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ESSAYS

THE POLITICAL PATH OF DETENTION POLICY

Aziz Z. Huq*

No one doubts that the choice of instruments for detaining individuals suspected of terrorism presents hard choices for legislators, executive officials, and judges.¹ All concerned bring to the problem not only strong and divergent moral intuitions, but also quite distinct views about the constraints imposed by the Constitution and international law on the government’s power to lock up its own citizens and noncitizens. Making the problem even more resilient to consensus, few participants in the debate have extensive empirical data about the downstream effects of detention policy choices.² Uncertainty about specific cases is compounded by the rapid changes in al Qaeda’s modus operandi and organizational structure, changes that will only accelerate in the wake of Osama bin Ladin’s death.³ Facing seemingly intractable normative and empirical differences, jurists have responded by changing the analytic focus. Rather than asking what policies are justified on empirical and normative grounds, they instead ask which institution should take the lead in crafting counterterrorism policy.⁴ Employing that institutional lens, they transform a debate about “first order” detention policy choices into a debate about “second order” choices of institutional design—a debate about “the legal institutions that are used to implement first order policy goals.”⁵

* Assistant Professor of Law, University of Chicago Law School. Thanks to the Frank Cicero, Jr. Faculty Fund and to the editors of the American Criminal Law Review for excellent editorial aid and suggestions. © 2012, Aziz Z. Huq.


² To pick but one example, the question of recidivism after terrorism-related detention is empirically fraught. See, e.g., Peter Bergen & Katherine Tiedemann, Guantanamo: Who Really “Returned to the Battlefield?”, New AM. Found. (July 20, 2009), available at http://counterterrorism.newamerica.net/publications/policy/guantanamo_who_really_returned_battlefield (providing statistics on the total number of detainees held at Guantánamo, the number of detainees remaining at Guantánamo as of July 1, 2009, and the number of detainees expected to engage in terrorist activities after release). Another difficult empirical question that has received almost no attention is whether the Guantánamo detentions have had a criminogenic effect.

³ For an overview of recent developments in al Qaeda, see Fawaz Gerges, The Rise and Fall of Al-Qaeda (2011).

⁴ For examples, see the sources cited infra note 7.


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Shifting the frame in this fashion has the important consequence of changing the tools available for answering hard questions of detention policy. Addressing matters of institutional choice, courts and scholars can leverage a rich vein of constitutional thinking about the separation of powers. The separation of powers provides a lens for analyzing second-order questions of detention law because it highlights institutional characteristics of the executive and the legislature that are often thought to be relevant to detention policy, such as expertise, speed, deliberation, and attention to rights-related externalities. There are two ensuing positions. On the one hand, some argue that the executive should take the lead on security policies because of its comparative institutional advantages in acting with speed and on the basis of a broad array of information sources (both public and classified). Others, by contrast, argue that it is both legally necessary and normatively desirable to have policies formulated through congressional deliberation because of the risk that the executive acting alone will behave too precipitously at the expense of individual rights. Participants in the debate, that is, agree on how to characterize the executive and Congress, but they disagree as to which institutional characteristics are most at a premium in detention policy.

This brief Essay uses the trajectory of detention law and policy to cast doubt on the utility of such a separation-of-powers lens. I offer here two reasons for doubting the perspicacity of these types of "institutionalist" arguments. First, I suggest that the intellectual heritage of the separation of powers is plural and contested. It is not possible therefore simply to invoke constitutional structure as a resolving device in debates on security policy. The analyst needs some indepen-

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6. Cases that have turned on separation-of-powers logic include: Boumediene v. Bush, 553 U.S. 723, 725 (2008) (arguing that habeas corpus "is designed to protect against cyclical abuses [during emergencies]" by ensuring that "except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of government’"); Hamdan v. Rumsfeld, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring) ("Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis."); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (discussing a U.S. citizen’s right to judicial review of the grounds for his military detention); Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) ("Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law.").

7. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 256 (2007) ("There is no reason to think that the executive would benefit from an excessive detention or conviction rate, or that political constraints would permit the executive to implement such a preference in any event."); Daphne Barak-Erez, Terrorism Law Between the Executive and Legislative Models, 57 AM. J. COMP. L. 877, 877 (2009) (noting the pervasively offered “choice between promulgating anti-terrorism measures through the executive branch [or] ... through the legislative branch”); Harold Hongju Koh, Setting the World Right, 115 YALE L.J. 2350, 2378 (2006) (endorsing “an approach guided by the Constitution’s requirement that all three branches of government meaningfully participate in significant war making decisions”); Samuel Issacharoff & Richard H. Pildes, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 THEORETICAL INQ. L. 1, 44-45 (2004) (making a descriptive claim that federal courts ensure “that the right institutional process [i.e., one involving Congress] supports the tradeoff between liberty and security at issue”); Samuel Issacharoff, Political Safeguards in Democracies at War, 29 OXFORD J. LEGAL STUD. 189, 192 (2009).

dent theory to decide how to interpret the separation of powers to resolve present policy debates. That exogenous theory, in my view, tends to do the analytic labor, with the ‘separation of power’ label merely supplying a conclusory label at the close of the argument. Second, the theory that often implicitly animates judges’ and scholars’ separation-of-powers claims is one of comparative institutional competence. But tracing the recent trajectory of detention policy in Congress, the executive, and the federal courts, I suggest that this history indicates that it has not been comparative institutional competence, but rather brute partisan politics, that has shaped policy’s path. To determine the future trajectory of policy, it is therefore less helpful to ask “which institution” and more helpful to ask “which party.” More specifically, it is useful to consider how calculations of electoral risk for legislators and occupants of the White House shift with partisan affiliation and circumstances in ways that conduce to certain policies.

Because I have written elsewhere skeptically about institutionalist arguments in the national security law context, it is incumbent on me to explain at the threshold how the arguments presented here are distinct from and supplement that other work. I have argued elsewhere that it is transsubstantive dynamics cutting across doctrinal barriers, not any logic peculiar to national security or counterterrorism, that best explain the behavior of courts responding to post-9/11 policies.9 In a forthcoming article, I also draw on empirical and theoretical evidence about the political economy of national security policy-making to suggest that principles of structural constitutionalism—abstract conceptions of the separation of powers—do not provide a reliable guide for judges of the efficacy or tailoring of national security policies.10 Unlike those articles, this Essay is not focused on judicial behavior. Nor does this Essay rely on evidence from the political economy literature. This Essay instead focuses first on the legal theory of the separation of powers, and then provides a historical case study to show how that theory’s predictions do not find support in the observed outcomes of detention policy. These are arguments, so far as I can tell, that have not been aired elsewhere in the literature.

I.

Scholars and judges alike presume that the intellectual heritage of the separation of powers supplies a foundation on which to judge the merits of today’s detention policies.11 Rather than asking whether a policy is wise, they imply, we should ask


10. See Aziz Z. Huq, Structural Constitutionalism as Counterterrorism, 100 Cal. L. Rev. (forthcoming 2012) (developing both political economy and political psychology reasons for doubting the value of structural constitutional heuristics for judges).

whether it has been formulated by the right institution.\textsuperscript{12} On the one hand are those who favor security and tend to believe that the executive should take the lead. On the other we find those with a more libertarian bent, who tend to believe that Congress should play a larger role. On both sides, there is a tendency to invoke the Constitution’s separation of powers as if that principle could end the debate.\textsuperscript{13}

Rather than canvassing the rather large field, I highlight here just one especially important example of this type of institutionalist logic. Justice Kennedy’s opinion for the Court in \textit{Boumediene v. Bush} explicitly and repeatedly invoked a separation-of-powers logic for its holding that the review of Guantánamo detention decisions be routed through the federal district courts.\textsuperscript{14} To support this conclusion, Justice Kennedy argued that the Suspension Clause—or rather, the jurisdiction guaranteed against displacement by that Clause—“is designed to protect against cyclical abuses [during emergencies]” by ensuring that “except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of government.’”\textsuperscript{15} Hence, “the protection of individual [liberties]” was to be achieved by vindicating the “separation-of-powers scheme.”\textsuperscript{16} The Court’s logic here is echoed by many commentators, who follow Justice Kennedy’s assumption that the constitutional tradition of the separation of powers directs a resolution of the currently divisive problematics of detention policy.\textsuperscript{17}

A threshold problem with this leap from immanent constitutional logic to policy outcomes is that the separation of powers is not a simple concept. On its own, talismanic invocation of the separation of powers does little or no meaningful work because that tradition is diverse and fragmented. It is not constitutional tradition, but pragmatic and consequentialist notions of institutional competence that do the work in Justice Kennedy’s argument and its ilk. The “separation of powers” is thus a legal label applied to the end result of an instrumental analysis.

Even at the time of the Founding, the phrase “separation of powers” had already accumulated “many meanings.”\textsuperscript{18} At a minimum, the English experience of

\textsuperscript{12} See, e.g., Barak-Erez, \textit{supra} note 7, at 878–79 (evaluating the “significance of the choice between promulgating anti-terrorism measures through the executive as opposed to doing so through the legislative branch”).

\textsuperscript{13} For example, Dean Harold Koh speaks for many when he says, “In a war on terror, all three branches of government must continue to play their constitutionally assigned roles.” Koh, \textit{supra} note 7, at 2379. That is, a return to the legally correct distribution of powers will necessarily yield desirable policy outcomes.

\textsuperscript{14} 553 U.S. 723, 742 (2008).

\textsuperscript{15} Id. at 725 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)); cf. Fay v. Noia, 372 U.S. 391, 401 (1963) (“It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely . . . .”).

\textsuperscript{16} Boumediene, 553 U.S. at 743.

\textsuperscript{17} See, e.g., Stephen I. Vladeck, Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers, 84 \textit{Notre Dame L. Rev.} 2109, 2115 (2009) (“[D]oes the separation of powers have a meaningful contribution to make to our understanding of how the Constitution limits the power of the political branches to deny access to the courts? . . . I suggest that the answer is yes.”).

\textsuperscript{18} GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 8 (1997) (“[B]y the last quarter of the eighteenth century, no single doctrine using the label ‘separation of powers’ had emerged that could command
"mixed" government and the sharper separation of governmental functions limned and endorsed by the French political thinker, Charles-Louis de Secondat, baron de La Brède et de Montesquieu, supplied two mutually inconsistent "paradigms" for thinking about the concept.19 Historians have identified five subsequent and distinct streams in early American thinking about the separation of powers.20 The Framers did not owe sole allegiance to any one single strand.21 Those who met at Philadelphia in 1787 did not converge on a sole design goal that would have enabled them to select amongst separation of power conceptions. They divided, for example, on whether a "modern European war-making state" provided a plausible model for the new Republic.22 And with the exception of the 1780 Massachusetts Constitution—which was not even followed as a template—the Framers had few examples of how to implement the separation of powers in the form of a legal text.23 As a result, the Constitution's wording and enacting context can oxygenate starkly divergent views about the division of effectual power between Congress and the executive. Circumstantial evidence from the Founding era—such as the Federalist Papers and the Pacificus-Helvidius debate of 179324—perhaps unsurprisingly supplies further ample ammunition for both sides.

Moreover, there is continuing disagreement about the core purpose of the Constitution's separation of powers. In 1996, for example, Justice Kennedy could enumerate in one (quite long) breath a litany of diverse, divergent goals for the separation of powers: "[d]eterrence of arbitrary or tyrannical rule," a government general assent."); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 151 (1969); see also Martin S. Flaherty, The Most Dangerous Branch, 105 YALE L.J. 1725, 1764–65 (1996) (discussing the influence of Locke and Montesquieu at the time of the Founding).


20. See WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 127–28 (1965) (observing that the separation of powers has been justified as a path to greater government efficiency, laws made in the public interest, the impartial administration of the law, accountability, and balance.)

21. See RAKOVE, supra note 19, at 250 ("In reconstituting the executive, Americans paid homage to Montesquieu's principle of separation without allowing his (or Locke's) defense of prerogative to outweigh the lessons of their own history."). Some go further and suggest that "[t]he doctrine of the separation of powers had clearly been abandoned in the framing of the Constitution." FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 258 (1985); accord CASPER, supra note 18, at 22 ("No consensus existed as the precise institutional arrangements that would satisfy the requirements of the doctrine.").

22. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 32 (2010); see also CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 169 (1923) ("The dogma of separation of powers and that of checks and balances ... were not the determining influences [on the design of the presidency].")

23. Cf. MASS. CONST. art. XXX (1780) ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them ... to the end it may be a government of laws and not of men."); see also Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (discussing that provision).

“that is both effective and accountable,” and “responsive and deliberative lawmaking.”

Not all of these goals can be achieved simultaneously. Most obviously, “effective” government, especially in crisis moments, may not be “deliberative.” And accountable government may act in “arbitrary” ways depending on the nature of public preferences to which government is accountable. Achieving Justice Kennedy’s different goals would further entail empowering different institutions in inconsistent ways. Accountability, for example, might be best achieved through Congress, since voters have more bites at the electoral apple. But effectiveness might be best achieved by shifting authority from Congress to the executive, which may have less accountability, especially in a President’s second term. As a result, a multipurpose separation of powers does not provide an operational compass to orient policymakers in a single, steady direction today—at least not standing on its own.

Compounding confusion, judges and commentators also part company on the methodology conformable to separation-of-powers problems. Some take a formalist approach, identifying three distinct forms of government authority and allocating them to three textually distinct branches. Formalists typically favor a clear separation between the branches in the name of “vigor and accountability.”

On another side are functionalists, who find fewer clean resolutions in the constitutional text and instead ask whether a challenged arrangement destabilizes some pragmatic concept of “balance” between the branches. This methodological divide multiplies possible permutations of separation of powers. The latter can now be invoked in favor of different branches, using different interpretative methodologies, in the name of inconsistent foundational principles.


26. Consider, for example, the debate as to whether democracy promotes economic growth better than dictatorship. See, e.g., DENNIS C. MULLER, PUBLIC CHOICE III, at 423 (2003) (“Although some studies have established a significant positive link between measures of political freedom and growth... others have found that authoritarian regimes have better growth records...”).

27. Further, to the extent committee assignments provide the public with a way of discerning the particular areas of responsibility of their legislators, in contrast to the bundled tasks of the presidency, voters may be better able to express views on policy in congressional elections.


The net result of these abundant confusions is that the constitutional tradition of the separation of powers cannot, standing alone, solve the institutional design problem in detention policy. Naked invocations of constitutional principle are simply no response to the hard problems in detention law because they are necessarily under-theorized. A theorist needs more than a tradition to answer presentist policy questions. She also needs a method of constitutional interpretation and a set of normative priors about the values that government is supposed to pursue in the national security domain. Those values must be derived from an unexplicated judgment about what institutional qualities matter in the security policy domain and how resources should be allocated to avoid different sorts of risks (for example, in the detention domain, between the risk of inaction on the one hand and the harm from a false positive on the other).

Rather than a freestanding source of elucidation, the separation of powers instead supplies an idiom for jurists and judges to frame arguments about democratic accountability or institutional competence. It is, so to speak, the way we frame our questions, not a source of our answers. Rather than constitutional principle, what are doing the work in this literature are ideas of comparative institutional competence—notions of which branch does a better job in deliberating on hard policy questions or acting expeditiously.

II.

Notwithstanding the plurality of separation-of-powers conceptions, it is possible that the branches have played stable roles in the drama of detention that reflect durable and entrenched institutional competences. It may be that the executive has indeed acted with dispatch and deep expertise as a historical and contemporary matter, while Congress has proceeded with deliberation and due regard for potential executive overreach and harm to individual liberties. If so, this would suggest that the separation of powers usefully stands in for the logic of comparative constitutional competence, which should, in any event, drive the second order design of detention policy.

This Part pursues the question of whether the path of post-9/11 detention policy corroborates those institutional competence arguments. I suggest that the path of detention law does not provide evidence of an efficient executive and a deliberative, rights-respecting Congress. Supporters of both the presidency and the legislature, to the contrary, should find ground for reconsideration of their partis pris in the known path of recent detention policy and law. Rather than an institutional logic, I argue, detention policy reflects the naked politics that motivates elected officials in both branches to act in ways unfounded by institutional role expectations.

I use as an example in this Part the trajectory of the Guantánamo detentions,
which began in early 2002. Those early detentions were quickly challenged through habeas corpus actions in the federal courts, which in turn were initially dismissed on jurisdictional grounds. In 2004, the Supreme Court affirmed the availability of statutory jurisdiction. Congress, however, responded by eliminating habeas jurisdiction by statute and channeling cases into a new jurisdictional forum in the United States Court of Appeals for the District of Columbia Circuit. Congress reaffirmed its jurisdictional strip in 2006. Limitations on habeas, however, were invalidated two years later in the *Boumediene* decision.

What does this (rather abbreviated) history tell us about the institutional competences of the President and Congress respectively? Consider, first, the role of the executive. As a threshold matter, the rapid early growth in the Guantánamo detainee population may well have been a function of the decision by the Bush Administration not to convene battlefield hearings. These have been used in other conflicts as recently as Vietnam and the First Gulf War to screen those pulled into the detention system. Rather than homing in on true threats, the executive’s post-9/11 approach to detention was characterized by disregard of what, from a military perspective, were elementary sorting protocols that had been routinely employed where the tug of military exigency was arguably greater than in the Afghan theater. As a result, initial detentions included a variety of fighters and those swept up accidently by either American or allied forces. Having failed to sort “wheat” from “chaff,” the Administration nonetheless insisted vociferously and repeatedly that it had captured only dangerous individuals—the worst of the worst. No explanation has ever been offered for the decision to abandon sorting protocols under circumstances in which that decision would inevitably produce a massive spike in erroneous detentions (and thus a spike in detention costs for the government). And no explanation has ever been proffered for the iterative public statements by the government to the effect that the Guantánamo detainees were uniformly dangerous. These failures of explanation are especially baffling since it

37. *See Boumediene*, 553 U.S. 734.
39. *Id.*
40. *Id.* at 34 (noting the finding of one study that “only 8 percent of the detainees at Guantánamo were characterized as al Qaeda fighters and 40 percent had no definitive connection with al Qaeda” based solely on government data).
41. *Id.* at 33–35.
was the government’s own decision not to sift captures for false positives that ensured that its own claims about dangerousness would predictably be misleading.42

Over time, the Bush Administration would release more than three-quarters of the detainees at the Cuban base.43 This was, in effect, implicit acknowledgement that its threshold claims had been false, and, as a correlative, that the decision to forego the (legally mandated) battlefield sorting measures unwise. It was also a sub silentio admission that at the very moment at which the government security-related resources were in peak demand, the executive had squandered those resources in an effort to generate a visible detainee population that provided tangible proof to the American public that effective action was being taken against al Qaeda. And it had done so in a way that would, in time, predictably impugn the moralistic soft power of U.S. counterterrorism. Thus, if the failure to engage in battlefield screenings and the bold (and false) rhetoric of Guantánamo in the early days is any guide, detention policy in exclusively executive hands is driven less by expertise and more by the need to express a political, and even partisan, point.44

If the rise of the Guantánamo detention bespeaks political motives, so too do its decline and its recent stabilization. Four years after founding the Cuban prison, the Bush Administration started a slow but steady stream of releases that had the effect of thinning its detainee population.45 Between 2006 and 2008, exactly 120 detainees were released annually from the base.46 One might account for this puzzling pattern as follows: By this point, Guantánamo had served its political purpose. Rather than an asset illustrating the Administration’s toughness, it had become a public liability. Each remaining detainee was potentially an embarrassing court proceeding and perhaps a humiliating setback for the rhetoric of executive competence. Because the Court’s opinion in Rasul v. Bush47 deepened

42. It is tempting to see the public statements as an effort to compensate for the Administration’s abject failure to mobilize against al Qaeda in early 2001. See Peter L. Bergen, The Longest War: The Enduring Conflict Between America and Al-Qaeda 36–50 (2010) (detailing the federal government’s failure to prioritize the risk posed by al Qaeda in the months leading up to the September 2001 attacks).


44. To put the point differently, notice that the Bush Administration used military detention domestically in a way that was remarkably sparing given the historical precedent. Unlike the World War II era, there were only two cases of domestic enemy combatant detentions. See Al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008) (per curiam), rev’d sub nom. Al-Marri v. Spagone, 129 S. Ct. 1545 (2009); see also Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002), aff’d in part, rev’d in part sub nom. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), rev’d, 542 U.S. 426 (2004). The decision not to aggressively use military detention domestically is at least suggestive of the political delicacy of this issue.

45. Huq, Habeas, supra note 43, at 385 (presenting data showing steady stream of releases from the base even prior to judicial involvement).

46. Id.

the potential for the exercise of such compromising jurisdiction, the government moved to empty the base.\textsuperscript{48} Indeed, it was only with the advent of the Obama Administration—which did not face the same negative publicity costs from continued erroneous detentions as did the Bush Administration—that the stream of releases dried up.\textsuperscript{49}

Contrary to prevailing wisdom, the political calculus for the Obama Administration cut in favor of less—and not more—releases notwithstanding its liberal credential. Unlike the Bush Administration, the Obama Administration does not pay a political price from a judicial decision showing that it erred in its threshold detention decisions. Hence, embarrassment does not provide a strong motive for the Obama Administration to clear the Cuban base. Moreover, erroneous releases are more costly for the Obama Administration than they were for the Bush Administration. The behavior of the two administrations is remarkably consistent with these political motivations\textsuperscript{50}: The Bush Administration, which faced little political criticism for being soft on security, found it politically costless to release detainees once it had proven its toughness on terrorism—and hence did so at a predictable pace.\textsuperscript{51} By contrast, the Obama Administration, from its inception, took political heat for being lax on security and for the possibility of detainees returning to the fight.\textsuperscript{52} Consequently, it has faced more of a downside political risk from release decisions—and, as a result, dramatically lowered the rate of release despite its liberal inclinations. Hence, the rate of releases from Guantánamo dropped precipitously between the Bush and the Obama Administrations.\textsuperscript{53}

More telling, John O. Brennan, the Assistant to the President for Homeland Security and Counterterrorism, has candidly explained the Obama Administration’s inaction on Guantánamo by saying that “political support for [the base’s] closure waned.”\textsuperscript{54} This suggests that the Administration faces little pressure even

\textsuperscript{48} Huq, \textit{Habeas}, supra note 43, at 404 (charting the timing of releases from Guantánamo in the period from 2002 to 2009); \textit{id.} at 405 (arguing that the Court’s intervention in the \textit{Rasul} case catalyzed changes to the aggregate population).

\textsuperscript{49} \textit{Id.} at 385.

\textsuperscript{50} My claim here is not strongly causal. That is, I am not claiming to have direct evidence of the effects of crudely political motivations.

\textsuperscript{51} Obviously, there could be strategic costs to a false release.

\textsuperscript{52} \textit{See}, e.g., \textit{Former Guantánamo Detainee Killed in Afghanistan}, \textit{Wall St. J.} (Sept. 4, 2011), http://online.wsj.com/article/SB100014244065386878700045766550391937381316.html?mod=googlenews-wsj (illustrating the risks involved in ending the Guantánamo detention system by describing the reentry of a former detainee into al Qaeda operations).

\textsuperscript{53} Huq, \textit{Habeas}, supra note 43, at 403.

from its core supporters on detention issues.\footnote{Although the Obama Administration gained much support for change on security-related policy from the legal community, my impression is that this support was often framed in terms of a return to legality, and was only ever thinly committed to substantive changes respecting the position of particular detainees. That is, liberal lawyers' commitment was to process rather than people, which made the scope of demanded post-election change shallow.} Hence, by the Obama Administration's own frank admission, it is politics—not an exercise of institutional competences—that best explains its detention policy.\footnote{Indeed, the Obama Administration was initially open to the idea of transfers. \textit{See, e.g.}, Exec. Order No. 13,492, 74 Fed. Reg. 4898, 4899 (Jan. 22, 2009) (vesting the Secretary of Defense and other participants in the detainee review process with determining "whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release").} This suggests the force of politics is not easily reducible to the mere policy preferences of the President \textit{du jour}. Rather, trends in detention policy reflect a calculus of electoral risk.

While the volume of detention and the rate of releases has veered up and down, other elements of detention policy that receive relatively limited political attention because of their technical nature have proved to be remarkably durable. They have, that is, remained constant across the Bush and Obama Administrations. Consider in this regard the legal category of "enemy combatant," which has been used to delimit the class of persons who can be detained by the military in the course of counterterrorism operations.\footnote{See Ahmed v. Obama, 613 F. Supp. 2d 51, 54 (D.D.C. 2009) (quoting the Obama era 2009 definition); Parhat v. Gates, 532 F.3d 834, 838 (D.C. Cir. 2008) (quoting Combatant Status Review Tribunals ("CSRT") for the Bush era 2004 definition); \textit{see also} Memorandum from Paul D. Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (establishing the CSRT and providing the 2004 definition).} That definition has remained stable across two Administrations of different political complexions.\footnote{See, \textit{e.g.}, Issacharoff \\& Fildes, \textit{supra} note 7, at 44–45 (observing that where the executive has acted against legislative policy or without legislative approval, the judiciary has invalidated the action or subjected it to close scrutiny).} This may be a result of a relative absence of political pressure to expand (or, less likely, contract) the definition of "enemy combatant" (a relatively technical point of law). This leaves the subject to technocratic determination or interagency politicking. Hence, the quality of executive-driven detention policy may change fundamentally with variance in the strength of political scrutiny to a policy question.

So much for the executive. What of Congress? The separation-of-powers literature suggests that Congress should have been a deliberative brake on precipitous executive branch action that infringes on basic rights, whether for good or for ill.\footnote{For an account of the public debate, see Charlie Savage, \textit{Developments Rekindle Debate over Best Approach for Terrorist Suspects}, N.Y. TIMES, Oct. 13, 2011, at A14.} Congress’s role may be especially important in crafting jurisdictional channels. A central question in public debates around detention policy is which forum will review detention decisions.\footnote{\textit{See, e.g.}, Issacharoff \\& Fildes, \textit{supra} note 7, at 44–45 (observing that where the executive has acted against legislative policy or without legislative approval, the judiciary has invalidated the action or subjected it to close scrutiny).} It has been suggested recently that

Congress plays an important role by providing a "structural" defense of federal court jurisdiction.61 Such arguments reflect the comparative institutional claim that Congress performs better than the executive as a protector of rights and as a friction on excessively speedy policy-making.

In reality, congressional involvement in detainee matters has been erratic and largely animated by narrow-gauge, short-term partisan concerns. As a threshold matter, Congress has consistently failed to speak clearly to the hard substantive questions of detention law, such as the scope of detention authority. The scope of lawful detention authority respecting alleged members of terrorist organizations was for a decade grounded on an opaquely worded 2001 statute.62 Congress did not revisit the scope of detention authority during that decade, despite the changing demands and contours of counterterrorism policy.63 To the extent that recent legislation just enacted at the time of this writing contains revisions to the statutory scope of detention authority, legislators may have initially been motivated by a dispute between the Departments of State and Defense over the application of the 2001 statute to counterterrorism operations in Yemen and Somalia.64 Rather than a source of careful and cautious deliberation, then, Congress has persistently passed the buck to the executive and the judiciary on the scope of detention authority.65 This is consistent with political science models that predict Congress will try to avoid hard questions of policy, preferring instead to legislate in ambiguous terms that allow all concerned legislators to claim credit and avoid blame.66

61. See generally Tara Leigh Grove, The Structural Safeguards of Federal Jurisdiction, 124 HARV. L. REV. 869 (2011) (arguing that the veto gates of bicameralism and presentment make it very unlikely that Congress will strip away jurisdiction, and that they hence provide "structural safeguards" to Article III jurisdiction).


63. To be sure, there have been some proposals to amend the scope of detention authority. See, e.g., Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, H.R. 4892, 111th Cong. §§ 4, 6(10) (2d Sess. 2010) (defining a category of "unprivileged enemy belligerent"). The Obama White House has opposed these proposals on the ground that they would have little operational effect. See Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy on H.R. 1540—National Defense Authorization Act FY 2012 (May 24, 2010), http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf ("The Administration strongly objects to section 1034 which, in purporting to affirm the conflict, would effectively recharacterize its scope and would risk creating confusion regarding applicable standards."). The proposals, thus, are best seen as partisan theatries rather than responses to policy challenges on the ground.


66. See DAVID EPSTEIN & SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 197–98 (1999) (arguing Congress will always delegate authority to avoid political costs).
Congress's main intervention in detention policy has taken two forms. First, it has enacted jurisdiction-stripping measures targeting habeas corpus litigation related to Guantánamo Bay.\textsuperscript{67} Second, it has enacted a raft of post-2008 measures meant to reproduce the effect of jurisdiction-stripping without running afoul of the Suspension Clause.\textsuperscript{68} After the \textit{Boumediene} Court rejected jurisdiction-stripping in habeas cases,\textsuperscript{69} the 110th Congress curbed executive discretion to release detainees, including those found innocent of any connection to terrorism.\textsuperscript{70} In the 111th Congress, legislators enacted further restrictions on detainee transfers.\textsuperscript{71} A consequence of these measures is that physical release is a distant prospect even for detainees at Guantánamo who have already been cleared for such release by the military.\textsuperscript{72}

Congress has thus assuredly not provided a structural safeguard for habeas or other core rights. It has not done so because it is not in legislators' political interest to play this role. Just as in other domains of social order maintenance where the safety of the many is weighed against the liberty of the few (e.g., crime-related policy), congressional intervention has routinely listed toward the preservation or even the expansion of detention authority.\textsuperscript{73} Detainees and their fervent supporters make up a trivial portion of electorate.\textsuperscript{74} It seems likely that they are far outnumbered by those who wish to see government err on the side of excess detention (especially if those detained have different complexions, faiths, or passports). This dynamic is visible in the recent restrictions on detainee transfers.


\textsuperscript{68} This demonstrates that the rich scholarly debate on jurisdiction-stripping omits an important fact: Congress can achieve the same result as jurisdiction-stripping by altering either substantive statutory rights or the remedial entitlements for constitutional interests. It may be the availability of these substitutes, and not any constitutionally infused norm, that has made jurisdiction-stripping so infrequent.


\textsuperscript{71} Michael John García, Cong. Res. Serv., Guantánamo Detention Center: Legislative Activity in the 111th Congress 18 (2010).

\textsuperscript{72} In addition, the D.C. Circuit has proved categorically set against any releases. See Peter Finn & Del Quentin Wilber, Guantánamo Detainees See Legal Progress Reversed, Wash. Post (June 24, 2011), http://www.washingtonpost.com/national/national-security/guantanamo-detainees-see-legal-progress-reversed/2011/06/21/AGr71jH_story.html.

\textsuperscript{73} Cf. James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe 43–57 (2003) (making a similar point about criminal justice).

\textsuperscript{74} Cf. CNN, CNN Poll: Big Shift on Closing of Guantánamo Bay Facility, CNN Pols. (Mar. 29, 2010, 10:18am), http://politicalticker.blogs.cnn.com/2010/03/29/cnn-poll-big-shift-on-closing-of-guantanamo-bay-facility/ (reporting that less than forty percent of Americans believe the facility in Cuba should be closed). Like many such polls, this one must be taken with a pinch (or a handful) of salt.
Individual legislators openly express "NIMBY" fears about the possibility of trials or confinements of former detainees in their districts. The combination of legislators' local allegiances and their national mandate has a deleterious effect. From the legislators' perspective, a status quo that is costly and suboptimal for the nation may nonetheless be preferable to change that may land them in electoral peril. So long as transferring detainees to the United States is a plausible policy option—and no other option may be feasible for those found to be innocent but whom no other nation will take—Congressional sensitivity about the placement of detainees renders convergence on an optimal transfer policy unlikely.

In short, neither the behavior of Congress nor that of the executive on detention matters is well explained in terms of the standard institutional competence predicates of the separation of powers. The deliberative Congress and the omnicompetent executive are mere figures in the fecund imagination of the constitutional scholar. They are not empirical regularities. Parochial politics routinely overwhelms institutional considerations on both ends of Pennsylvania Avenue. The path of detention policy can thus better be explained by the ebb and flow of political forces acting directly on elected officials. So even if separation-of-powers theory yielded stable answers, it would be to no avail. Politics, not any institutional logic, is the best predictor of policy change.

75. "Not in my backyard." For example, legislators have expressed alarm that concededly innocent Uighur detainees might be transferred into the United States, despite the fact that even the government does not see them posing a risk. Peter Finn, Nominee for Counterterrorism Chief Is Grilled on Guantanamo Bay Detainee Plans, WASH. POST (July 26, 2011), http://www.washingtonpost.com/national/security/nominee-for-counterterrorism-chief-is-grilled-on-guantanamo-bay-detainee-plans/2011/07/26/glQAIfuqWbI_story.html?nav=emailpage.


77. Cf. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 160-61 (2011) (noting the potentially perverse effects of political localism in the federal criminal law context). Stuntz more generally favors increased local control of policing for reasons that are not relevant to the analogy I draw here.

78. By contrast, were one to reconstruct the separation of powers around the presumption that Congress is routinely craven while the executive engages in security charades, one might approximate better the observed play of institutional forces.


80. It is for this reason that I am skeptical of the turn to emergency politics or the analytic framework of "states of exception" to explain the development of post-9/11 detention policy. See generally GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005). That analytic framework pays too short shrift to the mundane operation of politics in supposedly extraordinary times.
CONCLUSION

Many scholars follow Justice Kennedy's lead in valorizing the separation of powers as a useful lens for the analysis of second-order questions of detention law. I have offered here two reasons for skepticism of this analytic move. First, I have suggested that the tradition of the separation of powers is too varied to provide analytic grist on its own. The analyst's unstated assumptions about comparative institutional competence do the real work, standing apart from any coherent constitutional tradition. Second, analyzing Guantánamo detention policy, I have argued that politics, not institutional competence, best explains the path of detention policy. If the ordinary ebb and flow of democratic politics tugs on and shapes detention policy, then the separation of powers provides no template for understanding, let alone directing, the path of detention law.