidivism in the gravest terms possible, through high-profile public speeches, and through the allocation of scarce congressional resources—to *make* recidivism into an issue. Just as bureaucratic resistance was enabled by legislative intervention, members of Congress deployed information from the military bureaucracy to undermine a President who they viewed with antipathy. Legislative constraints on Guantánamo transfers are hence best understood as endogenous products of an interbranch alliance of bureaucrats and legislators against the President.

²⁰³ See Daniel Romer, Kathleen Hall Jamieson, & Sean Aday, *Television News and the Cultivation of Fear of Crime*, 53 J. COMM. 88, 88 (2003) ("According to the 1994 Gallup Poll, concern about crime reached its highest point in history in that year. Nevertheless, both police arrest records . . . and annual victimization studies . . . show that violent crime declined throughout the 1990s."). More generally, increasing public punitiveness supplies one potential explanation of the increasing reliance on incarceration notwithstanding declining crime rates. See Peter K. Enns, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 54 AM. J. POL. SCI. 857, 858, 862 fig.1 (2014) (charting increasing punitiveness through the 1990s and identifying it as a "primary" cause).

²⁰⁴ See STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 16-28 (1978) (using the theoretical device of a "moral panic" to frame and explore the social construction of crime perceptions).

²⁰⁵ See *supra* note 181 and accompanying text.

2. The Substance of Legislative Intervention

When Congress finally interposed itself in 2009 and 2011 on the flow of detainee transfers, it might have been expected that the resulting enactments would fully exploit the force of law to impede the President's agenda. It is conventional wisdom that the checking function of the separation of powers is associated with the binding effect of laws restricting executive discretion.²⁰⁶ In a similar vein, but in more general terms, Frederick Schauer has recently argued that coercive law is needed to restrain even well-intentioned officials.²⁰⁷ But a close analysis of the pivotal first and second waves of transfer-related legislation, enacted respectively in 2009 and 2011, suggest coercive prohibitions were not dispositive in this case. Instead, the statutes precipitated by military-bureaucratic and legislative mobilization on recidivism did not of their own force constrain the White House. Most importantly, these initial measures did not absolutely bar all transfers. Rather, they left surprisingly ample room for the executive to continue pursuing the goal of dispersing the whole detainee population. Contrary to standard accounts,²⁰⁸ therefore, the collapse of transfers from Guantánamo was not the product of Congress enacting restrictive legislation. Congress instead instigated an internal *politics*, rather than using a *rule with the force of law*, to constrain presidential action.

To see this, it is necessary to examine in some detail the initial legislative restrictions imposed on detainee transfers. Congress enacted the first iteration of transfer restrictions in June 2009.²⁰⁹ This regime had several components. It allowed transfers into the United States for criminal prosecution, though it required the President to provide Congress with “a plan regarding . . . proposed disposition” of the detainee.²¹⁰ Transfers to other countries were also allowed, provided that the Pentagon reported the identity, risk, and plans for handling a detainee.²¹¹ Each of these reporting requirements elicited information that was already within the possession of the military bureaucracy, but not of Congress. The military bureaucracy was probably not

²⁰⁶ Cf. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment) (explaining that “[t]he ‘check’ the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review”).

²⁰⁷ SCHAUER, *supra* note 32, at 109.

²⁰⁸ See *supra* note 45 for studies relying solely on the limited particularized evidence gleaned through litigation to analyze the detainee population as a whole.

²⁰⁹ See Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, §§ 14103(c)–(e), 123 Stat. 1859, 1920 (2009) (restricting the use of funds to transfer Guantánamo detainees and creating other barriers to transfers).

²¹⁰ *Id.* Another provision of this Act required periodic reports about the remaining detainee population at Guantánamo. *Id.* § 319.

²¹¹ *Id.* § 14103(e).

even required to expend any additional effort in gathering the information about detainees: it seems safe to assume it was already gathering information about receiving nations. All the 2009 legislation required was disclosure of this information; it did not identify any specific transfers as prohibited.²¹² As a result, it is by no means clear from the face of the June 2009 limitations that the executive branch could not have continued the pace of detainee transfers previously maintained by the Bush Administration.

More onerous restrictions on detainee transfer and release were not enacted until after the rate of transfers and releases had already dropped to zero. But even under the subsequent legislative dispensation, the military bureaucracy preserved substantial *de facto* discretion. The second set of transfer restrictions, enacted on January 7, 2011, differed along several margins from their June 2009 antecedent.²¹³ Most, but not all, changes were explicitly motivated by a sharpened concern about post-transfer recidivism. On the one hand, transfers to the United States were categorically barred.²¹⁴ On the other, the certification requirements were waived for all transfers “to effectuate an order affecting the disposition of [an] individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction.”²¹⁵ Hence, the legislation explicitly recognized a safety valve for detainee transfers—albeit one mediated through the third branch of government. This exception alleviated the difficult constitutional question that might arise if a judicially ordered transfer were expressly blocked by legislation falling short of a suspension of the habeas writ. It also implied that both bureaucratic and congressional resistance to transfers could be diminished if another branch took responsibility for that decision. From January 2011 onward, therefore, judicial review provided a mechanism to alleviate even the disclosure-based transaction costs of release.

Yet in all other ways, the 2011 transfer legislation installed a more onerous latticework of constraint. This statutory hardening of the prison’s walls found explicit justification in recidivism concerns. In a provision labeled “Recidivism,” the January 2011 statute barred transfers to nations “if there is a confirmed case of any individual who was detained at [Guantánamo] . . . who was transferred [there] . . . and subsequently engaged in any terrorist activity.”²¹⁶ The certification requirements imposed on the Secretary of Defense as a condition precedent to a transfer, moreover, were more reticulated and precise than their 2009 antecedents. Under the 2011 statute, the Secretary of Defense had to certify, among other things, that a receiving nation “has agreed to take

²¹² See *supra* note 209 and accompanying text.

²¹³ See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1031-1034, 124 Stat. 4137, 4351 (2011) (codified in scattered sections of the U.S. Code).

²¹⁴ *Id.* § 1032.

²¹⁵ *Id.* § 1033(a)(2).

²¹⁶ *Id.* § 1033(c)(1).

effective steps to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future”²¹⁷ and *also* “has taken such steps as the Secretary determines are necessary to ensure that the individual cannot engage or re-engage in any terrorist activity.”²¹⁸

Notwithstanding these onerous demands, the January 2011 restrictions may still have had more bark than bite. Most importantly, Congress once again depended on the bureaucracy for information relevant to compliance. Unlike other regulatory domains, Guantánamo policy lacks “fire-alarm” interest groups that can alert Congress to false positives among those released.²¹⁹ It seems likely, that is, that only the military, rather than any private interest group, would have accurate and timely information about recidivism in the first instance. Further, the actions of potential recipient states are generally unobserved by Congress or the public. Evaluation of whether those actions are sufficiently rested again quite explicitly with the Secretary of Defense. Failures, in the form of high-profile recidivism, could be ascribed straightforwardly to a receiving nation’s breach of good faith or negligence. Finally, although this statute required recidivism reporting, it relied exclusively upon the military bureaucracy to calculate and report raw numbers of confirmed or suspected recidivists. In short, the force of the 2011 restrictions depended once more *not* on the credible threat of future sanctions,²²⁰ but rather on the extent to which officials had internalized either a legalistic mentality or a common set of incentives or objectives. External interest groups, moreover, are not plausibly seen as a dispositive friction on executive discretion given their dearth of information about recidivism trends.²²¹ For these reasons, it is not quite

²¹⁷ *Id.* § 1033(b)(4).

²¹⁸ *Id.* § 1033(b)(5). By explicitly envisaging a situation in which a detainee has not engaged in unlawful actions before detention, and then does so afterward, this provision arguably constitutes a legislative recognition that Guantánamo could have a criminogenic effect. The statute does not address the difficult normative questions raised by a dynamic in which the state creates the conditions for violent criminality and then invokes those conditions to justify a coercive action.

²¹⁹ See generally Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). For a discussion of the use of “fire alarm” oversight mechanisms in the national security context, see Huq, *Structural Constitutionalism*, *supra* note 12, at 925-26.

²²⁰ *But cf.* SCHAUER, *supra* note 32, at 52 (exploring the possibility that “if those who take the very fact of law as a reason for action . . . are few,” then law’s effectiveness depends on coercion).

²²¹ There is also little evidence that pro-detainee interest groups altered the political calculus in any meaningful way. Offering too little too late, the Obama Administration intimated a veto threat to 2012 detainee transfer restrictions. See Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy: S. 1867—National Defense Authorization Act for Fiscal Year 2012, at 3 (Nov. 17, 2011) (warning that “[a]ny bill that challenges or constrains the President’s critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation” would result in the recommendation of a veto). He relented, quite quickly, on this threat. See Charlie Savage, *Obama Drops Veto Threat over Military Authorization Bill After Revisions*, N.Y. TIMES (Dec. 14, 2011), <http://www.nytimes.com/2011/12/15/us/politics/obama-wont-veto-military-authorization->

enough to say that certification requirements were effective because they imposed personal responsibility on the Secretary of Defense alone: there must be a reason to believe that a personalized form of responsibility was in fact capable of bite.²²²

In the political context in which they were enacted, these disclosure mandates are best understood as efforts to impose political costs on the President's agenda. Detainee transfers, that is, forced the executive into exposing information that could be embarrassing or be used to attack him or his agenda in the political sphere. Indeed, it is telling that these disclosure mandates were asymmetrical in effect. Congress has never imposed any disclosure provisions in relation to other controversial aspects of Guantánamo operations that might undermine the case for enlarged detention. For example, it has elicited no definitive accounting of the number of detainees who were subjected to coercive interrogation methods or torture; no accounting of the physical or psychological cost of coercion and indefinite detention;²²³ no official examination of the rate of false positives among the detainees; and no tally of whether or how countries that receive detainees have mistreated or abused them. Congress, that is, has demonstrated a persistent unwillingness to consider—let alone act upon by disclosure mandates—the plethora of seemingly pressing moral issues raised by the detentions. Instead, it has shone the disinfecting light of transparency solely where it is most likely to entrench deprivations of human liberty.

* * *

In summary, close inspection of the substance of the 2009 and 2011 legislative constraints on detainee transfers corroborates and extends the finding of a bureaucratic alliance with Congress. In this account, the collapse in transfers from Guantánamo depended upon implicit cooperation between the military bureaucracy and Congress, both in the production and the operation of legislative bindings. The contrary assumption that Congress alone extinguished the flow of releases via restrictive legislation motivated by changes in the external security environment does not survive close scrutiny.

bill.html [perma.cc/HZM9-DKS5] (stating that the changes “made by a House-Senate conference committee” had satisfied the White House and that a veto would not, therefore, be recommended). This hardly suggests that civil society’s “engines of liberty” had much steam.

²²² Bruck accepts at face value former Defense Secretary Leon Panetta’s hyperbolic claim that the “provision required that I sign my life away.” Bruck, *supra* note 28, at 42. However sincerely felt, such resistance relies on something more than the reasonably anticipated effect of the certification.

²²³ See Matt Apuzzo, Sheri Fink, & James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES. (Oct. 9, 2016), <http://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html> [https://perma.cc/56MW-YHKQ] (describing the enduring effects of imprisonment, inter alia, on Younous Chekkouri, a Moroccan detainee at Guantánamo).

C. *The Role of Judicial Supervision*

In contrast to legislative attention to the Guantánamo detentions, judicial review after *Boumediene* might have been expected to abet the presidential agenda of dispersing the detainee population. Conventional wisdom across the ideological spectrum predicts that judicial review tends to narrow executive discretion by enforcing “the rule of law.”²²⁴ This entails, at a minimum, judicial invalidation of the executive’s ultra vires actions. Courts are thought especially well-placed to identify false positives in the detention context. The judiciary is often thought to be less risk-averse than the political branches, and hence more willing to recognize errors and end a detainee’s custody where the underlying evidence is weak.²²⁵ In the detention context, moreover, recall that Congress in 2011 created a statutory exception to its limitations on detainee transfers for court-ordered releases.²²⁶ To the extent certification preconditions on transfers imposed weighty frictions on release, judicial review could have offered a useful and relatively uncontroversial safety valve. If the executive branch sought to maximize the rate of transfers, it could have declined to litigate cases or even conceded error, triggering the statutory exception for court-ordered releases. For both constitutional and statutory reasons, it would therefore seem that the engagement of Article III as an element of the separation of powers ought to be associated with an elevated pace of transfers.

Close attention to empirical evidence, institutional behavior, and the substance of judicial interventions, however, points toward a quite different story. I decompose and analyze the effect of judicial intervention along two margins.

First, courts are responsible for adjudicating individual cases, which can yield orders of release. My empirical analysis finds that among the handful of detainees with habeas petitions adjudicated to final judgment, a favorable outcome is indeed positively associated with release. But that group is a very small slice of the detainee population. Almost half of all detainees did not seek judicial review. And almost four-fifths of those who did failed to litigate their petitions to final judgment.

Second, the effect of judicial review is not confined to retail adjudication. Courts also play a role in declaring the law. If courts interpret statutory authority to detain more narrowly than the executive branch does, they might

²²⁴ *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment).

²²⁵ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in the judgment) (arguing that “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”).

²²⁶ *Ike Skelton National Defense Authorization Act for Fiscal Year 2011*, Pub. L. No. 111-383, § 1033(a)(2), 124 Stat. 4137, 4352 (2011); *see supra* text accompanying note 215.

generate pressure to thin the detainee population even absent litigation. A rational government, that is, will forego the expense of litigation when the law changes to render a judicial defeat likely. But this did not happen. An empirically informed comparison of the law produced by the federal courts in habeas cases with (1) the government's litigation positions and (2) its de facto practice reveals that courts were *more* risk-averse than either the bureaucracy or its lawyers. With the possible exception of a small handful of detainees released after favorable judgments, the overwhelming majority of the detainee population was hindered—not aided—by Article III involvement.

1. The Impact of Discrete Adjudication

To understand the impact of post-*Boumediene* habeas review, it is necessary to know how many detainees filed habeas petitions, how many litigated those petitions to final judgment, and how many of those who did so secured a favorable disposition. This Article is the first to present comprehensive data on any of these questions.

Individual adjudication of detainees' challenges to the lawfulness of their custody became possible on June 12, 2008, when *Boumediene v. Bush* issued.²²⁷ Detainees, however, had been filing habeas petitions since 2002. I have identified 408 Guantánamo detainees who filed habeas petitions before or after *Boumediene* through an examination of the federal court's PACER database.²²⁸ These petitions vary widely in the extent to which they were litigated. Ten of the identified dockets have only one or two entries (i.e., filings by either the petitioner, the government, or an amicus). Thirty-one have more than 2000 entries. This suggests that the petitioners exerted widely varying degrees of effort when litigating their cases.

Any tangible effect from this litigation cannot be ascribed to government lawyers' efforts to facilitate transfers. Examining government briefs in several typical cases litigated to final judgment, I have not identified a single instance in which government lawyers made outcome-relevant concessions to enable a

²²⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008). One case had already been decided under a different statutory scheme, although the litigants in that case went on to file habeas petitions. *See Parhat v. Gates*, 532 F.3d 834, 853-54 (D.C. Cir. 2008) (holding that a detainee's designation as an enemy combatant was inconsistent with the requirements of the Detainee Treatment Act of 2005).

²²⁸ For further details, see *infra* Appendix. I exclude from this statistic John Doe petitions filed on behalf of all detainees at Guantánamo; such petitions, although lodged, were never litigated beyond the petition stage.

release,²²⁹ unless forced to do so by contrary law.²³⁰ This would have required the government to make an affirmative filing conceding error, since the mere failure to file a return in a habeas proceeding does not generally trigger a default judgment.²³¹ Instead, when government litigators found their legal theory for detention at odds with a White House position, they simply changed their theory of the case.²³² To the extent cases were litigated to final judgment, the Justice Department never slackened in its zealous advocacy in favor of robust carceral authority.²³³ Consistent with this evidence, one former State Department official described the government's approach to detention litigation by explaining that the Department of Justice trial lawyers "internalized" the defensive posture advanced between 2002 and 2008 and so were inclined to "defend [positions] zealously if at all possible."²³⁴

Nor did rotation in the White House elicit meaningful mitigation of the government's position. In January 2009, Judge John D. Bates of the U.S. District Court for the District of Columbia ordered the Obama Justice Department to clarify its new position on detention authority.²³⁵ According to news reports, Bates's demand precipitated a rapid process of internal deliberation within the executive branch and the White House.²³⁶ The

²²⁹ For a similar assessment of the government's litigation positions, see Jed S. Rakoff, *A Fear of Foreign Law*, N.Y. REV. BOOKS, Dec 3, 2015, at 16 n.1 (reviewing STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015)). Rakoff writes, "[O]ver one hundred people remain in detention [in Guantánamo], at least half of whom have neither been charged with any crime nor cleared for release. Yet the Department of Justice has opposed every habeas petition on their behalf, arguing, among other things, that their detention is only temporary." *Id.*

²³⁰ The exception is *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33, 34 (D.D.C. 2008), where the government conceded that it could not hold seventeen Uighur detainees in the wake of the D.C. Circuit's determination in *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008), that the group to which they were affiliated had no connection to al Qaeda. Even in *In re Guantanamo Bay Detainee Litigation*, government lawyers insisted that authority to detain still existed as part of the government's power to "wind up" detentions. 581 F. Supp. 2d at 36.

²³¹ See, e.g., *United States ex rel. Mattox v. Scott*, 507 F.2d 919, 924 (7th Cir. 1974) (explaining that releasing a habeas corpus petitioner in response to the government's "failure to make a timely return" would inappropriately place the burden "upon the community at large"); *Wattmuff v. Perini*, 427 F.2d 527, 528 (6th Cir. 1970) (stating that a detainee's contention that he was "entitled to default judgment and immediate release" because the government's return to a show cause order was filed late was "without merit").

²³² SAVAGE, *POWER WARS*, *supra* note 102, at 149-52.

²³³ *Id.* at 301.

²³⁴ Ingber, *supra* note 37, at 384-85; accord J. Wells Dixon, *President Obama's Failure to Transfer Detainees from Guantánamo* (stating that the Obama Administration continued prosecuting the detainee cases "as vigorously as the prior administration"), in *OBAMA'S GUANTÁNAMO*, *supra* note 7, at 48-49.

²³⁵ See Order at 3, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (No. 05-2378) ("[I]t is hereby [ordered] that by not later than March 13, 2009, respondents shall submit any refinement of their position on the appropriate definition of 'enemy combatant.'").

²³⁶ DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 58-60 (2012).

government hewed largely to the same standard of detention authority used by the Bush Administration.²³⁷ Its definition plainly encompassed members and supporters of al Qaeda, the Taliban, or associated groups, but it added the new qualification that independent support must be “substantial” to trigger eligibility for detention to the definition proposed by the Bush Justice Department.²³⁸ This shift did not require a different result in any case then (or subsequently) under judicial consideration.²³⁹ One district court judge even witheringly described it as “a distinction of purely metaphysical difference.”²⁴⁰ Yet the “substantial support” threshold generated heated intramural debate. Rejecting the State Department’s narrow view of that language, the Pentagon argued that it encompassed “mere supporters . . . picked up far away from enemy forces.”²⁴¹ This debate ended in an interagency compromise allowing detention beyond the battlefield when a person performed “functions that made them effectively part of the terrorist organization.”²⁴² The debate is relevant here because it underscores once more the role of internal military-bureaucratic resistance in forestalling leniency toward detainees.²⁴³

Regardless of the government’s legal position, judicial review might still have nudged the arc of transfer policy via orders directing release or anticipatory transfers or releases by the government to alleviate or avoid the

²³⁷ See Chesney, *Military Detention*, *supra* note 45, at 830-31 (stating that the Obama standard made some minor changes in nomenclature, but generally adhered to the substantive requirements of the “Combatant Status Review Tribunal (CSRT) standard” employed by the Bush Administration). The Obama Administration also eschewed reliance on evidence gained by torture. See SAVAGE, *POWER WARS*, *supra* note 102, at 152. It is not clear the Bush Administration ever attempted to introduce such evidence in court.

²³⁸ Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (No. 05-0763).

²³⁹ See Noah Feldman, Opinion, *A Prison of Words*, N.Y. TIMES (Mar. 18, 2009), <http://www.nytimes.com/2009/03/19/opinion/19feldman.html> [<https://perma.cc/24UJ-7LAM>] (noting that the government’s *refined* position on its detention authority, requiring a showing of “substantial support” for terrorism, “is potentially broad enough to continue detaining everyone whom the Bush administration put in Guantánamo in the first place”).

²⁴⁰ *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70 (D.D.C. 2009).

²⁴¹ Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, N.Y. TIMES (Mar. 28, 2010), <http://www.nytimes.com/2010/03/29/us/politics/29force.html> [<https://perma.cc/38GE-CZBP>].

²⁴² *Id.*; accord Chesney, *Military Detention*, *supra* note 45, at 842 (recounting a disagreement between Defense Department General Counsel Jeh Johnson and State Department Legal Advisor Harold Koh about the nature of support required to detain, which resulted in the government’s litigation position that “functional members of al Qaeda” could be detained).

²⁴³ Inger suggests that the Obama Administration’s ultimate position on detention authority might have been different had it not been for the habeas litigation. See Inger, *supra* note 37, at 387-88 (suggesting that the “extremely defensive context of defense of individual clients” limited the President’s flexibility in assessing the rights of Guantánamo detainees). I am skeptical. The evidence assembled here suggests the internal balance of power would still have favored the military bureaucracy’s perspective.

costs of judicial review. I focus first on this more easily measured direct effect.²⁴⁴ To determine this, I compiled from Westlaw a database of reported and unreported judicial decisions resolving individual detainees' petitions. This dataset includes sixty-seven reported and one unreported decision.²⁴⁵ Within the subpopulation of petitioners who litigated their cases to final judgment, detainees prevailed in thirty-three (forty-nine percent) of those cases. At its upper bound, judicial review could have influenced 4.23% of the total number of 780 detentions at Guantánamo.²⁴⁶

The magnitude of the effect of judicial review can be ascertained more precisely by an econometric analysis of the determinants of release within the pool of sixty-eight litigated cases. That is, conditional upon having filed and litigated a habeas petition, it is possible to estimate whether a judicial grant of relief changed the odds of actual release from the Cuban base. In asking this question, it is also useful to consider whether the government's own risk evaluations, in addition to (or in contrast to) judicial determinations, influence the likelihood of release. Table 2 presents the results from an ordinal logistic regression of sixty-six detainees with litigated cases,²⁴⁷ where the dependent variable is the fact of a transfer out of custody. This specification includes controls for whether there was a judicial order of release ("detainee prevails"), and whether the detainee was assigned a high-risk status (as opposed to a medium- or lower-risk status).

²⁴⁴ Indirect effects are hard to identify because of an omitted variable problem. My data does show that a large number of detainees who did not litigate their petition extensively nonetheless obtained release. This is at least consistent with an indirect effect. But it may also be that filing, but not litigating, a habeas petition and early release (cutting short the litigation) are both predicted by a variable I cannot observe—such as a dearth of evidence in the government's possession justifying detention, or the underlying absence of any such evidence in the first instance.

²⁴⁵ The unreported case is *Idris v. Obama*, No. 05-1555 (RCL) (Oct. 4, 2013) (on file with author).

²⁴⁶ Cf. Huq, *What Good*, *supra* note 22, at 428 (reporting an upper bound of 3.75%).

²⁴⁷ Two cases are omitted because they involved detainees classified as low-risk, and would have distorted the binary variable used as a control here.

Table 2: Ordinal Logistic Regression of Transfer Decisions Among Litigated Cases

	Transfer Likelihood
Detainee Prevails	3.952 (3.63)**
High risk	-0.905 (1.13)
Constant	-0.077 (0.11)
<i>N</i>	66
<i>Pseudo R2</i>	0.4160

* $p < 0.05$; ** $p < 0.01$

Table 2 suggests that within the circumscribed domain of judicial review, a court's decision that detention was unlawful played a statistically (and practically) significant role in predicting release. When included in the same specification, the government's risk evaluations did not have a statistically significant effect. These would have been expected to be negative. Intriguingly, this suggests that the government's own risk assessments did not predict which detainees would be released by judicial order. The results thus demonstrate a gap between the executive's and the judiciary's standards for detention.

In summary, post-*Boumediene* discrete adjudications of individual petitions did not play a large role in changing the rate of transfers for three reasons. First, government litigators did not leverage statutory exceptions to accelerate transfers. Second, only about half (fifty-two percent) of detainees filed habeas petitions, either before or after *Boumediene*. Third, of those who filed petitions, less than one in five (sixteen percent) managed to litigate their petition to a final judgment. It was only once a detainee had passed the substantial obstacles of filing and litigating a petition that discrete adjudication of the legal merits of detention seemed to make any difference at all. At this point, however, that difference appears real.

2. The Impact of the Courts' Law-Declaration Function

Courts do not only decide discrete cases and controversies. They also articulate authoritative interpretations of statutory and constitutional law. This law-declaration function is a second—and independent—vector of judicial power. Courts exert influence via their clarification and creation of

new law; their influence is conceptually and practically independent of their remedial function.²⁴⁸ To estimate its effect, this subsection contrasts the doctrinal products of habeas litigation with both government litigation positions and de facto bureaucratic practice.

Recall that the 2001 AUMF was silent on the precise scope of related detention authority or the procedures necessary to ascertain whether a specific individual may be detained.²⁴⁹ It effectively delegated to executive branch officials and federal judges the task of developing substantive and procedural rules.²⁵⁰ Executive and judicial positions on these questions are expected to differ. The nature of this divergence is an empirical question. The data I have assembled allow two distinct comparisons between the revealed preferences of the executive and judicial branches. Both suggest that the federal courts staked out positions more hostile to detainees' liberty interests than those taken by government lawyers or military bureaucrats.

To begin with, post-*Boumediene* habeas litigation generated legal precedent that was more favorable to the executive than even the positions sought by the Justice Department. As a procedural matter, the D.C. Circuit Court of Appeals allowed the government to use a preponderance of the evidence standard;²⁵¹ installed a "presumption of regularity" for government documents;²⁵² and reversed district court habeas grants for taking an insufficiently holistic view of the government's evidence.²⁵³ The Court of Appeals also repeatedly

248 In other work, I have criticized the Court's pervasive failure to provide an adequate level of constitutional remedies. See Aziz Z. Huq, *Judicial Independence and the Rationing of Judicial Remedies*, 65 DUKE L.J. 1, 12-40 (2015) [hereinafter Huq, *Judicial Independence*] (arguing that violations of constitutional rights are systematically disregarded because of a lack of constitutional remedies). The contrast developed here between comparative remedial scarcity, see *supra* Table 2, and robust, statist law declaration is consistent with the analysis of constitutional law more generally developed in that work.

249 See 2001 AUMF, § 2(a) (authorizing the President to use all "necessary and appropriate force" to prevent acts of international terrorism against the United States); *Hamdi*, 542 U.S. at 519 (plurality opinion) (noting that "the AUMF does not use specific language of detention").

250 Congress often delegates authority to coordinate branches on controversial and divisive policy questions, such as the scope of military detention policy, by using ambiguous language. See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 197 (1999) (stating that policy areas shrouded in uncertainty are more often delegated).

251 See *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010) (finding no indication that a preponderance standard is unconstitutional); see also *Uthman v. Obama*, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011) (stating that the preponderance of evidence standard is constitutionally sufficient).

252 See *Latif v. Obama*, 666 F.3d 746, 749 (D.C. Cir. 2011) (holding that official intelligence documents were entitled to a presumption of regularity).

253 See *Al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010) (finding that the district court wrongly looked at each piece of evidence in isolation rather than evaluating the government's evidence in totality). The Court, however, has held that a failure to find whether a detainee belonged to one terrorist group or another (e.g., al Qaeda or the Taliban) is not a reversible error. See *Suleiman v. Obama*, 670 F.3d 1311, 1314 (D.C. Cir. 2012).

invited government litigators to seek a lower burden of proof than the preponderance standard upon which they relied in their briefs.²⁵⁴

On substantive-law questions, the Appeals Court again favored expansive government direction. District courts had demanded that the government demonstrate that a detainee was part of an AUMF-covered organization's "command structure" to render detention lawful.²⁵⁵ In effect, this forced the government to tie a detainee to one of the terrorist organizations covered by the AUMF. The Circuit Court rejected this test as too narrow, directing instead that the government show either that a detainee was "a 'part of' [or . . .] sufficiently involved with" a covered organization.²⁵⁶ The Circuit Court also underscored that the government can satisfy the "part of" element of this definition by an accumulation of otherwise innocuous facts.²⁵⁷ Evidence of affiliation was not necessary.²⁵⁸

Appellate judges also repeatedly offered suggestions about how detention authority could be inflated. For instance, more than one appellate judgment intimated that the test for lawful detention might be satisfied solely on a showing that an individual had stayed at a Taliban or al Qaeda guesthouse.²⁵⁹

²⁵⁴ See *Awad v. Obama*, 608 F.3d 1, 11 n.2 (D.C. Cir. 2010) ("[O]ur analysis here does not establish that preponderance of the evidence is the constitutionally-required minimum evidentiary standard."); see also *Al-Bihani*, 590 F.3d at 878 & n.4 (noting that American citizens are likely entitled to greater procedures than noncitizens seized abroad during the war on terror). In addition, the court has attached a "presumption of regularity" to government documents that precludes accuracy challenges in many cases. *Latif v. Obama*, 666 F.3d 746, 748-49 (D.C. Cir. 2011).

²⁵⁵ See, e.g., *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) ("The key inquiry, then, is . . . whether the individual functions or participates within or under the command structure of the organization . . ."); see also *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68-69 (D.D.C. 2009) (asserting that "[s]ympathizers, propagandists, and financiers" who do not "receive and execute orders within [the terrorist group's] command structure" "cannot be considered part of the enemy's 'armed forces' and therefore cannot be detained militarily unless they take direct part in the hostilities").

²⁵⁶ *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011); accord *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010) (detailing the analysis used to find that *Awad* was "part of" al Qaeda).

²⁵⁷ See *Hussain v. Obama*, 718 F.3d 964, 969-70 (D.C. Cir. 2013) (finding possession of a Taliban-supplied weapon near the Afghan lines, residence at a Jama'at al-Tablighi mosque, and inconsistent responses to interrogators to be sufficient evidence), *cert. denied*, 134 S. Ct. 1621 (2014).

²⁵⁸ *Id.*

²⁵⁹ See *Al-Bihani*, 590 F.3d at 873 n.2 (holding that evidence of al-Bihani visiting al Qaeda guesthouses was sufficient justification for his detention); see also *Alsabri v. Obama*, 684 F.3d 1298, 1302 (D.C. Cir. 2012) ("[S]taying at [al Qaeda] houses can be 'powerful' evidence that a detainee was part of al Qaeda and/or the Taliban."); *Suleiman v. Obama*, 670 F.3d 1311, 1314 (D.C. Cir. 2012) (finding that a voluntary decision to move into an al Qaeda guesthouse used as a staging area for recruits going to a military training camp is strong evidence that the individual was a recruit); *Almerfed v. Obama*, 654 F.3d 1, 6 n. 7 (D.C. Cir. 2011) (holding that proof "that a petitioner trained at an al Qaeda camp or stayed at an al Qaeda guesthouse 'overwhelmingly' would carry the government's burden" of justifying detention); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1075 (D.C. Cir. 2011) (noting that staying at an al-Qaeda guesthouse or training camp constitutes "overwhelming" evidence "that the United States had authority to detain that person"); *Uthman*, 637

This position appears more generous than the definition limned by the Department of Justice in its litigation documents. The weighty significance assigned by federal judges to this particular fact is especially striking because residence at such a guesthouse is the most frequently occurring trait identified in the detainee assessments (n=414).²⁶⁰ Courts hence identified, and argued for the dispositive significance of, the one trait with the largest marginal inflationary effect on the state's legal authority to detain.

Given their willingness to treat guesthouse residence as per se factual justification for detention, federal judges evinced a notable incuriosity about what exactly counted as a terrorist guesthouse. The D.C. Circuit instead peremptorily suggested that “[i]t is highly unlikely that a visitor to Afghanistan would end up at an al Qaeda guesthouse by mistake, either by the guest or by the host.”²⁶¹ That court also asserted that guesthouses were “heavily fortified terrorist den[s].”²⁶² Neither conclusion, though, reflects factual evidence about specific facilities.²⁶³ Indeed, there is remarkably little record evidence about what ranks as a terrorist guesthouse, and how that designation was assigned or verified.²⁶⁴ In some instances, guesthouses were identified and raided by Pakistani, rather than American, forces.²⁶⁵ This raises the possibility that lawful detention could hinge upon factual assertions made by a foreign intelligence service, assertions that a federal judge would be in no position to analyze or verify. Of course, those assertions may or may not be true in

F.3d at 406 (calling the fact of capture at an al Qaeda guesthouse “overwhelming” evidence that a detainee is a member of that organization).

²⁶⁰ By way of comparison, membership in al Qaeda is flagged in 402 assessments.

²⁶¹ *Uthman*, 637 F.3d at 406.

²⁶² *Ali v. Obama*, 736 F.3d 542, 547 (D.C. Cir. 2013).

²⁶³ In some cases, the government relied on expert testimony from a political scientist specializing in the Arabian Peninsula. See *al-Adahi v. Obama*, 698 F. Supp. 2d 48, 60 (D.D.C. 2010) (citing the declaration of Dr. Sheila Carapico). Studies of al Qaeda presence in Pakistan in the early 2000s, to the contrary, suggest that al Qaeda “did not have a dedicated infrastructure to recruit Pakistanis for Al Qaeda operations,” but rather “use[d] informal networks with Pakistani organizations to obtain logistical support.” C. Christine Fair, *Militant Recruitment in Pakistan: Implications for Al Qaeda and Other Organizations*, 27 *STUD. CONFLICT & TERRORISM* 489, 494-95 (2004).

²⁶⁴ The Department of Defense’s “Threat Matrix,” a document used by analysts at the Cuban base to reach determinations about individual detainees, does not define the term “guesthouse,” although that term is used in several locations. In its opening pages, it talks about “suspected compound[s] or safe house[s],” which are identified using a “tip-off” or based on “suspicion about the occupants.” Dep’t of Def., *JFT-GTMO Matrix of Threat Indicators for Enemy Combatants 2-3, 8-9* (on file with author). This might be read to suggest that a site is designated as a terrorist guesthouse because of suspicions about the specific individuals identified therein. If a court later uses the guesthouse designation to confirm that a detainee is a member of a proscribed organization, a circularity might arise in the underlying logic of detention: suspicions about individuals conduce to the designation of a guesthouse, which in turn “confirms” that suspicions about such individuals are well-founded.

²⁶⁵ See *Barhoumi v. Obama*, 609 F.3d 416, 419 (D.C. Cir. 2010) (noting that Pakistani police officers raided the guesthouse to arrest the appellant).

discrete cases. The relevant point here is that federal judges evinced no concern with precisely defining what counts as a “guesthouse” or figuring out how the specific allegation of guesthouse residence could be proved or disproved, even as they pressed for indefinite detention authority pivoting on that one allegation alone.

A second way to evaluate the federal courts’ position in relation to the executive’s is to compare expressed judicial preferences with the expressed preferences of the military bureaucracy. Courts have treated detention as a binary: either a person can be detained, or they cannot, “pursuant to . . . relevant law.”²⁶⁶ In contrast, the military bureaucracy is not confined to binary decisions (although, in fact, it never conceded the illegality of any individual’s detention).²⁶⁷ It can also hold individuals for more or less time, making thereby nonbinary, granular distinctions on the intensive margin of detention authority. The duration of detention, even in early 2016 with ninety-three detainees still in custody, varied widely.²⁶⁸ It ranged from only 137 days to more than 5000 days.²⁶⁹ As of December 2015, the mean length of detention for all detainees was 2180 days, and the standard deviation was 1525 days.²⁷⁰ It is possible to use the variance in this intensive margin to evaluate how the revealed preferences of the military bureaucracy compare with the law on the books.

To understand the relation between judicial and executive practice, I constructed an ordinary least squares (OLS) regression that tested the relationship between the duration of detention for the subpopulation of detainees who have been released on the one hand, and a range of factors identified as justifications for detention in the detainee assessments or in judicial opinions.²⁷¹ Figure 6 presents the marginal effects of governmental

²⁶⁶ *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

²⁶⁷ The Obama Administration reviewed all detainees still in custody at the beginning of 2009, and determined that 126 of the 240 were “approved for transfer.” TASK FORCE REPORT, *supra* note 104, at 9-10. The Task Force that reached this decision indicated that “for most of the detainees approved for transfer, there were varying degrees of evidence indicating that they were low-level foreign fighters affiliated with al-Qaida or other groups operating in Afghanistan.” *Id.* at 16. A decision to transfer, in short, did not constitute an admission of erroneous detention in the first instance. Clearances for transfer, moreover, are treated as “protected” information that cannot be disclosed, or discussed by, detainees’ counsel. *Ameziane v. Obama*, 699 F.3d 488, 498-99 (D.C. Cir. 2010).

²⁶⁸ See Aziz Z. Huq, *The Predicates of Military Detention at Guantánamo: The Role of Individual Acts and Affiliations*, 13 J. EMPIRICAL L. STUD. 567, 580 fig.3 (2016).

²⁶⁹ See *id.* at 581 tbl.2.

²⁷⁰ See *id.*

²⁷¹ The analysis presented here is only one way of analyzing the relationship between detention duration and underlying factual predicates. In a related empirical article, I employ a wider range of more sophisticated instruments. Most importantly, I use a Cox’s Survival Analysis corrected for nonproportional hazards with scaled Schoenfeld residuals to explore these relationships. I use OLS here not only because it supplements the analyses used in the latter article, but also because it is a method that allows for a crisp visual depiction. The survival analysis does generate different estimates for some independent variables. In particular, it detects an effect of training on detention

attributions of six behavior-related traits found in the detainee assessments: residence at a guesthouse; attendance at a terrorist training camp; participation in hostilities; allegiance to a radical mosque; making explicit threats against the United States; and having a classified “SCI filing” noted in an assessment. The last trait is a potential indicator of more serious allegations.

The point in each line presents the average percentage change in the duration of detention observed when a specific trait is attached to a detainee. The bars around each of the dots represent the ninety-five percent confidence interval for that estimate. A confidence interval containing zero implies that the hypothesis that the durational effect of attributing a given trait to a detainee is zero cannot be rejected.²⁷²

Figure 6: The Marginal Effects of Selected Behavioral Findings in Detainee Assessments

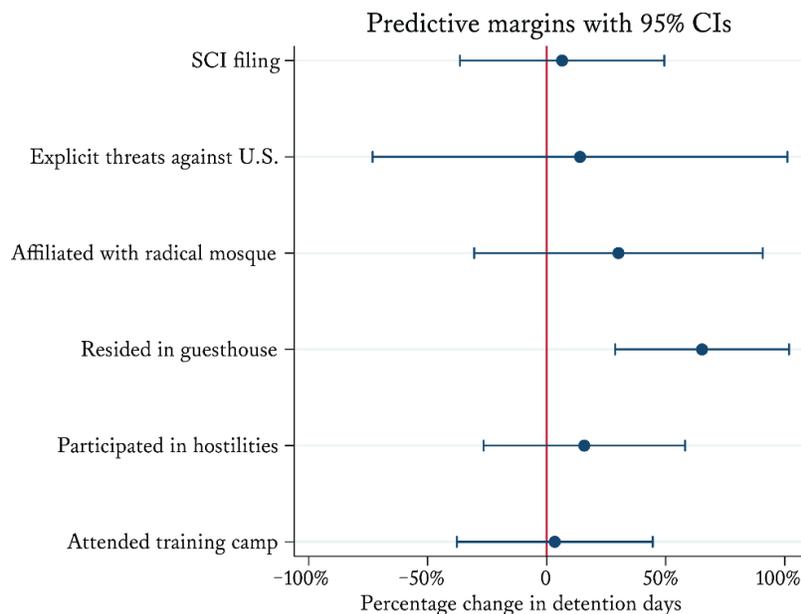


Figure 6 shows that, within the population of detainees who have been transferred, only one-of-six behavior-related traits flagged in detainee assessments have statistically significant effects on detention duration that are

duration that the OLS method fails to capture. The relative effect associated with different independent variables, however, is roughly parallel.

²⁷² See ALAN AGRESTI & BARBARA FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 110 (4th ed. 2009) (describing a confidence interval as an interval of numbers within which the parameter is hypothesized to fall).

distinguishable from a null finding²⁷³—the finding that an individual stayed at a guesthouse. There is no evidence from the OLC specification employed here that other traits identified in the assessments had any effect on detention duration, including attending a terrorist training camp, participating in hostilities, visiting a radical mosque, making threats against the United States during captivity, and the existence of classified evidence that would be presented in what is called an SCI filing.

How does this compare to the law on the books? Federal courts have relied, as I have noted, on guesthouse attendance to find detention lawful.²⁷⁴ But they have also leaned heavily on factors that have had no significant de facto effect on the duration of detention. For example, district courts—who have typically taken a less minatory view of habeas petitions than the Court of Appeals²⁷⁵—have cited attendance at a training camp to endorse the legality of a detention.²⁷⁶ Because training-camp allegations appear in 236 of 765 detainee assessments released by Wikileaks, in one-in-three potential cases, the government can invoke in federal court a legally sufficient basis for detention that its own institutional practices may not have employed, and that certainly was not dispositive in the fashion that federal courts have suggested.²⁷⁷

In sum, whereas a close study of discrete adjudication shows that courts directly helped liberate a very small number of detainees, analysis of their law-declaration function suggests that federal judges refused to spur indirectly a higher rate of transfers by contracting the space of lawful detention authority. To the contrary, the law as embodied in formal rules of decision elaborated by Article III judges has turned out to be considerably more punitive than either the posture of government litigators or the practice

²⁷³ For a discussion of the importance of seeking both statistical and practical significance defined in these terms, see Justin H. Gross, *Testing What Matters (If You Must Test at All): A Context-Driven Approach to Substantive and Statistical Significance*, 59 AM. J. POL. SCI. 775, 779-80 (2015).

²⁷⁴ See *supra* text accompanying notes 261-64.

²⁷⁵ My analysis of Westlaw's relevant databases shows that the D.C. Circuit Court of Appeals has reversed or remanded all nine district-court grants of habeas it has considered, while affirming all but two of nineteen district-court denials it has considered.

²⁷⁶ See, e.g., *Al-Adahi v. Obama*, 698 F. Supp. 2d 48, 61-62 (D.D.C. 2010) (holding that a detainee's attendance at a training camp makes it more likely than not that he knew he was associating with al Qaeda); accord *Ali v. Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013).

²⁷⁷ Aziz Huq, *Recidivism Mentions in Major Papers and Congressional Record* (unpublished data set) (on file with author). The radical mosque trait appears in thirty-three assessments, while explicit threat allegations appear in fourteen assessments. *Id.* Hence, neither is numerically as significant as training camp allegations. The one instance in which the government invoked attendance at a radical mosque (in London) as justification for detention received a district-court rebuke. *Mohammed v. Obama*, 704 F. Supp. 2d 1, 9-10 (D.D.C. 2009).

of the military bureaucracy. As a model of the “duty to supervise,” in short, post-*Boumediene* habeas may leave something to be desired.²⁷⁸

3. Understanding the (Non-)Effect of Judicial Review

Why did federal courts take positions friendlier to state power than the executive branch itself? We can better understand the limited checking function of the federal courts in the detention context by nesting the operation of judicial review within a larger separation-of-powers context along two margins.

The first reason for chastened expectations of judicial review turns on timing. Judicial decisions in habeas petitions are necessarily after-the-fact. When a court is called upon to evaluate the legality of state coercion, and in particular detention, this often occurs only after the executive has made decisions about (1) who to target for detention, (2) on the basis of what evidence, and (3) who within the custodial population to release in order to obviate judicial review.²⁷⁹ This sequencing empowers the executive to select which fact patterns will be litigated from the larger population. By molding the distribution of observed cases, the executive furthers several goals, not the least of which is shaping judges’ perceptions of executive branch conduct.

In this regard, recall that Figure 4 suggested that post-*Boumediene* habeas courts confronted a significantly riskier selection of detainees than the population as a whole. This nonrandom array of detainees results from the early release of less risky detainees—and hence need not be ascribed to improper motives. Nevertheless, it introduces a form of “path-dependency” into the resulting litigation.²⁸⁰ Legal precedent is shaped by fact patterns in which the underlying impetus toward continued custody is more strongly felt than in the modal detainee case. Judges’ perceptions of the costs and benefits of different legal standards are inflected by the heightened salience of false positives, rather than false negatives.

In addition, the executive’s discretionary control of federal court case flow works as a means of preventing the disclosure of the bureaucracy’s evidentiary

²⁷⁸ See Metzger, *Constitutional Duty*, *supra* note 31, at 1924-25 (citing *Boumediene* as a possible example of judicial execution of the duty to supervise).

²⁷⁹ Judicial review is *ex ante* in the context of arrest warrants and (sometimes) in the context of pretrial detention.

²⁸⁰ In the political science literature, this has been defined as the quality of “exhibit[ing] increasing returns or positive feedback. Each step along a particular path produces consequences which make that path more attractive for the next round. As such effects begin to accumulate, they generate a powerful virtuous (or vicious) cycle of self-reinforcing activity.” Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 253 (2000). Path dependency can arise when a population is sorted even when the principle of selection is random. See Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 609-10 (2001).

or analytic errors (or worse). Stated most crudely, the government can select individuals for release to ensure that flawed or illegal governmental practices remain undisclosed. For example, consider the possibility that the intelligence services relied on informants of imperfect quality to identify al Qaeda safehouses and guesthouses.²⁸¹ Revelation of this error might undermine courts' and legislators' confidence in other factual predicates, or more generally sap judges' willingness to treat government evidence as accurate and authentic.²⁸² Or consider the (hardly far-fetched) possibility that litigation of a habeas suit would reveal as-yet-unrevealed torture or cruel treatment.²⁸³ Although habeas litigation has brought some coercive treatment to light,²⁸⁴ other egregious instances of coercive interrogation may remain unaided.²⁸⁵ Strategic deployment of the release power can limit public criticism and maintain institutional legitimacy in such cases.²⁸⁶

Although the magnitude of these effects here remains unknown, the basic dynamic can be observed in other contexts. Consider criminal prosecutors' power to condition plea bargains on the waiver of appeal rights, a power exercised in some two-thirds of federal criminal cases.²⁸⁷ Empirical studies

²⁸¹ See *supra* text accompanying notes 261–65 (discussing the fragility of the guesthouse finding in many cases).

²⁸² Cf. *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2012) (assigning a presumption of regularity to government records produced on the battlefield).

²⁸³ A 2009 study that interviewed fifty-five former detainees found thirty-one alleged abusive interrogations. LAUREL E. FLETCHER & ERIC STOVER, *THE GUANTÁNAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES* 62–68 (2009); see also MOHAMEDOU OULD SLAHI, *GUANTÁNAMO DIARY* 202–63 (Larry Siems ed., 2015) (describing, with redactions, but still in harrowing detail, a litany of coercive interrogation methods used at Guantánamo against one detainee). While Slahi's treatment was exceptionally harsh, it is worth noting that physical abuse appears to have been pervasive. When detainees arrived at the base, many report being "punched and kicked" and then subjected to medical processing "whose harshness and humiliation was hard to forget." GREENBERG, *supra* note 2, at 79.

²⁸⁴ Several habeas cases involve allegations of torture found to be credible by district court judges. See, e.g., *Anam v. Obama*, 696 F. Supp. 2d 1, 5–9 (D.D.C. 2010), *aff'd sub nom.* *Al-Madhwani v. Obama*, 642 F.3d 1071, 1074 (D.C. Cir. 2011) (documenting a case in which the government's primary evidence of twenty-three reports and summaries of interrogations were not reliable because they were obtained through coercive means).

²⁸⁵ There are nine detainees at Guantánamo who have died in custody, several at their own hands. *The Detainees*, N.Y. TIMES: THE GUANTÁNAMO DOCKET (Nov. 18, 2016), <http://projects.nytimes.com/guantanamo/detainees> [<https://perma.cc/CW37-B2HR>]. At least in these cases, there will never be an accounting of how the detainees were treated.

²⁸⁶ An extension of this point is that strategic delay in habeas litigation may serve the same reputation-preserving goal. For example, the habeas petition filed by Abu Zubaydah, a known subject of coercive interrogations, has languished on a district court docket for over six years without explanation. Raymond Bonner, *The Strange Case of the Forgotten Gitmo Detainee*, POLITICO (May 12, 2015), <http://www.politico.com/magazine/story/2015/05/abu-zubaydah-tortured-waterboarded-cia-d-c-circuit-court-guantanamo-117833.html> [<https://perma.cc/92A3-HTV5>].

²⁸⁷ See Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (describing findings from a study of 971 plea bargains reached in Fiscal Year

have demonstrated that prosecutors use appellate waivers to prevent certain legal and constitutional challenges from being litigated.²⁸⁸ Ineffective assistance of counsel claims, for example, are typically amenable to challenge only via collateral review processes that are often extinguished by waiver.²⁸⁹

The second reason for chastened expectations for judicial review turns on the courts' institutional character. The Framers imagined that abuses by the federal government would be constrained by the separation of powers because each branch would have an institutional motive to resist *ultra vires* actions by coordinate branches.²⁹⁰ Institutional interests enabled by the separation of powers, however, may not incentivize interbranch checking. This is true of Article III as much as the other branches.²⁹¹

The institutional interests of the Article III judiciary are plausibly understood to include the maximization of prestige and the minimization of the institutional costs of litigation, which include the burden of adjudicating politically contentious cases with potential public blowback.²⁹² But these interests can create institutional incentives to avoid responsibility for controversial policy decisions, thereby enlarging a coordinate branch's effectual authority. In my view, the evidence suggests that risk-averse federal judges perceived post-*Boumediene* habeas as an onerous assignment of low prestige with large attendant risk of public backlash. One suggestive piece of evidence on this score is the absence of ideological division in habeas cases. This datum contradicts criticisms proffered by liberal commentators, who explain the government-friendly results in detention cases by blaming "ideologically extreme" judges.²⁹³ With only a small number of exceptions, the major

2003 and finding that in nearly two-thirds of cases settled by plea agreements, the defendant waived his or her right to review); accord Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 211 (1995) (describing appellate waivers as common in the context of plea bargains).

288 See King & O'Neill, *supra* note 287, at 249-50 (noting that "once a defendant waives his right to appeal the sentence, that waiver blocks any claim that the sentence violated his rights under the Fifth and Sixth Amendments").

289 Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 546-47, 580-81 (2014). Sentencing courts, aware of their own constitutional flaws, may also strategically sentence defendants to shorter terms to avoid appellate review. See *id.* at 580-81.

290 See THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008) ("[T]hose who administer each department [possess] the necessary constitutional means and personal motives to resist encroachments of the others."); see also Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 771 (2012) (extolling the virtues of rivalrous separation of powers).

291 See Huq, *Judicial Independence*, *supra* note 248, at 40-67 (analyzing the connection between Article III institutional interests and the doctrinal limits upon constitutional remedies).

292 See *id.* Federal judges and Justices have long expressed antipathy to adjudicative obligations that would tarnish the luster and prestige of Article III courts. See Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 972 (2000) (tracing back arguments of preserving the prestige of Article III courts to Chief Justice Taft).

293 See, e.g., Janet Cooper Alexander, *The Law Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 594-95 (2013) ("The D.C. Circuit . . . has stubbornly resisted the recognition of detainee rights . . .");

appellate decisions on the procedural treatment of habeas petitions and the substantive law of detention have been unanimous. Dissents in favor of detainees have been rare.²⁹⁴ This suggests that the judicial response to post-*Boumediene* litigation should not be reduced to facile ideological terms. Indeed, in a much-noted concurrence, Judge Laurence Silberman explicitly pointed to institutional concerns that extend to liberal and conservative jurists alike; he expressed his “doubt [that] any of [his] colleagues [would] vote to grant a petition if he or she believe[d] that it [were] somewhat likely that the petitioner [was] an al Qaeda adherent or an active supporter.”²⁹⁵ The breadth of this statement—covering liberal and conservative jurists alike—and the absence of any rebuttal by liberal judges in subsequent opinions suggests that Judge Silberman’s comments indeed fairly characterize Article III actors’ convergent institutional incentives.

Prestige concerns also plausibly explain the Supreme Court’s failure to intervene in post-*Boumediene* habeas litigation, even though the decision to grant certiorari in one of the post-*Boumediene* cases demanded less than the five votes needed for the *Boumediene* majority.²⁹⁶ Having obtained a measure of public commendation for its ruling in *Boumediene*, the Court could delegate to inferior courts the more hazardous and mundane business of granular adjudication. That is, since judicial prestige was advanced by the “great victory”²⁹⁷ of a constitutional ruling on the Suspension Clause, the Court only stood to lose from further engagement.

Finally, judges may be particularly leery of narrowing government power in detention cases because of spillover effects that could be blamed on Article III actors. The AUMF defines the bounds of legal force not just for detention, but also for other species of military power, such as targeted killings.²⁹⁸ Scholars had by this time already highlighted the filial relations of targeting and detention law.²⁹⁹ Although the first targeted killing of al Qaeda suspects occurred in 2002, the program’s acceleration and expansion primarily occurred in 2008 and 2009, just as post-*Boumediene* habeas petitions were starting to be

Vladeck, *supra* note 45, at 1488 (arguing that detainee cases show a “fundamental unwillingness by the D.C. Circuit” to follow the Court’s analysis in *Boumediene*).

²⁹⁴ Probably the most important dissenting opinion is Justice Tatel’s in *Latif v. Obama*. See *Latif v. Obama*, 677 F.3d 746, 770–90 (D.C. Cir. 2012) (Tatel, J., dissenting).

²⁹⁵ *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (emphasis added).

²⁹⁶ See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

²⁹⁷ Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS (Aug. 14, 2008), <http://www.nybooks.com/articles/2008/08/14/why-it-was-a-great-victory/> [<https://perma.cc/S8HV-3F67>].

²⁹⁸ See Chesney, *Military Detention*, *supra* note 45, at 773–74 (documenting that although targeted killing decisions “ordinarily are not directly subject to judicial review,” they can fall under the “notional scope of detention authority”).

²⁹⁹ For the leading work on this point, see Matthew C. Waxman, *Detention As Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1385 (2008), arguing that “detention decisions can be understood analogically as targeting decisions, sharing many of the same policy and moral issues.”

litigated.³⁰⁰ Jurists may have been conscious that their decisions in the detention context would have unanticipated consequences for other programs, such as the use of targeted killing. That possibility of unanticipated spillovers with ambiguous welfare effects during a period of flux and experimentation in national security policy may have generated additional constraint on risk-averse federal judges.

In sum, even if the judiciary's institutional interests are engaged, they yield no guarantee that courts' intervention will constrain the political branches. To the contrary, the Guantánamo example suggests that Article III's institutional bent can lead, unexpectedly, to an increase in the effectual scope of executive branch discretion.

D. Conclusion

This Part has developed a granular account of how the separation of powers constrains presidential initiatives by closely parsing bureaucratic, legislative, and judicial incentives and instruments. It has, in other words, attempted to describe the separation of powers from the ground up, rather than from the top down.

In the aggregate, my account suggests that President Obama's ambition of closing Guantánamo confronted disabling frictions as a result of a dynamic entanglement between military bureaucracy and legislators. Each abetted the other in generating barriers against an aggressive rate of transfers. The military bureaucracy impeded diplomatic efforts to expedite transfers and winnow the detainee population. It also strategically disseminated claims of rising recidivism rates in a fashion timed and framed to disrupt maximally the White House's ambition. Legislators in turn seized on bureaucratic estimates of recidivism, notwithstanding their facial ambiguities and potential flaws, to prime the pump of public anxiety. Ensuing statutory curtailments of the executive's transfer authority, in turn, worked by vesting larger discretion in the military bureaucracy to resist presidential pressure.

By contrast, standard accounts of President Obama's failure tend to focus on recidivism-related security risk and political opposition in Congress.³⁰¹ Neither of these explanations supplies the full story. It is not the case that the flow of transfers from the Cuban base slowed and ceased because of a dearth of plausible transferees. Ultimately, there may be a group of detainees who cannot be transferred, and for whom some sort of trial or alternative disposition is necessary. But transfers ended before this dilemma was even reached. Instead,

³⁰⁰ See Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681, 685 (2014) (describing the changing pace of the targeted killing program).

³⁰¹ See *supra* notes 26–27 and accompanying text.

political opposition to Guantánamo transfers, and concomitant perceptions of recidivism-related risk, were shaped and channeled by a bureaucratic–legislative alliance out of institutional and partisan incentives. The absence of any judicial spur to transfers, by contrast, reflects the path dependency of judicial review upon prior executive branch choices, and also the parochial institutional concerns of the Article III judiciary. In short, the separation of powers matters—but in unanticipated ways.

III. WHAT CONSTRAINS PRESIDENTIAL POWER? THE SEPARATION OF POWERS REVISITED

The persistence of Guantánamo is a case study in the constraint of presidential ambition. In its particulars, it might be ranked either as a constitutional success, or as a species of tragedy. On the one hand, Congress’s use of appropriations riders to reign in executive power reflects Justice Story’s prediction that Congress “must have[] a controlling influence over the executive power, since it holds at its own command all the resources, by which a chief magistrate could make himself formidable.”³⁰² Alternatively, one might conclude that courts’ use of the “Great Writ” of habeas corpus to write a jurisprudence of statist authorizations for detention is cause for dismay. Reactions will diverge, I suspect, based on readers’ priors as to whether the Guantánamo detentions were warranted, not so much as a matter of law, but more as a matter of political morality.

I offer no answer here to that difficult moral question (although I have a view on the matter). My more modest aim in this Part is to ask whether the dynamics identified in Parts I and II have broader implications for our theoretical understanding of the separation of powers as an element of constitutional design. Only afterward will I ask whether they also have implications for possible pathways to President Obama’s initial goal of ending detention operations at Guantánamo. The analysis is developed here without any assumption that readers will support that goal, but rather is conducted in the spirit of positive inquiry into how Presidents can achieve their democratically credentialed policy agendas.

The central theoretical contribution of this Article comprises three discrete observations about the mechanics of the separation of powers. First, the separation of powers, insofar as it works to bind presidential authority, does not necessarily operate in a mechanical fashion between branches operating as unitary entities. Instead, more granularly, it can rely on actors

³⁰² 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 531, at 372 (2d ed. 1851); see also Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 142–53 (1994) (discussing the Framers’ insistence on checks and balances).

both within and outside the government that comprise elements of a thick political surround. Second, the effect of law within the separation of powers can turn on political dynamics, rather than the coercive force of statutory prohibitions and commands. This has two further implications: important constraints on the presidency are produced first by interbranch politics and, further, that those legal constraints can depend primarily on the expected political cost of violation. Third, notwithstanding recent work that emphasizes partisan considerations over institutional ones in the separation of powers, institutional incentives at the branch and the sub-branch level play a large role in generating interbranch constraints. Together, these three points do not amount to a new theory of the separation of powers; rather, they gesture toward the value of more retail analysis that looks beyond the labels of branch and at the constituent actors, motives, and localized politics around a given policy question. Only by taking account of those micropolitics can sensible predictions be reached about which of the separation of power's plural and contradictory goals will play out in practice.

I develop each of these retail-mechanism-related points in turn. Then, I draw some more general conclusions for the normative projects often hitched to the separation of powers. Finally, I return to the specific question of what path forward could lead to the closure of the Guantánamo detention facility.

A. *Beyond Branches: The Role of the Thick Political Surround*

One larger theoretical implication of the analysis in Parts I and II concerns the range of actors relevant to interbranch dynamics. The separation of powers is often analyzed as a “three-branch problem.”³⁰³ Yet the constraining effect of the separation of powers cannot be understood without attention to actors within the branches. In separate work, Jon Michaels and I have called attention to the important causal role played by a “teeming ecosystem of institutional, organizational, and individual actors within as well as outside of government” that comprises what we term the “thick political surround.”³⁰⁴ Depending on which elements of this thick political surround are engaged, the separation of powers can have different results in practice.

The account developed in Parts I and II draws attention to the fact that neither the executive nor Congress act as a unified whole. In the political science argot, both are a “they”—not an “it.”³⁰⁵ For example, the analysis in Part II

³⁰³ William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 898 (2001).

³⁰⁴ See Huq & Michaels, *supra* note 25, at 352, 391.

³⁰⁵ For an application to Congress, see generally Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992), which argues that

suggested that the State Department and the Pentagon pursued distinct, and sometimes conflicting, policy priorities regarding the Guantánamo detentions.³⁰⁶ Similarly, close observers of intrabranched dynamics have insisted on the independent preferences and motivations of trial-level attorneys tasked with responding to habeas petitions.³⁰⁷ Nor are the federal courts a unified entity. Critics of the post-*Boumediene* habeas jurisprudence may err in blaming “extremist” judges.³⁰⁸ But it is still striking that trial and appellate judges had such divergent responses to the Guantánamo habeas petitions. Had the Department of Justice not chosen to appeal its losses, and instead used trial-level defeats as a platform for statutorily enabled releases,³⁰⁹ the trajectory of the net detainee population might have been quite different. In short, each branch acts not as a unified whole but through component entities. As in any other principal-agent relationship, there is a consequent possibility of slippage between what “the branch” wants (however that may be determined) and what a constituent element wants.

All of this has implications for the separation of powers.³¹⁰ Reifying the “branches” as homogenous, unitary entities and ignoring the variegated ecosystem of institutional factions hiding within and around them invites serious misdiagnosis of the causes and consequences of interbranch interactions. The choice of which institutional faction engages in an interbranch transaction can alter the nature and the consequences of that interaction. Congressional responses to Guantánamo’s persistence likely hinged upon which faction within the executive was better able to mobilize legislative attention. The downstream adjudicative treatment of an action can also be influenced by the exact path that a challenge takes through the Article III hierarchy.

The pivotal role of an internal ecosystem of institutional players that I highlight here both complements and complicates a recent and growing literature celebrating “internal” separation of powers.³¹¹ Gillian Metzger, in a leading exemplar of the genre, cites *Boumediene* as a decision that gave the

legislative intent of a “collective body” is a contradiction; for extension to the national security executive, see Huq, *Structural Constitutionalism*, *supra* note 12, at 904-05.

³⁰⁶ See *supra* text accompanying notes 124–31.

³⁰⁷ See Ingber, *supra* note 37, at 384–86 (noting that personalities of individuals, as well as bureaucratic dynamics, play a role).

³⁰⁸ See *supra* text accompanying note 293.

³⁰⁹ See *supra* text accompanying note 215.

³¹⁰ Judicial doctrine on the separation of powers is surprisingly sensitive to the diverse institutional preferences and motivations of both internal and external actors. In separate work, I show how much of the anarchic quality of separation-of-powers jurisprudence can be glossed sympathetically as an effort to tame this institutional heterogeneity. See generally Huq & Michaels, *supra* note 25.

³¹¹ See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

executive “an incentive to craft internal administrative procedures that address the constitutional weakness the majority identified in the current system.”³¹² The account of bureaucratic responses to increasing pressure to wind down the Guantánamo detentions developed in Part II confirms Metzger’s hypothesis that dynamics internal to the executive are a necessary component of any understanding of the separation of powers. The same account, contra Metzger’s claim, also suggests that bureaucratic responses to those pressures can generate policy outcomes at odds with the ends anticipated by internal separation-of-powers proponents.

But whereas the internal separation-of-powers literature has celebrated the recreation of checks and balances within the executive branch as a substitute for the weakness of external interbranch checks,³¹³ the account offered here suggests that bureaucratic actors are salient not because of *internal* dynamics but only because of their *outward-facing* influence on Congress and the judiciary. They are complements to, not substitutes for, interactions among the three branches. Intrabranched checks, I have suggested, are partially caused by and mediated through bureaucratic forces. Hence, legislative resistance to presidential pressure to close Guantánamo hinged on information produced by the bureaucracy. More tentatively, I have also hypothesized that bureaucratic entrepreneurship on the recidivism question may have increased the divisiveness of the larger political landscape. As much as being a *product* of partisan deadlock in Congress, therefore, bureaucratic policymaking authority was a *contributing factor* to partisan polarization.

The role of Congress as a constraint on the President, moreover, is yet more complex still. Legislative barriers to transfers depended upon the executive for their efficacy. These statutes elaborated new opportunities for bureaucratic foot-dragging and resistance to the presidential agenda. A close parallel here is the legislator–prosecutor alliance identified by William Stuntz as the source of “pathological” criminal-law politics.³¹⁴ Similarly, the opportunities for judicial intervention, and the relative salience of its costs and benefits, were a function of the military bureaucracy’s choices. Interbranch constraints on presidential power, in short, are best understood as flowing from a matrix of actors stretching across all three branches and implicating more than just

³¹² Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Law*, 110 COLUM. L. REV. 479, 498 (2010).

³¹³ See, e.g., Katyal, *supra* note 311, at 2335–42 (discussing the White House Office of Legal Counsel’s interactions with the Attorney General on John Yoo’s torture memos as an example of intrabranched checks).

³¹⁴ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2011) (noting the “tacit cooperation” between prosecutors and legislators that is a historic foundation of American criminal law).

the three textually specified actors enumerated in Articles I through III of the Constitution.³¹⁵

In short, the analysis here points to the value of moving beyond the unit of the “branch” to more granular determinants of interbranch relations. In addition, it suggests that the idiom of the “internal separation of powers” is hopelessly disconnected from the actual vectors of institutional behavior.

The question I have not answered is how far to drill down with this analysis: I have demonstrated that it is feasible to decompose branches into relatively coarse particles, such as “the Justice Department,” and “the military bureaucracy.” I have not gone farther because the evidentiary record that would enable an even more precise analysis of specific individuals or offices within executive departments simply does not exist. But that is not to say that others cannot gain traction with more granular data. Ultimately, the unit of analysis employed in institutional analysis will depend on the purposes of the analyst, the available evidentiary record, and the potential toeholds for reform. Nevertheless, I suspect that the shift in focus from branches to intrabranched actors will prove an enduring one in legal scholarship with a positive, descriptive ambition.

B. *The Interaction of Law and Politics in the Separation of Powers*

My analysis suggests that the operational vector of the separation of powers may be political, rather than legalistic, in character. The force of law—understood as affirmative prohibitions on certain actions—proved at best a secondary constraint on President Obama’s agenda. It was instead politics—first internal to the executive branch, and then externally in and around Congress—that fatally entangled his ambitions. By “politics” here, I do not mean simply *electoral* politics.³¹⁶ I mean the term in its broader sense. So understood, the term picks out the dense public network of evaluative claims, assertions, and

³¹⁵ In my estimation, external elements of the thick political surround may have been responsible for framing Guantánamo as an important public-policy problem, and even motivating the robust early rate of releases. See Huq, *What Good*, *supra* note 22, at 422-23. However, I see less evidence that external actors shaped post-*Boumediene* policy. *But see* Deeks, *supra* note 22, at 844-48 (offering examples of Obama detention policy that may have been shaped by a concern to head off subsequent litigation). This suggests that different policy environments—characterized by different status quos, and different perceived priorities—can empower and emasculate different actors.

³¹⁶ Other scholars do reduce constraints on the presidency to a crude function of electoral reward or punishment. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4-10 (2010) (asserting that the “major constraints on the executive . . . do not arise from law or from the separation-of-powers framework . . . but from politics and public opinion”). That conception, however, is far too reductive and, even in its accounting of electoral effects, too imprecise to be useful. For a response and critique that underscores the role of institutional norms and preferences for legality, see Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777 (2012).

counterarguments in which we jockey over what the state should do. Officials reside in politics so conceived. Absent some pathology, whether personal or institutional, that environment infuses their judgment and shapes the rewards and penalties of political action.

Hence, it was first of all an intramural political falling out between the Pentagon and the White House that generated the legislative environment in which restrictions upon detainee transfers could be perceived not merely as prudent but necessary, even at the risk of courting a presidential veto.³¹⁷ And further, the effect of transfer restrictions enacted in 2009 and 2011 did not depend on coercive law. Rather than blunt prohibitions, these “restrictions” worked by imposing certain disclosures on the executive before making a transfer; no countervailing transparency mandates revealed the costs of continued detentions, erroneous or otherwise. Because these disclosures required nothing more than publication of information already in the executive’s possession, they are best understood as efforts to impose political costs on detainee transfers by providing ammunition for the White House’s internal and external foes. In short, the dynamics observed here confirm Frederick Schauer’s hypothesis that “the question of legal compliance is answered in the realm of politics, rhetoric, and the other determinants of public [and official] opinion,” and not by coercion or the force of law.³¹⁸ Political costs and benefits, Parts I and II suggest, are not a product of external factors alone: they can arise endogenously from internal control within or between the branches.

This analysis also has bite with respect to our understanding of courts’ role. As Justice Thomas recently described the standard account of the judiciary’s position within the separation of powers, “[t]he ‘check’ the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review.”³¹⁹ This pivots courts’ role on the measurement and implementation of formal legal prohibitions or mandates. But a consideration of post-*Boumediene* habeas cases points in another direction. This litigation supplied a negligible push toward release in individual cases, while at the same time producing a body of law asymmetrically indifferent to the risk of false positives. In contrast, politics internal to the executive branch generated leaked disclosures of recidivism emphasizing (and arguably exaggerating) their costs. Political entrepreneurs in Congress then leapt upon the disclosures, leveraging them (and further exaggerating them) to gin up public opposition and new

³¹⁷ President Obama threatened in 2012 to veto certain transfer restrictions, but backed down without carrying out the threat. See *supra* note 221.

³¹⁸ Frederick Schauer, *Official Obedience and the Politics of Defining “Law,”* 86 S. CAL. L. REV. 1165, 1177 (2013).

³¹⁹ *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment).

platforms for bureaucratic resistance. An exclusive focus on law—understood as positive enactments that prohibit or mandate action—as the channel for interbranch dynamics thus misses much of causal importance.

C. *The Motivational Foundations of Interbranch Relations*

A third implication of this study relates to the *motivational* foundations of the separation of powers. It casts some doubt on an important body of recent work on the pervasive role of partisan incentives in separation-of-powers controversies. In a widely cited Article, Daryl Levinson and Richard Pildes argued that “almost from the outset,” political parties and partisan motivations “overwhelmed” the Madisonian conception of the separation of powers.³²⁰ Other commentators have echoed their skepticism of the possibility that officials, at work in any of the three branches, will discard ideology and partisan allegiances to prioritize the mission of their institution.³²¹ In a similar vein, empirical scholars of the judicial branch have flagged ideology, rather than institutional affiliation, as the most powerful determinant of judicial behavior.³²² Ideology and partisanship are now assumed to be the dominant motivating forces at work among and between the branches.

The persistence of Guantánamo, however, cannot be explained by ideological or partisan conflicts alone. As Part I demonstrated, bureaucratic resistance arose in 2009 and 2010 even though there was a deep operational continuity between the Bush and Obama Administrations.³²³ In policy terms, there was no ideological divide to engender resistance. Nor does a narrow focus on partisan incentives illuminate why national security bureaucrats contrived to undermine the White House. Rather, I have posited a number of more subtle internal dynamics in which bureaucratic actors are moved to protect their own visions of appropriate policy or to shore up their own local institutional prerogatives. This is evidence of what Daniel Carpenter and George Krause describe as “organizational socialization and shared identities” within federal agencies and departments directly shaping policy from the bottom up.³²⁴

³²⁰ Levinson & Pildes, *supra* note 33, at 2313.

³²¹ See, e.g., David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 602 (2009) (“[W]hen one political party captures all of the levers of power, then the American system of separation of powers fails.”).

³²² See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64-65 (1993) (presenting an “attitudinal model” of Supreme Court decisionmaking which posits that Justices vote largely based on their “ideological attitudes and values”); Harold J. Spaeth, *The Attitudinal Model* (asserting that Supreme Court Justices make decisions based partly on “personal policy preferences”), in *CONTEMPLATING COURTS* 296 (Lee Epstein ed., 1995).

³²³ See *supra* text accompanying notes 104–07.

³²⁴ Daniel Carpenter & George A. Krause, *Transactional Authority and Bureaucratic Politics*, 25 J. PUB. ADMIN. RES. & THEORY 5, 13 (2014); see also JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* 3 (1999)

Partly informed by Carpenter's powerful historical accounts of how bureaucrats have crafted their own agencies' missions,³²⁵ Carpenter and Krause emphasize that bureaucrats, no less than their elected principals, may cultivate freestanding sources of institutional support and public legitimacy.³²⁶ Among those pillars of bureaucratic sustenance is the ability of officials "to induce" congressional majorities to legislate in accord with bureaucratic preferences.³²⁷ Protecting local institutional priorities—such as Pentagon control over detainee releases or the priority of counterterrorism over counternarcotics in Afghanistan³²⁸—can undermine a wider strategic agenda pursued by the White House, such as closing Guantánamo.

Similarly, partisan affiliation does not fully explain the observed degree of legislative resistance. Congressional opposition to President Obama's agenda instead has evinced a consistently bipartisan character. A crucial 2009 vote on funding to close the Cuban base's detention operations was derailed by six leading Democratic Senators,³²⁹ notwithstanding the contemporaneous support among Democratic voters for the President's agenda.³³⁰ My account thus suggests that partisanship is not a necessary condition of interbranch constraint. Instead, legislators' interests can align with those of an internal governmental constituency, such as the military.³³¹ The institutional interests of the bureaucracy exert a gravitational pull on legislative action that defies intraparty identification. Separation of parties, in short, is not the whole story.

Equally, when the *Boumediene* Court extended the reach of the Suspension Clause to Guantánamo, tasking district courts with a role in retail habeas litigation, it forcefully underscored the federal bench's role in serving as a beneficial separation-of-powers check on executive discretion and a protector

(summarizing historical research that shows the influence of "the bureaucrat's own preferences, peer bureaucrats, supervisors, and the bureaucrat's clients" on agency work decisions).

325 See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, 255–89 (2001).

326 Carpenter & Krause, *supra* note 324, at 12–13.

327 Daniel Carpenter, *The Political Foundations of Bureaucratic Autonomy: A Response to Kernell*, 15 *STUD. AM. POL. DEV.* 113, 113 (2001).

328 See *supra* text accompanying note 137.

329 See David M. Herszenhorn, *Funds to Close Guantánamo Denied*, *N.Y. TIMES* (May 20, 2009), <http://www.nytimes.com/2009/05/21/us/politics/21detain.html> [<https://perma.cc/6HWH-J9P7>] (noting that the "six Democrats who voted against the measure include some of their party's most prominent voices on military affairs and criminal justice issues").

330 See Alec Tyson, *Should Guantanamo Be Open or Closed? Either Way Democrats Have Stuck with Obama*, *PEW RES. CTRS.* (May 29, 2013), <http://www.pewresearch.org/fact-tank/2013/05/29/should-guantanamo-be-open-or-closed-either-way-democrats-have-stuck-with-obama/> [<https://perma.cc/25QG-JW46>] (reporting a survey finding that fifty-nine percent of Democratic voters supported Obama's goal in late 2009).

331 See THORPE, *supra* note 196, at 93–108 (demonstrating the fiscal basis of many relations between the military and Congress).

of individual liberty.³³² In *Boumediene*, Justice Kennedy contrasted a judiciary “disinterested in the outcome and committed to procedures designed to ensure its own independence” with an executive branch in which these beneficial traits “are not inherent.”³³³ In contrast to Justice Kennedy’s prediction, federal courts adjudicating post-*Boumediene* habeas petitions systematically assigned greater weight to false positives over false negatives.³³⁴ They were influenced by the flow of factual scenarios presented to them as a downstream result of executive branch decisions. Even apart from that path-dependent effect, federal judges’ behavior also reflected their own institutional interest in evading public blame for controversial decisions. In so doing, they perhaps inadvertently enlarged the executive’s sphere of discretion. Attention to the institutional incentives of the federal judiciary, in short, helps us understand the gap between *Boumediene*’s soaring rhetoric and the more ambiguous legacy of judicial intervention on the ground.

D. *The Microfoundations of the Separation of Powers:
Normative Implications*

The three elements identified here—the thick institutional surround, the entangling of law and politics, and the prevalence of institutional incentives—help illuminate a basic puzzle in the practical operation of the separation of powers. That puzzle emerges from the normative and causal pluralism of the separation of powers. The latter concept can be invoked as a way of achieving different, and mutually inconsistent, ends. For example, in 2011, a unanimous Court stated that the separation of powers “protect[s] each branch of government from incursion by the others” and thereby also “protect[s] the individual.”³³⁵ But it is also a commonplace notion that the separation of powers operates to check presidential initiatives.³³⁶ The tension here is palpable. When a presidential initiative aims to promote individual liberty notwithstanding the other branches’ failure to act, separation-of-powers

³³² See *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (“The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.”); accord *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (“[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”); *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (since “[e]xecutive imprisonment” without judicial review is “oppressive and lawless,” “this Court has recognized the federal courts’ power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace” (citation omitted)).

³³³ *Boumediene*, 553 U.S. at 783.

³³⁴ See *supra* text accompanying notes 275–77.

³³⁵ *Bond v. United States*, 564 U.S. 211, 222 (2011).

³³⁶ See *supra* text accompanying note 302.

devices will tend to thwart both goals. Worse, the separation of powers will often impede libertarian policy goals. For at least a century, political scientists have observed that the division of governmental power between the legislative and executive branches tends to raise the costs of large policy shifts.³³⁷ All else being equal, the President acting alone will thus have an easier time promoting liberty than the President acting with necessary concurrence from Congress and the courts. The mere fact that separation-of-powers constraints on the executive have been triggered, in short, tells us little about the likely final policy outcome. Without knowing more about the micropolitics of the specific interbranch dynamic at issue, it is difficult to know what will result from engaging with the separation of powers.

A recent example illustrates this simple point: the recent interbranch dynamic over the federal refusal to recognize same-sex marriages under Section 2 of the Defense of Marriage Act (DOMA). After two federal courts held that Section 2 of DOMA was unconstitutional, Attorney General Eric Holder decided to renounce any defense of that provision.³³⁸ The House of Representatives, through its Bipartisan Legal Advisory Group, responded by hiring private counsel to defend the statute.³³⁹ In the Supreme Court, legislators' counsel offered "sharp adversarial presentation of the issues."³⁴⁰ Although that adversarial presentation ultimately failed, legislative resistance to same-sex marriage illustrates one of the manifold ways in which the separation of powers enables resistance to executive efforts to promote individual liberty. Without understanding the entangled legal-political pressures on the Attorney General to defend Section 2 of DOMA, and without accounting for the internal fragmentation of Congress, the effect of the separation of powers on DOMA's demise would be hard to understand.

Or consider the effect of the separation of powers on the *quality* of political deliberation. Constitutional scholars have persuasively described the Court on

³³⁷ For the locus classicus of this observation, see WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 54-81 (Transaction Publishers 2002) (1908). It has recently been argued that the separation of powers would not necessarily have this effect where the President would, in the absence of a legislative veto, be constrained by electoral punishment. See Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 *HARV. L. REV.* 617, 643-45 (2010). This theory requires not only exceptionally epistemically well-endowed voters—it also assumes electoral sensitivity on the margin to presidential actions on a particular policy question. Neither condition is likely satisfied here.

³³⁸ Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to the Hon. John A. Boehner, Speaker of the House, Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [https://perma.cc/DH53-8RA3].

³³⁹ Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose, *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 CIV 8435), <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/04/House-intervene-mtn-Windsor-4-18-11.pdf> [https://perma.cc/3DGX-NY8X].

³⁴⁰ *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013).

occasion as shifting policymaking from exclusively within the executive onto the field of interbranch contestation as a means of promoting better outcomes. In *Hamdan v. Rumsfeld*, for example, the Court invalidated a military commission system that was the result of an executive order promulgated by the White House, rather than a product of Pentagon expertise.³⁴¹ Jody Freeman and Adrian Vermeule have plausibly argued that the *Hamdan* ruling was in part animated by the perceived inadequacy of an intrabranched policymaking dynamic in which agencies possessing relevant expertise played no role.³⁴² Similarly, the Court decided to hear the *Boumediene* case, after having first denied the detainees' petition for certiorari, only when presented with evidence of dysfunctional intrabranched process.³⁴³ In other domains of law, purely internal decisional processes are viewed with like skepticism. In evaluating non-Article III adjudicative fora in recent cases, for example, Justices have expressed skepticism about their purely internal character.³⁴⁴

But is the Court correct in assuming that adding a dose of the separation of powers to a policy debate will improve outcomes? That migration can promote some constitutional goals while undermining others. On the one hand, it may induce more extensive democratic debate and invite more focused internal deliberation. On the other hand, deliberation need not conduce to more empirically grounded, rational decisions. In the case at hand, elevating the visibility of detainee transfers into an interbranch conflict did not lead to more rational policymaking.³⁴⁵ The ensuing debate was distinctly asymmetrical, with disclosures highlighting the costs but not the benefits of transfers. It invited opportunistic political entrepreneurship. This in turn stoked public fears of detainee recidivism, and eventually crystallized into legislative constraints on transfers that derailed even transfers of detainees already cleared for release, such as Shaker Aamer. The interbranch context produced periodic bouts of panic about recidivism risk, policy elite opportunism, and intermittent restrictions unmoored from nuanced assessments of recidivism

³⁴¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006); see also *Detention, Treatment, and Trial of Certain Noncitizens in the War Against Terrorism*, 10 U.S.C. § 801 (2000) (reporting the President's military order that established military tribunals).

³⁴² Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52.

³⁴³ See Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417, 448-49 (2012) (exploring the circumstances of the certiorari grant in *Boumediene* in more detail).

³⁴⁴ See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1956 (2015).

³⁴⁵ Where competitive pressures on policy are more diverse and multifarious, by contrast, changing the institutional sites of a policy question in a way that increases its salience can have the opposite effect. See Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1166 (1993) (arguing that "[t]ax institutions, because of their greater visibility and more competitive nature, are less susceptible to interest group capture").

risk. Richer process, in short, paradoxically produced normatively impoverished outcomes. This is hardly the stabilizing, legalistic, and legitimizing outcome anticipated by traditional accounts of the separation of powers. Nor is it a species of democratic deliberation and interbranch dialogue that is obviously desirable.

The sort of bureaucratic–legislative alliance observed here, moreover, is not unique. Another example is the Obama Administration’s efforts to mitigate the extent of deportation’s shadow on young migrants who were brought into the country as children. These efforts were quickly, if unsuccessfully, challenged by elements of the federal bureaucracy.³⁴⁶ The bureaucrats’ challenge complemented and reinforced legislative resistance to immigration reform, and provided a platform for legislative criticism of mitigation efforts led by the executive.³⁴⁷ The joint action of bureaucrats and legislators—subsequently supported by several states—succeeded in delaying and ultimately derailing those mitigation efforts.³⁴⁸

Another instance in which an internal separation-of-powers dynamic may have influenced the shape of external, interbranch contestation is Attorney General John Ashcroft’s 2001 effort to use the Controlled Substances Act to preempt Oregon’s assisted suicide regime without consulting “anyone outside his department.”³⁴⁹ In rejecting General Ashcroft’s proposed regulation, the Supreme Court emphasized the absence of approval from medical experts within the federal government and in particular the Secretary of Health and Human Services.³⁵⁰ Hence, the initial fact of disagreement within the executive branch catalyzed an interbranch conflict, one that was ultimately resolved by looking to the positions of actors within the Article II sphere.

In sum, attention to the microfoundations of the separation of powers—the diversity of relevant institutional actors, the entanglement of law and politics, and the force of institutional incentives—point to a previously unacknowledged measure of complexity within interbranch relations. The separation of powers should, in this light, no longer be treated as something fixed and immovable,

³⁴⁶ See *Crane v. Napolitano*, No. 3:12-cv-03247-0, 2013 WL 8211660, at *2-3 (N.D. Tex. July 31, 2013) (dismissing the challenge on jurisdictional grounds).

³⁴⁷ See Stephen Dinan, *Immigration Agents Sue to Stop Obama’s Non-Deportation Policy*, WASH. TIMES (Aug. 23, 2012), <http://www.washingtontimes.com/news/2012/aug/23/immigration-agents-sue-stop-obamas-non-deportation> [<https://perma.cc/83FH-KVF4>] (discussing legislators’ invocation of immigration officials’ suit against the Obama Administration to criticize the President).

³⁴⁸ A follow-on challenge filed by twenty-six states resulted in an injunction against the President’s program that remained in place after the Supreme Court split 4–4 on the matter. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016).

³⁴⁹ *Gonzales v. Oregon*, 546 U.S. 241, 250 (2006).

³⁵⁰ *Id.* at 253.

or something “sacred.”³⁵¹ Rather, it should be the object of careful and detailed inquiry in a fashion that accounts for the discrete local dynamics adumbrated here.

E. *The Road to Guantánamo’s Closure Reconsidered*

The foregoing analysis has implications for understanding the scope of existing restrictions on detainee transfers imposed by Congress.³⁵² Arguments for the narrow construction of those limitations to date have focused on Article II as a limit on congressional regulation of detainee transfers.³⁵³ But the Supreme Court has endorsed such congressional control of detainees since the early 19th century.³⁵⁴ The failure of Article II arguments for narrowly construing transfer restrictions should not, however, end matters: transfer restrictions might still be read narrowly to vest with the President broad authority to override bureaucratic resistance. Although it seems highly unlikely that such power will be exercised in the coming four years, I explore here the legal question as a lens onto more general separation-of-powers dynamics.

The pivotal question in the construction of statutory transfer restrictions is the partition of discretion between the President and the military bureaucracy. Like earlier iterations, the 2015 statute vests the Secretary of Defense with authority to make pivotal determinations, for instance, about whether post-transfer conditions will “substantially mitigate the risk of recidivism.”³⁵⁵ The analysis presented in Part II suggests that the restrictions will likely have the effect of thwarting a presidential agenda that would wind down detentions. The greater the loss of presidential control, the longer in expectation that process will take. If, conversely, transfer restrictions are construed to maximize presidential control, they are more likely to promote the speedy flow of detainees from the facility.

³⁵¹ See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, J., dissenting) (quoting 1 ANNALS OF CONG. 604 (1789) (Joseph Gales ed., 1834)).

³⁵² See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 1031-34, 129 Stat. 726, 968-71 (Nov. 25, 2015) (to be codified in scattered sections of the U.S. Code). This current version of the transfer restriction again exempts judicially mandated transfers. *Id.* § 1034(2). It also bars transfers to Yemen, Libya, Somalia, and Syria. *Id.* § 1033.

³⁵³ See, e.g., Gregory Craig & Cliff Sloan, *The President Doesn’t Need Congress’s Permission to Close Guantánamo*, WASH. POST (Nov. 6, 2015), https://www.washingtonpost.com/opinions/the-president-doesnt-need-congresss-permission-to-close-guantanamo/2015/11/06/4cc9d2ac-83f5-11e5-a7ca-6ab6ec2of839_story.html [<https://perma.cc/G2BT-6R67>] (“Under Article II of the Constitution, the president has exclusive authority to determine the facilities in which military detainees are held.”).

³⁵⁴ See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128-29 (1814) (determining that whether to confiscate enemy property during the War of 1812 was a question of policy, “proper for the consideration of the legislature, not of the executive or judiciary”).

³⁵⁵ National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, § 1034(b)(3), 129 Stat. 726, 969 (2015) (codified at 10 U.S.C. § 801 note).

Scholars diverge on whether statutory grants of discretion to cabinet-level officials implicitly limit White House control. Justice Elena Kagan argued for maintaining presidential control.³⁵⁶ In response, Kevin Stack developed powerful arguments for limiting presidential control over such statutory delegations.³⁵⁷ A central normative element of Stack's argument, though, was the utility of *external* constraints on executive power.³⁵⁸ But this assumption does not hold here. The etiology of transfer restrictions demonstrates that they are *not* wholly external, but rather flow from bureaucratic efforts to stymie a contested presidential agenda-item. The structural justifications for resisting presidential control of the statutory delegation to the Secretary of Defense, therefore, are absent in this case. Further, the normative justifications for constraining presidential power are much weaker here than in other contexts. The separation of powers is typically justified as a means of promoting liberty and good governance.³⁵⁹ That instrumental justification loses its force when the separation of powers is associated with arbitrary deprivations of liberty and a political environment dominated by deliberately inflated security fears.³⁶⁰

If instrumental rationales for constrained executive power lack traction, statutory interpretation of transfer restrictions should instead be infused with a direct concern for liberty interests. That rights-oriented approach is more defensible than Article II constitutional-avoidance arguments given the political economy of federal legislation. Whereas the executive branch always has an opportunity to raise Article II concerns during the legislative process, individual rights claimants often go unattended by Congress.³⁶¹ Just as the rule of lenity can be justified by a worry about the asymmetrical influence of defendants and prosecutors in the legislative process,³⁶² so a narrow view of

³⁵⁶ See Kagan, *supra* note 10, at 2326-31.

³⁵⁷ See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 276-99 (2006) (arguing that congressional delegation of authority to executive officials alone should not be read as a grant of "directive authority" to the executive).

³⁵⁸ *Id.* at 269.

³⁵⁹ See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592-93 (2014) (Scalia, J., dissenting) (noting that the Constitution's government-structuring provisions are "critical to preserving liberty"); *id.* at 2559 (majority opinion) ("We recognize, of course, that the separation of powers can serve to safeguard individual liberty . . ."); see also *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting) (commending the framers for devising a government structure promoting "liberty and accountability"); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (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.").

³⁶⁰ See *supra* text accompanying notes 178-94.

³⁶¹ See Aziz Z. Huq, *Enforcing (but not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1076 (2012) (arguing that the "political circumstances of the moment" impact whether individual interests are represented in the legislative process).

³⁶² See EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 182 (2008) (arguing that courts should systematically rule against those groups or

transfer restrictions can be defended as a means of correcting for asymmetries in the federal legislative process.

To summarize, transfer restrictions can and should be interpreted to maximize presidential control and to minimize bureaucratic obfuscation and delay tactics. The statutory construction advanced here would promote a speedier drawdown of detentions whenever that becomes politically feasible, even if it provides no panacea for hard cases in which release is not viewed as plausible.

CONCLUSION

This Article has presented the first comprehensive, empirically based account of how the prison at Guantánamo developed and, more importantly, persisted in the teeth of presidential directions to wind it up. This story, rather surprisingly, has not yet been told despite being a flash-point for partisan and policy debate. Attention to the specific dynamics of a particular separation-of-powers dynamic, I have suggested, yields dividends not only in our understanding of a particular, important policy question, but also more significantly in our sense of how the separation of powers operates in practice.

Combining econometric tools with doctrinal and institutional analysis, I have isolated several previously underappreciated incentives and causal mechanisms animating the observed separation-of-powers constraints on presidential initiatives. In particular, my account foregrounds the role of bureaucratic–legislative alliances; the importance of politics rather than law; and the exiguous effects of judicial review given Article III actors’ perverse institutional incentives. Similar dynamics, I have suggested, are likely to arise in whole or in part whenever the executive seeks to mitigate the harshness of baseline federal policy. Rather than taking the separation of powers for granted, this Article establishes the utility of more granular analysis of its effects and new theories of presidential power. Rather than a “sacred”³⁶³ element of our legal order, I have tried to show that the separation of powers should be taken as a contingent, complex institutional assemblage. This assemblage cannot be disentangled from its larger normative and political context without considerable analytic loss. And it reveals its inner working less by the application of an abstract, theoretical lens than by granular, retail inquiries into the working dynamics of discrete policy questions.

interests most likely to have “a significant advantage in commanding the legislative agenda compared to those favored by an alternative interpretation”).

³⁶³ See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, J., dissenting) (referring to the separation of powers as a “sacred” principle of the Constitution).

APPENDIX: THE WIKILEAKS FILES AND
OTHER DATA ON GUANTÁNAMO

This Appendix details the three sources of data about policymaking at Guantánamo employed in this Article.

A. *Wikileaks*

On April 29, 2011, the Wikileaks organization disclosed 765 classified “detainee assessments”—one for all but about fourteen detainees held at the Cuban base.³⁶⁴ These documents were dated between 2002 and 2009, and were written by intelligence analysts within the military Joint Task Force (JTF) responsible for counterterrorism detention operations at Guantánamo.³⁶⁵ Although widely varying in length, detail, and date of production, almost every detainee assessment contains a narrative of the reasons that the government credited for detaining that individual Guantánamo detainee.³⁶⁶ The narratives pick out certain acts and affiliations of the individual detainee as relevant to the security risk posed by the detainee and to his intelligence value.³⁶⁷ In effect, the assessments provide prima facie evidence of the specific factual predicates used for decisions to detain (or release) an individual. Most assessments contain ordinal risk and intelligence values on a four-tier scale.

Although these assessments are not self-authenticating, there is reason to believe they provide a unique snapshot of the government’s reasons for individual detention decisions. First, the government treated the assessments as classified documents. The Department of Justice initially instructed the private counsel who represented detainees at the Cuban base in habeas proceedings that the assessments were classified, and thus could not be viewed.³⁶⁸ Second, the government prosecuted the leaker, Private Chelsea Manning, on charges of having shared classified material, including the assessments, with Wikileaks.³⁶⁹ Third, of the six news publications across four

³⁶⁴ Charlie Savage et al., *Classified Files Offer New Insights into Detainees*, N.Y. TIMES: GUANTÁNAMO FILES (Apr. 24, 2011), <http://www.nytimes.com/2011/04/25/world/guantanamo-files-lives-in-an-american-limbo.html> [<https://perma.cc/UC8E-JUFG>].

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ Scott Shane, *Guantánamo Detainee’s Lawyer Seeks a Voice on WikiLeaks Documents*, N.Y. TIMES, April 28, 2011, at A16. More than a month later, the Justice Department relented and allowed detainees’ counsel to view the assessments under the same conditions in which other classified information could be viewed. Charlie Savage, *Lawyers for Detainees Allowed to See Leaked Files*, N.Y. TIMES, June 11, 2011, at A8.

³⁶⁹ Charlie Savage, *Soldier Faces 22 New WikiLeaks Charges*, N.Y. TIMES, Mar. 3, 2011, at A6.

nations that initially received the assessments, not one has published allegations that the documents are anything other than what they appear to be.³⁷⁰

Perhaps most strongly probative of the assessments' nature and status is the prosecution witnesses' testimony offered in the military court-martial of Private Manning.³⁷¹ Two pieces of testimony—by Jeffrey Motes, counterterrorism analyst at Guantánamo Bay, and by Colonel Morris Davis, the former commander of the JTF-Guantánamo—directly address how the assessments were produced and employed by military leaders to craft detention policy.³⁷² Together, these two pieces of testimony suggest that the assessments were government-wide distillations of all available intelligence concerning given detainees, and as such were used by JFT-Guantánamo commanders to make release decisions.

According to Motes's and Davis's testimonies, an intelligence analyst would produce a detainee's assessment by reviewing all available intelligence concerning a detainee in the Task Force's classified databases and other intelligence databases.³⁷³ The analyst would then use the resulting intelligence to draft an assessment and to reach an evaluation of an individual's riskiness and his intelligence values. These were recorded on four-tiered scales ranging from "no" to "low" to "medium" to "high." Assessments had to contain the reasons for the detainee's transfer to Guantánamo. The assessments were then peer reviewed; evaluated and reviewed by senior intelligence analysts and officers; reviewed by lawyers in the Office of the Staff Judge Advocate for legal content; and then submitted to the Deputy Commander of JTF-Guantánamo for final approval. Each assessment in net required eighty to ninety hours to produce. According to Davis, military personnel at Guantánamo prepared individual detainees assessments for "senior officials and other administration processes."³⁷⁴ Although the assessments did not contain primary source intelligence material, Davis explained that they would be used by government personnel when making decisions concerning individual detainees. For example, Davis testified, he "would look at the [assessment] . . . to get an idea of who [a detainee] was" before signing off on a transfer to another country.³⁷⁵

370 Michael Calderone, *WikiLeaks' Guantanamo Bay Documents: The Backstory on News Outlets' Race to Publish Them*, HUFFINGTON POST (June 25, 2011), http://www.huffingtonpost.com/2011/04/25/wikileaks-gitmo-documents-backstory_n_853126.html [<https://perma.cc/88EZ-9YU8>].

371 DAVID LEIGH & LUKE HARDING, WIKILEAKS: INSIDE JULIAN ASSANGE'S WAR ON SECRECY 20-31 (2011).

372 See Stipulation of Expected Testimony from Jeffrey Motes, *United States v. Manning* (June 23, 2007), <http://www.documentcloud.org/documents/716014-pe131-stipulation-of-expected-testimony-mr-motes.html> [<https://perma.cc/PY9U-GCHJ>]; see also Transcript of Trial Testimony of Col. Morris Davis at 44, 58, *United States v. Manning* (2013) [hereinafter Davis Testimony] (on file with author).

373 The following paragraph draws on the sources cited *supra* note 372.

374 Davis Testimony, *supra* note 372, at 44.

375 *Id.* at 58.

For purposes of this Article, I have downloaded, transcribed, and coded all 766 detainee assessments. I have recorded, inter alia, individual demographic details; the enumeration of specific factual grounds reasons cited for each man's detention; and the risk and intelligence classifications assigned by JTF-Guantánamo analysts from a four-point scale. Using the unique "Internment Serial Number" (ISN) contained in every assessment, I then linked the information contained in the Wikileaks documents to data about when detainees transferred in and out of Guantánamo kept by the *New York Times*.

The remaining three sources used here can be more briefly identified. First, the *New York Times* maintains a comprehensive archive of both documents and data concerning the Guantánamo detainees.³⁷⁶ A Python script was written to scrape this website for data concerning the timing of each individual detainee's entry and exit from Guantánamo. Two caveats are important here. First, the data used in this Article's analysis was last updated on November 16, 2016. Second, the data used here captures only the period of custody at *Guantánamo*. But many detainees were either in custody before their transfer to the Cuban base, or remained in custody in the hands of a foreign state thereafter. Unfortunately, there is no public-domain data that captures this additional custody. Hence, this study relies on the available data, and should be read accordingly.

B. *Westlaw*

Second, using the Westlaw database of opinions from the District of Columbia Circuit and district courts, I finally created a database of all published and unpublished resolutions of habeas corpus petitions by either district courts or the Circuit Court in the wake of the *Boumediene* decision (n=68). I have coded these decisions by their outcome (i.e., whether the petition was denied or granted, or alternatively whether the case was ongoing), and associated them with detainee assessments by matching ISNs. In combination, these three unique data sets allow unprecedented longitudinal analysis of the institutional trajectory of the Guantánamo detentions.

C. *PACER*

Finally, I wrote code to search the federal courts' PACER to identify all cases filed in the federal district courts in Washington, D.C. by Guantánamo detainees. I further examined documents in each docket to identify ISNs related to each individual petitioner. Where these underlying documents did

³⁷⁶ See *A History of the Detainee Population*, N.Y. TIMES: THE GUANTÁNAMO DOCKET (Oct. 20, 2016), <http://projects.nytimes.com/guantanamo> [<https://perma.cc/7P29-VP8N>].

not contain ISN data, I cross-referenced docket numbers against lists produced by the government of resolved cases that relate docket numbers to ISNs. In forty cases, this did not yield a matching ISN. In those cases, I directly contacted petitioners' counsel as listed on the docket to obtain ISN data. In all but seven cases, this generated ISN data. Treating each petitioner in each docket as a single observation, this process generated 466 observations. I was unable to identify ISNs for seven individual petitioners. Once petitioners who filed more than one petition were accounted for, I identified 408 detainees who filed habeas petitions.

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