

## WHAT GOOD IS HABEAS?

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*This essay examines empirically the effect of the Supreme Court's 2008 judgment in Boumediene v. Bush. Boumediene marked a sharp temporal break because it introduced a new regime of constitutionally mandated habeas jurisdiction for non-citizens detained as "enemy combatants" at Guantánamo. The Boumediene Court envisaged habeas jurisdiction as serving a twofold purpose. First, it claimed habeas vindicates physical liberty interests in line with a longstanding historical understanding of the writ. Second, the Court viewed habeas as a mechanism to generate or preserve legal boundaries on executive discretion. This essay gathers empirical evidence of the opinion's effect up to January 2010 to determine whether these goals were fulfilled. While the data is in many respects ambiguous, it suggests the effect of Boumediene on detention policy was not as significant as many believe. For example, less than four percent of releases from the Cuban base have followed a judicial order of release. Even in those cases, it is unclear if judicial action or something else caused release. Because the effects of habeas jurisdiction have been uncertain and perhaps marginal, effusive praise or blame of the Court's 2008 decision is premature.*

Few axioms of constitutional law seem more self-evident today than the proposition that the Great Writ of habeas corpus, as protected by the Suspension Clause,<sup>1</sup> is a "vital instrument for

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1. U.S. CONST. art. I, § 9, cl. 2.

the protection of individual liberty.”<sup>2</sup> Also largely common ground is the idea that habeas at its “historical core . . . has served as a means of reviewing the legality of executive detention.”<sup>3</sup> So understood, the habeas writ ranks as “an essential mechanism in the separation-of-powers scheme.”<sup>4</sup> It is one of the “necessary constitutional means” vested by the Constitution’s text in one branch “to resist encroachments of the others” as part of a “constant aim . . . to divide and arrange the several offices in such a manner as that each may be a check on the other.”<sup>5</sup> The integration of habeas into a larger account of the Constitution’s separation-of-powers architecture played a prominent role in Justice Kennedy’s recent majority opinion in *Boumediene v. Bush*,<sup>6</sup> which has been labeled “one of the most important Supreme Court decisions in recent years.”<sup>7</sup> Even *Boumediene*’s critics do not doubt habeas has policy consequences, although they profess to be “mystif[ied]” as to why a check on executive detention power is necessary.<sup>8</sup>

This essay questions the conventional wisdom about habeas as a “check” on the executive branch. In *Boumediene*, the Supreme Court supplied a twofold normative justification for constitutional habeas jurisdiction: It first directly promotes physical liberty, and second reinforces the separation of powers by preserving a limited government via enforcement of unambiguous legal constraints on the executive branch. Using the aftermath of *Boumediene* as a case study, I argue that the resulting habeas jurisdiction has had at best a complex, largely indirect, effect on detention policy. In the end, the impact of habeas is far more ambiguous than either critics or supporters of *Boumediene* have recognized. Harsh criticism and extravagant

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2. *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008).

3. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

4. *Boumediene*, 128 S. Ct. at 2246.

5. THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

6. 128 S. Ct. at 2246; cf. Stephen I. Vladeck, *Boumediene’s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2110 (2009) (“The *Boumediene* majority opinion expressly invokes the separation of powers in at least ten additional passages.”).

7. Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18.

8. 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.”).

praise of the Court should both be tempered in the teeth of persisting empirical uncertainty.

Empirical and doctrinal data for this essay are drawn from litigation and judicial opinions following the Supreme Court's *Boumediene* opinion. *Boumediene* concerned the scope of judicial supervision of detention operations at the Guantánamo Bay Naval Base in Cuba. *Boumediene* marked a temporal break because it introduced a new regime of constitutionally mandated habeas jurisdiction. Until June 12, 2008, there was doubt about the availability of habeas for non-citizens detained as "enemy combatants" at Guantánamo. It was "widely assumed that the Court would not intervene to invalidate executive action clearly authorized by statute that implicated military matters and foreign policy during a time of war."<sup>9</sup> So for many Justice Kennedy's majority opinion for the Court was a surprise. It also set in motion a new line of district court litigation—the "enemy combatant" habeas—with novel procedural rules, substantive standards invented on the fly, and few preexisting expectations. That litigation provides evidence of *Boumediene*'s effect on the Executive's policy options. While natural experiments about constitutional design choices are rare,<sup>10</sup> *Boumediene* sets up an opportunity to examine (no doubt through a cloudy lens) the effect of one abrupt shift in constitutional design.

Part I of the essay describes *Boumediene* and situates the Court's theory of habeas as part of the separation of powers. Part II analyzes the consequences of post-*Boumediene* litigation. I examine first empirical data about detainee policy, and then turn to the doctrinal aftermath. Part III offers some tentative explanations for data presented in Part II, while underscoring quite how much remains empirically elusive.

## I

What role does habeas jurisdiction, as guaranteed by the Suspension Clause, play in the constitutional order?<sup>11</sup> According

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9. Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 39 (2009).

10. We cannot, for instance, unspool history's tape to see what would be different if, say, the Framers had prohibited textual supermajority rules explicitly in both federal legislative chambers. Cf. GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 77–78 (1994) (arguing for a counterfactual definition of causality).

11. I leave aside two largely settled questions here to focus on the "historical core" of federal court habeas: First, should the Suspension Clause be read to guarantee state

to Justice Kennedy's *Boumediene* opinion, habeas jurisdiction not only promotes liberty but also plays a prominent function in the separation of powers.<sup>12</sup> But the strong connection between habeas and the separation of powers elaborated by Justice Kennedy is neither obvious nor necessary. To the contrary, it is of recent vintage, and finds roots as much in Justice Kennedy's views on structural constitutionalism as it does in the storied history of the Great Writ.

A recent comprehensive account of habeas's origins in its original early English context has argued that the writ early on was not a liberty-promoting restraint but "fundamentally an instrument by which the sovereign, through his judges, might ensure that his authority was not abused whenever an officer acting in the king's name imprisoned someone."<sup>13</sup> On this account, habeas was at its inception not a tool for dispersing power within government. Even its later celebration as a limit on "arbitrary government" was largely a "fiction."<sup>14</sup> Until at minimum the seventeenth century, habeas operated in a political regime wherein "every . . . instrument of authority in England shared the same legal and conceptual source: the king."<sup>15</sup> In this context, it was at best a mechanism for reducing the cost of agency slack for the government's sole principal—the monarch.<sup>16</sup>

habeas jurisdiction over federal custody? The Supreme Court rejected this position more than a century ago. See, e.g., *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411–12 (1872). In any case, it is hard to see how state habeas could play this ambitious role now without reworking the state court bench and fundamentally altering the larger political relationship of the states to the federal government. Second, does the Constitution require federal court habeas review of state court criminal judgments even absent the statutory authority created in 1867? See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385–386. I thus do not take up the debate as to whether the 1789 Judiciary Act would have allowed the federal courts to supervise state criminal proceedings.

12. See text accompanying notes 31 to 55.

13. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 587 (2008); see also WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 14–17* (1980) (tracing habeas's function back to Norman consolidation of government power). In his magisterial new history of habeas, Halliday provides a compelling account of this monarchical usage of the writ. See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE 64–95* (2010). According to Halliday's account, the writ was also the King's means for protecting the liberty of his subjects; it played, that is, a double-edged role.

14. DUKER, *supra* note 13, at 40–41 (describing interactions of the Court of Common Pleas and the Privy Council).

15. Halliday & White, *supra* note 13, at 595 n.43.

16. Moreover, it was a mechanism for centralizing jurisdiction in the King's Bench. See DUKER, *supra* note 13, at 33–40. This is the inverse of its purported role under the separation of powers.

It was a means for the king to rein in potentially wayward vassals.

By contrast, in the American context the Framers proposed a federal government designed “first [to] enable the government to control the governed; and in the next place [to] oblige it to control itself.”<sup>17</sup> The principal in the American model is obviously no longer a king or central executive, but “the people.” To control agency costs in this new model, which arose from unavoidable slack between the people’s instructions and their representatives’ actions, James Madison emphasized above all elections as tools to enable popular monitoring and control of elected agents.<sup>18</sup> But he also praised the fragmentation and allocation of government power across three branches as an “auxiliary” design feature to dampen the misuse of power.<sup>19</sup>

Habeas takes on a new role in this new context. In one regard, American habeas is less significant than its English cousin. In the English context, recent histories have argued, access to habeas was a “critical marker of subjecthood,” an indicia of the bond between subject and sovereign monarchy.<sup>20</sup> There is no evidence I know of from the American context that habeas has had quite the same symbolic weight.<sup>21</sup> On the contrary, what is striking is how marginal a role habeas plays in the Federalist Papers’ canonical account of the separation of

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17. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961); accord Halliday & White, *supra* note 13, at 672–73. It would be an error to think the Framers did not understand this shift. Alexander Hamilton in the Federalist 84 argued that bills of rights were inapposite in the American context because they are “in their origin, stipulations between kings and their subjects.” THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

18. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (describing “dependence on the people” as “the primary control of the government.”). Agency costs might be reduced by either monitoring or selection. See generally TIMOTHY BESLEY, PRINCIPLED AGENTS? THE POLITICAL ECONOMY OF GOOD GOVERNANCE 99 (2006) (discussing agency problems in constitutional design).

19. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). I do not mean to suggest that Madison thought that the principal’s view could be reduced to aggregated democratic preferences. Nor do I address the surprisingly complex question of why (or even whether) fragmentation promotes good outcomes. See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–57 (2000) (“The exact reasons for a prohibition on the accumulation of government functions is surprisingly difficult to pin down.”) [hereinafter Magill, *Real Separation*].

20. Halliday & White, *supra* note 13, at 634.

21. Professor Oaks’s account of habeas in the states suggests that Founding-era evidence of habeas’s significance is at best ambiguous. See Dallin H. Oaks, *Habeas Corpus in the States—1776-1867*, 32 U. CHI. L. REV. 243, 247–51 (1965) (discussing early state constitutional treatment of habeas, and noting, inter alia, that in 1787 only four states’ constitutions guaranteed it).

powers, despite the fact that the suspension clause is one of the only individual rights guarantees in the original Constitution of 1787. In the Federalist 84, Alexander Hamilton devoted only a handful of sentences to describe habeas as a remedy for a particular harbinger of tyranny—the “secretly hurrying” of a person off the jail out of public sight.<sup>22</sup> Madison’s classic explication of separated powers, earlier in the Federalist Papers, does not linger on habeas. Hence, even if habeas was significant to the Framers, the writ was not a central architectural feature of the new Constitution’s dispersion of powers, as least as described in the Federalist Papers.

Subsequent American debates about habeas have centered on the scope of legislative control over the writ. In one of the first judicial expositions of the writ’s meaning, Chief Justice Marshall seemed to split the difference, holding that power to award the writ “must be given by written law,” but once jurisdiction had vested, “the meaning of the term habeas corpus,” would be given “unquestionably [by] . . . the common law.”<sup>23</sup> Even in the twentieth century, there was still no consensus as to how habeas operated. In 2001, a view of habeas as a weak, essentially majoritarian institution still persuaded a substantial minority of the Supreme Court. Writing for four dissenting Justices, Justice Scalia argued that the Suspension Clause “does not guarantee any content to (or even the existence of) the writ of habeas corpus,” but rather regulated one particular species of majoritarian abuse linked to emergencies.<sup>24</sup> On Justice Scalia’s view, constitutional habeas regulates agency costs largely by making suspension turn on legislative preferences. Unsuspended, the writ falls within plenary congressional control.<sup>25</sup> At most, this might preclude the Executive from asserting a unilateral “*Merryman* power” to ignore a court’s command absent suspension.<sup>26</sup> By Justice

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22. See THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

23. *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807).

24. *INS v. St. Cyr*, 533 U.S. 289, 337–39 (2001) (Scalia, J., dissenting).

25. Justice Scalia’s account of habeas in effect accepts Robert Dahl’s critique of Madisonian democracy as in tension with majoritarian democracy. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 31–33 (rev. ed. 2006).

26. See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). Michael Stokes Paulsen usefully describes President Lincoln’s refusal to honor judicial process in *Merryman* as an example of “autonomous executive branch interpretation.” Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 83 (1993).

Scalia's admission, this is hardly a robust bulwark of separation of powers.

The case law also contains a stronger view of habeas as an instrument for the preservation of human liberty from arbitrary executive branch action. Habeas, of course, has long been associated with freedom from physical constraint.<sup>27</sup> In 1963, at the dawn of habeas's revival as an instrument of state-court regulation, Justice Brennan explained that habeas's "function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."<sup>28</sup> Habeas, he contended, redressed "denials of due process of law."<sup>29</sup> In 2001, a majority of the Court in *INS v. St. Cyr* further styled the writ as a "means of reviewing the legality of executive detention" to ensure compliance with legislated limitations, including the availability *vel non* of discretionary relief from deportation.<sup>30</sup> Liberty in *St. Cyr* was tied to legality. But Justice Stevens's *St. Cyr* opinion did not articulate a more general or abstract account of how habeas furthers the separation of powers.

A more substantial integration of habeas into a larger account of separation of powers occurs in Justice Kennedy's 2008 *Boumediene* opinion.<sup>31</sup> *Boumediene*'s refinement, however, may be best understood as part of a more general theory of separation of powers that Justice Kennedy has developed over three decades in cases unrelated to habeas or the Suspension Clause. To understand this theory, it is helpful to consider first *Boumediene*'s holding and then to situate the case against the backdrop of Justice Kennedy's jurisprudence. In doing so, I do not suggest Justice Kennedy is the first to articulate a role for habeas in the separation of powers, but rather that his view is consequential in this context.

*Boumediene* held that non-citizen detainees at the Guantánamo Bay Naval Base "have the habeas corpus

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27. See, e.g., *Smith v. Bennett*, 365 U.S. 708, 712 (1961) (calling habeas "the highest safeguard of liberty").

28. *Fay v. Noia*, 372 U.S. 391, 401–02 (1963). Obviously, this diverged from the canonical understanding of many English legal historians. See Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 459–68 (1966).

29. *Fay*, 372 U.S. at 402.

30. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *id.* at 303–04.

31. Eric Posner has fairly noted that *Boumediene* also "turns on an implicit theory about the rights of noncitizens . . . that is *prior* to the conception of separation of powers." Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007-08 CATO SUP. CT. REV. 23, 23 (2007) (emphasis in original).

privilege” notwithstanding legislation eliminating statutory habeas jurisdiction for their petitions.<sup>32</sup> Justice Kennedy’s opinion began by asking whether the scope of the writ in 1789 provided guidance as to the territorial scope of the writ or its application to enemy aliens today.<sup>33</sup> Finding no clear answer to these questions in Founding-era materials, Justice Kennedy invoked instead a originalist understanding of habeas’s purpose to inform a contemporary reading of the Suspension Clause. Habeas’s English history, Kennedy suggested, demonstrated that “pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power.”<sup>34</sup> In Kennedy’s account, the 1679 Habeas Corpus Act was a watershed in the development of liberal limited government.<sup>35</sup> (Historians, by contrast, have cast that law as “merely codif[y]ing” judicial practices and not preventing “important innovations” via common law elaboration<sup>36</sup>). Reasoning from that historical example, Justice Kennedy then articulated a strong connection between “the protection of individual liberties” and the American “separation-of-powers scheme.”<sup>37</sup> Liberty and the separation of powers are thus intertwined.

Justice Kennedy then suggested 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.’”<sup>38</sup> The writ’s protections thus do not reside solely in the fact that it imposes publicity and political costs on an

32. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008).

33. *Id.* at 2244; *see also* St. Cyr, 533 U.S. at 301 (noting that “at the absolute minimum the Suspension Clause protects the writ as it existed in 1789”).

34. *Boumediene*, 128 S. Ct. at 2246.

35. *Id.* at 2245–46 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*137).

36. Halliday & White, *supra* note 13, at 611–12; *see also id.* at 611. (“A persistent misapprehension about the English history of habeas is that the ‘Great Writ’ was a parliamentary rather than a judicial gift.”).

37. *Boumediene*, 128 S. Ct. at 2246. Because the separation of powers serves to limit government power generally, Justice Kennedy explained, its discrete manifestations, such as habeas and the requirements of bicameralism and presentment, benefit not only citizens but also “foreign nationals who have the privilege of litigating in our courts.” *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 958–59 (1983) (invalidating legislative veto)).

38. *Id.* at 2247 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality op.)); *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 liberty clash most acutely.”).

abrogation of the writ as Justice Scalia suggested.<sup>39</sup> Rather, it is the ordinary availability of federal courts' habeas jurisdiction that promotes both liberty and the separation of powers.

The opinion, however, does not clearly articulate the way in which habeas jurisdiction will play this function. Justice Kennedy provided but vague guidance as to either the procedural contours or the substantive standards that would be applied in determining eligibility for habeas relief.<sup>40</sup> The closest the *Boumediene* opinion comes to specifying a mechanism for constraining government is a passage concerning the Constitution's ratification debates, in which Justice Kennedy claims that the Suspension Clause guarantees "an affirmative right to judicial inquiry into the causes of detention."<sup>41</sup> Later in the opinion, he characterizes the habeas inquiry as encompassing "a meaningful review of both the cause for detention and the Executive's power to detain."<sup>42</sup> While Justice Kennedy does not go on to explain how this serves the separation of powers, his logic seemed to build on Justice Stevens' *St Cyr* opinion: The function of habeas jurisdiction, on this account, is to ensure compliance by the Executive with existing legal rules that cabin executive authority to detain.<sup>43</sup> An additional premise seems to be that the enforcement of legal constraints on the detention power plays a special role in the separation of powers because of the centrality of physical liberty to political competition and debate.<sup>44</sup>

Nor does the *Boumediene* opinion contain a general account of the separation of powers. The latter is a complex and contested idea that comprises ideas about both separation and equilibrium between branches.<sup>45</sup> But while *Boumediene* has little

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39. See Amanda Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 687 (2009) (arguing that "exercises of the [suspension] power must be closely guarded and carefully checked to ensure that the power is not invoked except in the most dire of national emergencies").

40. See *Boumediene*, 128 S. Ct. at 2266–67.

41. *Id.* at 2246.

42. *Id.* at 2269.

43. Another view would look to other constitutional entitlements as being protected by the Suspension Clause. See Tyler, *supra* note 39, at 682 ("[W]here a [constitutional] right is arguably bound up with the Great Writ, it is protected from blanket displacement by the Suspension Clause's terms.")

44. Cf. *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.")

45. For a penetrating critique of several accounts of separation of powers, see M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA.

to say on the matter, its author, Justice Kennedy, has given considerable thought to the separation of powers since he penned the Ninth Circuit's opinion in *INS v. Chadha*.<sup>46</sup> In *Boumediene*, he cites two of his own earlier Supreme Court opinions discussing the separation of powers.<sup>47</sup> Earlier Kennedy jurisprudence should therefore inform a reading of *Boumediene*'s characterization of habeas and the separation of powers.

As early as the Ninth Circuit's opinion in *Chadha*, then-Judge Kennedy articulated a distinctive vision of separation of powers in the service of individual liberty. Writing for the Court of Appeals, he identified two "principal purposes" of the separation of powers: "preventing concentrations of power dangerous to liberty and . . . promoting governmental efficiency."<sup>48</sup> The *Chadha* opinion, however, does not explain how these goals are to be reconciled in cases they conflict. It is thus only a first step toward a general account of the separation of powers.

As a Justice, Kennedy elaborated his understanding of the separation of power. The efficiency motif by and large vanishes from his opinions.<sup>49</sup> By contrast, Justice Kennedy has vigorously pressed the theme of liberty. He has highlighted in particular a "fundamental political sense" of liberty that "inheres in [governmental] structure" absent any enumeration of constitutional rights.<sup>50</sup> People benefit from "fundamental

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L. REV. 603, 604 (2001) (arguing that "both commitments at the center of separation of powers doctrine [separation and balance] are misconceived"); *id.* at 609, n.13 (collecting other views).

46. *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *aff'd* 462 U.S. 919 (1983).

47. See *Boumediene*, 128 S. Ct. at 2246 (citing *Loving v. United States*, 517 U.S. 748 (1996); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring)).

48. *Chadha*, 634 F.2d at 425; *id.* at 422-24 (describing the separation of powers first, as a means to prevent "unnecessary and therefore dangerous concentration of power in one branch" and second, as a "practical measure to facilitate administration of a large nation" by precluding "cumbersome entanglement" of Congress in laws' administration). Kennedy's other Ninth Circuit opinion that addresses separation of powers takes the formalist approach directed by Chief Justice Burger's *Chadha* opinion. See *Pacemaker Diagnostic Clinic of Am., Inc. v. Instrumedix, Inc.*, 725 F.2d 537 (9th Cir. 1984) (upholding 28 U.S.C. §636(c), which allows magistrates to conduct civil trials with all parties' consent).

49. It briefly resurfaces, for example, in *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 616 (2007) (Kennedy, J., concurring) ("The Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns."), and *Loving v. United States*, 517 U.S. 748, 757-58 (1996) (connecting the separation of powers to "effective and accountable" government). See also Magill, *Real Separation*, *supra* note 19, at 1184 (discussing efficiency as a separation-of-powers value).

50. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J.,

political” liberty, on this account, when they delegate political power to a government in which “one branch of government [does] not possess the power to shape their destiny without a sufficient check from the other two.”<sup>51</sup> For Justice Kennedy, this proves especially so in moments of crisis.<sup>52</sup> Liberty, for Justice Kennedy, is a state of mind. It is the psychological assurance that each element of government will be checked by other elements.<sup>53</sup> So “[w]hen structure fails, liberty is always in peril”<sup>54</sup> because such assurance evaporates. It follows that “fundamental political” liberty is best promoted by clear, unambiguous limits on government power.<sup>55</sup>

There is, no doubt, a touch of the ineffable to all this. But *Boumediene*’s authorship and its citations nonetheless suggest the Court takes it seriously.

To summarize, the function of post-*Boumediene* habeas jurisdiction over Guantánamo detainees’ petitions is a twofold protection of liberty interests. First, habeas vindicates physical liberty interests in line with a longstanding historical understanding of the writ. Second, it is also, and perhaps more significantly, a mechanism to generate or preserve legal boundaries on executive discretion so as to ensure what Justice Kennedy has called fundamental political liberty. That value in turn is intertwined with the Constitution’s separation of powers.

## II

*Boumediene* created a rare opportunity to consider the effects of habeas jurisdiction. Does habeas directly benefit

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concurring).

51. *Id.*; see also *Loving*, 517 U.S. at 756 (“[S]eparation of powers [is] a defense against tyranny.”). So defined, “political liberty” is separate and distinct from any substantive conception of rights. *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment) (“It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when, as is the case here, no immediate threat to liberty is apparent.”).

52. *Cf.* *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Breyer, J., concurring) (“Respect for laws derived from the customary operation of the Executive and the Legislative Branches gives some assurance of stability in time of crisis.” Justice Kennedy joined Justice Breyer’s concurrence).

53. *Clinton*, 524 U.S. at 451 (“The individual loses liberty in a real sense if [government policy] is not subject to traditional constitutional constraints.”).

54. *Public Citizen*, 491 U.S. at 468 (Kennedy, J., concurring in the judgment).

55. For a different analysis of the interests served by judicial review in detention cases, see Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, 48 COLUM. J. TRANSNAT’L L. 3 (2009) (distinguishing interests in individual dignity, accuracy, and systemic regulation).

human liberty in the sense of ending unlawful detentions that in the absence of jurisdiction's exercise would continue? Does it enlarge liberty in Justice Kennedy's "fundamental political" sense of promoting a constrained federal government? This section considers both questions by examining the aftermath of the *Boumediene* decision. I first sketch the background to the Supreme Court's *Boumediene* opinion. I then identify sources of evidence about its effects. In the central section of this paper, I consider the evidence of *Boumediene*'s direct effect on detention policy at Guantánamo. I turn then to the less tractable question whether *Boumediene* had consequences for "fundamental political" liberty by considering the way in which the opinion changed or confirmed the black-letter law of executive detention.

### A

*Boumediene* provides a rare glimpse at separation-of-powers jurisprudence's effect on the ground.<sup>56</sup> *Boumediene* abruptly changed expectations about the exercise of habeas jurisdiction over petitions from Guantánamo. It was the first time the Supreme Court had invalidated a federal statute purporting to restrict the jurisdiction of the federal courts.<sup>57</sup> And it did so even after the Court had initially signaled, via a threshold denial of certiorari (later reconsidered), that it did not intend to police executive policy choices closely.<sup>58</sup> While its effect was not quite a shift from "no jurisdiction" to "plenary jurisdiction," *Boumediene* still disrupted government actors' expectations about detention policy's exposure to judicial supervision. To understand why requires some background about the detention policy at issue.

In its origins, the military detention operation at Guantánamo was crafted to be beyond federal court jurisdiction. Before the first detainees were transported to the base, although not before construction of detention facilities, government lawyers had concluded that the federal courts lacked jurisdiction over the base.<sup>59</sup> Habeas actions first filed on behalf of detainees

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56. This paper is hardly novel in proposing such an inquiry. For a pathbreaking example of such analysis, see JESSICA KORN, *THE POWER OF SEPARATION* (1998) (studying the effects of abrogation of the legislative veto in Chadha).

57. Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 1; see also *id.* at 13–20 (describing case).

58. See *Boumediene v. Bush*, 551 U.S. 1161 (2007) (mem.).

59. Memorandum for William J. Haynes II, General Counsel, Department of

in February 2002 were answered by threshold motions to dismiss on jurisdictional grounds.<sup>60</sup> The Supreme Court's 2004 statutory ruling in *Rasul v. Bush*,<sup>61</sup> affirming the availability of statutory jurisdiction, precipitated the filing of many habeas petitions. Congress, however, responded to *Rasul* by stripping habeas and channeling cases into a new jurisdictional avenue in the District of Columbia Circuit Court of Appeals under the 2005 Detainee Treatment Act ("DTA").<sup>62</sup> That jurisdictional strip was reaffirmed by Congress in 2006.<sup>63</sup>

Due to the DTA review mechanism, *Boumediene* hardly wrote on a jurisdictional *tabula rasa*. Yet uncertainty still obtained about the scope of Court of Appeals review under the DTA. One year before *Boumediene*, the D.C. Circuit had defined the record for the purposes of this new avenue of review to include all "reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant."<sup>64</sup> This ruling prompted vigorous protests from the government, which argued it did not have all "reasonably available" information, and that gathering "reasonably available" information would be prohibitively burdensome.<sup>65</sup> Such protest suggests that circuit court review under the DTA might have had real bite.<sup>66</sup> We will never know. This avenue of review was

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Defense from Patrick Philbin and John C. Yoo, "Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba" (December 28, 2001), <http://commons.wikimedia.org/wiki/File:20011228-philbin-yoo-guantanamo-habeus-memo.pdf>; cf. KAREN GREENBERG, THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS 43 (2009) (describing initial construction before then).

60. *Boumediene v. Bush*, 128 S. Ct. 2229, 2241 (2008).

61. 542 U.S. 466 (2004).

62. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (codified at 10 U.S.C. § 801, 42 U.S.C. § 2000dd (2006)) [hereinafter DTA].

63. See Military Commission Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in part at 28 U.S.C. § 2241 (2006)) [hereinafter MCA].

64. *Bismullah v. Gates*, 503 F.3d 137, 139 (D.C. Cir. 2007) (quoting Department of Defense regulations), *petition for reh'g en banc denied*, 514 F.3d 1291 (D.C. Cir. 2008) (per curiam).

65. See *Bismullah*, 514 F.3d at 1306-07 (Brown, J., dissenting from denial of rehearing *en banc*) (summarizing and endorsing government's complaints). It is impossible not to observe that the government was in effect claiming that it could lock up men for eight, going on nine years, without process, even though it did not have at hand "reasonably available" information pertaining to that detention decision.

66. At least in some instances, a habeas petitioner's ability to seek discovery and introduce exculpatory evidence in ways that the DTA would not have allowed may have been outcome dispositive. See, e.g., *Al-Rabiah v. United States*, 658 F. Supp. 2d 11, 22-24 (D.D.C. 2009) (granting petition based on exculpatory evidence based on extensive discovery by petitioner's counsel). I am grateful to Baher Azmy for drawing my attention to *Al Rabiah*.

exercised in only one case prior to *Boumediene*.<sup>67</sup> Still, its availability means that the legal effect of *Boumediene* was only a change in the kind of judicial oversight, not an absolute shift in its availability.

New judicial superintendence took the form of individualized district court litigation in the District of Columbia District Court. That litigation did not begin quickly after *Boumediene*. Initially, Chief Judge Thomas F. Hogan consolidated the habeas cases and in November 2008 issued a case management order stipulating rules for discovery, the content and order of filing, and burdens of proof.<sup>68</sup> Not all judges followed Chief Judge Hogan's lead. Judge Richard Leon moved forward separately. On November 20, 2008, Judge Leon became the first district court judge to resolve a Guantánamo habeas petition.<sup>69</sup> Numerous other district court judges have followed suit in reaching the merits of habeas actions. Judges have reached a variety of procedural rulings and sketched divergent accounts of the scope of detention authority. In March 2009, the D.C. Circuit Court of Appeals issued an opinion in a long-pending interlocutory appeal resolving some procedural questions concerning classified evidence and the scope of discovery.<sup>70</sup> In January 2010, the court of appeals issued its first ruling concerning the scope of detention authority with respect to Guantánamo detainees.<sup>71</sup> As of this writing, the post-*Boumediene* habeas is very much a work in progress.

The post-*Boumediene* inception of habeas did not mark the beginning of releases from Guantánamo. Releases have been ongoing since at least 2003. On December 16, 2008, just before the first detainees who obtained final relief from a federal court

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67. See *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) (granting detainees' petitions for review).

68. See *In re Guantanamo Bay Detainee Litig.*, No. 08-0442 (TFH), 2008 U.S. Dist. LEXIS 97095, at \*96 (D.D.C. Nov. 6, 2008). Judge Hogan was selected as coordinating judge to handle uniform procedural issues in the cases so that they could be "addressed as expeditiously as possible as required by the Supreme Court in *Boumediene v. Bush*." Resolution of the Executive Session (D.D.C. July 1, 2008), <http://www.dcd.uscourts.gov/public-docs/system/files/Guantanamo-Resolution070108.pdf>. Judges Richard Leon and Emmett Sullivan declined to transfer their cases. Sarah Lorr, Note, *Reconciling Classified Evidence and A Petitioner's Right to a "Meaningful Review" at Guantánamo Bay: A Legislative Solution*, 77 *FORDHAM L. REV.* 2669, 2671 n.13 (2009).

69. *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008).

70. *Al-Odah v. United States*, 559 F.3d 539, 546-47 (D.C. Cir. 2009) (per curiam) (explaining that procedural issues would be resolved by analogy to the DTA mechanisms and criminal trial procedures).

71. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

were released, there were 248 detainees in the facility.<sup>72</sup> Since the facility opened in 2002 through 2008, 779 prisoners had been detained there.<sup>73</sup> Habeas, therefore, operated against the backdrop of an ongoing circulation of prisoners and ongoing efforts to process the prison population for release. One result of these changes has been an alleged “shift in the detainee population [at Guantánamo] toward al-Qaeda personnel and away from Afghan Taliban and foreign fighters.”<sup>74</sup> That is, as more and more detainees have been processed, the remaining population increasingly comprises individuals alleged to have closer connections to terrorist groups as opposed to their allies.

By the end of 2009, about a year into the Obama presidency, there was thus a significant body of evidence comprising judicial opinions and policy changes about the operation of constitutionally mandated habeas. This evidence of habeas’s operation up through the end of January 2010,<sup>75</sup> moreover, can usefully be set alongside evidence about detention operations prior to *Boumediene*, when only an uncertain quantum of judicial review under the DTA was obtained. The two sets of evidence enable a rough evaluation of the effects of constitutionally mandated habeas jurisdiction.

## B

To test the Court’s aspirations for habeas, it is necessary to look at patterns of detention and release before and after *Boumediene*. In introducing this evidence, it is worth emphasizing again that it does not come from a controlled experiment. Rather, it comprises observations before and after June 2008. The data certainly cannot show whether any observed change to release decisions and rates is caused by habeas or by another unobserved variable. At best, this data allows us to suggest what might plausibly be the case, to rule out some hypotheses, and to identify possible unobserved variables. It emphatically is not evidence of causation.

Accurate data about detention operations at the Guantánamo Bay Naval Base has long been hard to secure. As

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72. BENJAMIN WITTES & ZAAHIRA WYNE, THE CURRENT DETAINEE POPULATION OF GUANTÁNAMO: AN EMPIRICAL STUDY 1 (2008), [http://www.brookings.edu/~media/Files/rc/reports/2008/1216\\_detainees\\_wittes/1216\\_detainees\\_wittes.pdf](http://www.brookings.edu/~media/Files/rc/reports/2008/1216_detainees_wittes/1216_detainees_wittes.pdf).

73. *Id.*

74. *Id.* at 2.

75. The data for this article was gathered in December 2009 and January 2010. The article does not address subsequent developments.

the Brookings Institution has observed, “the government has never identified the interned population in a contemporaneous fashion.”<sup>76</sup> The data used for this paper are derived from several sources. First and most importantly, information about the date and volume of releases or transfers, the net detainee population at Guantánamo, and the total numbers of detainees released or transferred at any point in time has been drawn from statements and releases by the U.S. Department of Defense and the U.S. Department of Justice.<sup>77</sup> Arguably, data about the timing of releases is secondary in importance to data about the timing of internal decisions to release, if the latter better reflect the impact of judicial action on executive behavior. But the latter data is not publically available. Until the transition from the Bush to the Obama Administration, primary responsibility for releasing data rested with the Department of Defense. After January 2009, data was released instead by the Department of Justice. In a break from Pentagon practice, the latter has not been releasing information on the total number of detainees remaining at the Cuban base (although that data is occasionally available via press reports).

The second source of information concerning the habeas litigation used for this article is not governmental. Rather, nongovernmental actors such as the *New York Times*, *ProPublica*, and the Brookings Institute have developed data bases. Rather than reconstructing this data from scratch, I have chosen to rely on these existing sources. The data presented here was thus drawn initially from databases developed by the *New York Times* and *ProPublica*.<sup>78</sup> It was cross-checked against the Westlaw database and data issued by the government.<sup>79</sup>

It should be noted that the data is likely unreliable at the margins even if it accurately captures trends. For example, the government is not always forthcoming about either releases or

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76. WITTES & WYNE, *supra* note 72, at 5.

77. Copies of all material relied on for this data are on file with the author and are available on request. See also methodological appendix.

78. *Transferred—The Guantanamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/transferred>; Chisun Lee, *Dig Into the Gitmo Detainee Lawsuits*, PROPUBLICA, updated April 15, 2010, <http://projects.propublica.org/tables/gitmo-detainee-lawsuits>.

79. Data gathered by British journalist Andy Worthington was also consulted, but is not organized in a form that allows easy cross-reference. See Andy Worthington, *Guantánamo: The Definitive Prisoner List*, <http://www.andyworthington.co.uk/guantanamo-the-definitive-prisoner-list-part-1/>.

suicides at the base.<sup>80</sup> Hence, it is quite possible that the data for the aggregate number of detainees at the base in particular is occasionally off by a small margin. Moreover, government statements concerning the release of detainees do not include the names of detainees or the precise dates of release, introducing a source of possible error.

### C

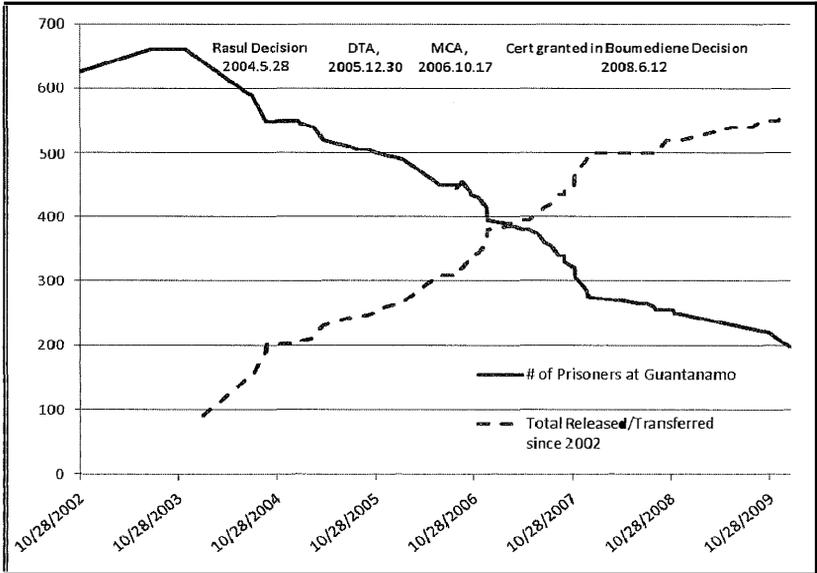
Consider first the interaction between habeas and simple physical liberty. To what extent does habeas have the effect of increasing the weight assigned to liberty interests as against security interests in a way that changes policy outcomes? Does habeas, in other words, both vindicate liberty interests and also change the policy space available to the Executive?

One way of assessing habeas is to compare the pattern of releases before and after *Boumediene*. I thus begin by looking at the pattern of releases and detentions at Guantánamo in the larger context of 2002 to 2009. Figure 1 reports two statistics: The total number of prisoners at Guantánamo and the total number of Guantánamo prisoners that had been released at a given point in time. Again, this data is drawn from government press releases that are not evenly spaced temporally, but the graph has been modified so that each year occupies an equal amount of space on the x-axis.

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80. GOVERNANCE STUDIES AT BROOKINGS, UPDATE TO THE CURRENT DETAINEE POPULATION OF GUANTÁNAMO: AN EMPIRICAL STUDY 7 (2009), [http://www.brookings.edu/~media/Files/rc/reports/2008/1216\\_detainees\\_wittes/1216\\_detainees\\_wittes\\_supplement.pdf](http://www.brookings.edu/~media/Files/rc/reports/2008/1216_detainees_wittes/1216_detainees_wittes_supplement.pdf)

Figure 1: Trends in Detainee Population at Guantánamo (2002–2009)



Because the data in Figure 1 are not immediately amenable to generalization, it is worth looking at the same data in annualized form. Table 1 and Figure 2 report the net detainee population and the cumulative number of detainees transferred or released at the end of each calendar year since 2002. Table 1 reports changes in population and aggregate transfers/releases by year, and breaks out the number transferred or released in a given year.<sup>81</sup>

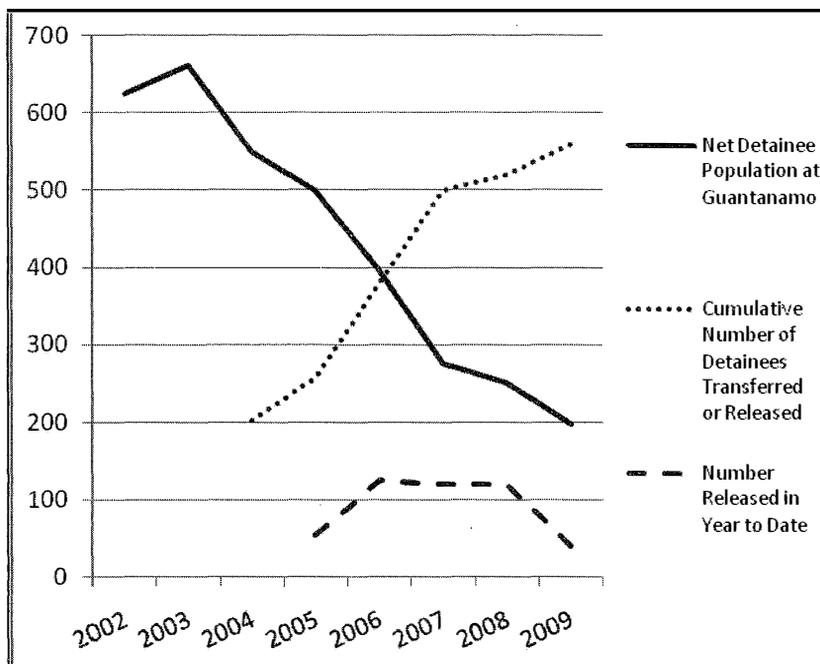
81. No annualized number of transfers and releases is reported from 2004 because it is not clear whether all the 202 reported released or transferred by the end of 2004 were released in the calendar year of 2004.

Table 1: Guantánamo population changes, aggregate releases/ transfers, and annualized releases and transfers (2002–2009)

End of Year	Net Detainee Population at Guantánamo*	Cumulative Number of Detainees Transferred or Released*	Number transferred/ released in year to date
2002	625	—	—
2003	660	—	—
2004	549	202	—
2005	500	256	54
2006	395	380	124
2007	275	500	120
2008	250	520	120
2009	198†	560	40

\* Data comes from the final press release issued by the government in a calendar year; † reported by *New York Times* on January 11, 2010. No government number is available

Figure 2: Trends in Guantánamo population changes, aggregate releases/transfers, and annualized releases and transfers (2002–2009)

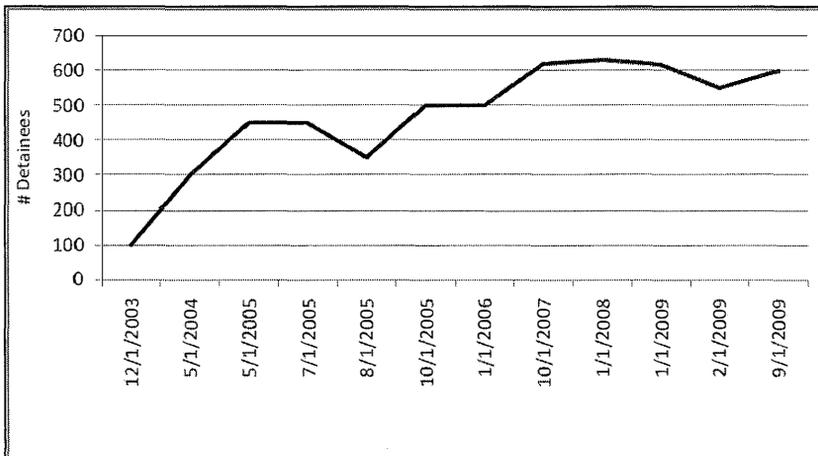


An additional set of data is useful in understanding the context of these trends. Guantánamo is not the sole internment facility used by the U.S. government for detainees in terrorism-related operations. The Bagram Theater Internment Facility, located just north of Kabul, Afghanistan, has been used for both individuals seized in the Afghanistan-Pakistan conflict and also globally.<sup>82</sup> Trends in aggregate detainee population at Bagram may be driven by two factors: developments in the regional conflict, and, to the extent the base provides a substitute for Guantánamo, governmental decisions to divert the flow of detainees from Cuba to Afghanistan. Data on the Bagram facility, however, is scarce. Figure 3 compiles the fragmentary data available from press and government sources concerning aggregate detention levels at Bagram. (It should be noted that

82. See *Al-Maqaleh v. Gates*, 604 F. Supp. 2d 205, 209 (D.D.C. 2009) *rev.d* 605 F.3d 84 (D.C. Cir. 2010).

the x-axis on Figure 4 does not represent time in a linear fashion).

Figure 3: Trends in Detainee Population at the Bagram Theater Internment Facility (2002–2009)<sup>83</sup>



Five threshold observations can be made about these multiyear data sets. First, the aggregate detention population at Guantánamo peaked in 2003 and has been dropping ever since. Anecdotal information suggests that inflows to the base in fact largely dried up in 2004, after the Supreme Court's first interventions in the field. The two largest transfers from the base represented in Figure 1 do not occur at the end of the time period, when habeas jurisdiction was in effect, but at the beginning. They are in i) July and November 2003 (respectively 27 and 20 transfers or releases), and ii) September 2004 (46 transfers or releases). It is worth noting what was happening in the federal courts at this time: The Supreme Court granted the *Rasul* petitioners' request for certiorari review on November 11, 2003,<sup>84</sup> and issued its *Rasul* opinion on June 28, 2004.<sup>85</sup>

83. Data in this chart is drawn from Alissa J. Rubin & Sangar Rahimi, *In Shift, U.S. Military Names 645 Detainees Held at Key Afghanistan Base*, N.Y. TIMES, Jan. 17, 2010, at A6; Tim Golden,  *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, <http://www.nytimes.com/2008/01/07/world/asia/07bagram.html>; see also data reproduced at [http://www.nytimes.com/imagepages/2008/01/06/world/20080107\\_BAGRAM\\_GRAPH.html](http://www.nytimes.com/imagepages/2008/01/06/world/20080107_BAGRAM_GRAPH.html).

84. *Rasul v. Bush*, 540 U.S. 1003 (2003) (mem.).

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

Second, after those initial large transfers, transfer and release patterns settle into a stable pattern through mid-2008. Periodic releases of between ten and twenty detainees at one go punctuate a steady drip-feed of daily releases in the single digits. The burst of movement from 2003-04 is not repeated. Moreover, the annualized number of releases remains stable. Indeed, given the extraordinarily low variance in net release rates from 2006 to 2008, it is worth asking whether patterns of release in this period were determined by an internal government quota rather than by exogenous factors, such as information concerning detainees' status or the changing situation in countries of release.

Third, even within the otherwise stable period of 2006-08, some details merit attention. For example, after the enactment of the DTA in December 2005, the rate of releases and transfers did not manifest a discernable decline. On the contrary, transfers and releases double between 2005 and 2006. There is also a distinct contrast between the first and second halves of 2007. In the first half of 2007, there were no days on which a double-digit transfer or release occurred. In the second half of 2007, by contrast, there were six separate double-digit transfers. In thinking about these trends, it is worth noting that the Supreme Court granted certiorari review in *Boumediene* on June 29, 2007. Of course, there is no clear evidence this correlation signals causation. An alternative explanation might point to internal administrative dynamics that are not available to an external observer, for example, around the iterative review processes made available after *Rasul* for detainees at the base.

Fourth, the pattern of releases and transfers tails off dramatically in late 2008 and 2009. With one exception, there are no further days on which a double-digit number of detainees are transferred or released. Moreover, the total number of releases and transfers dropped by about 66.7% from a stable 2006-08 level to a lower level in 2009. That is, just as the number of days on which significant numbers of releases and transfers declined, the overall number of release and transfers also declined after three years of stability. The decline in transfers and releases corresponds to the period in which habeas was available under *Boumediene*. It also includes the period in which President Obama entered office and assumed control and direction of detainee policy.

Finally, aggregate detention levels at Bagram have been on the rise since 2004. It is unclear whether this should be attributed to the changing dynamics of the Afghan conflict or to diversions

of transfers that would otherwise have gone to Guantánamo.<sup>86</sup> At a minimum, the trend line for Bagram raises the possibility that increased judicial scrutiny of Guantánamo results not in less detention, but rather detention in a different location.

The 2002-2009 timeframe is not the only lens through which to examine the effects of habeas. The effects of habeas might also be visible in the time it has been available since *Boumediene*. Figure 4 presents data from that timeframe. The first data point, from December 2008, is for the first set of releases of detainees who prevailed in the district court. It is hence a portrait of how habeas as a release mechanism has coexisted with whatever clearance and release mechanisms exist within the Executive.

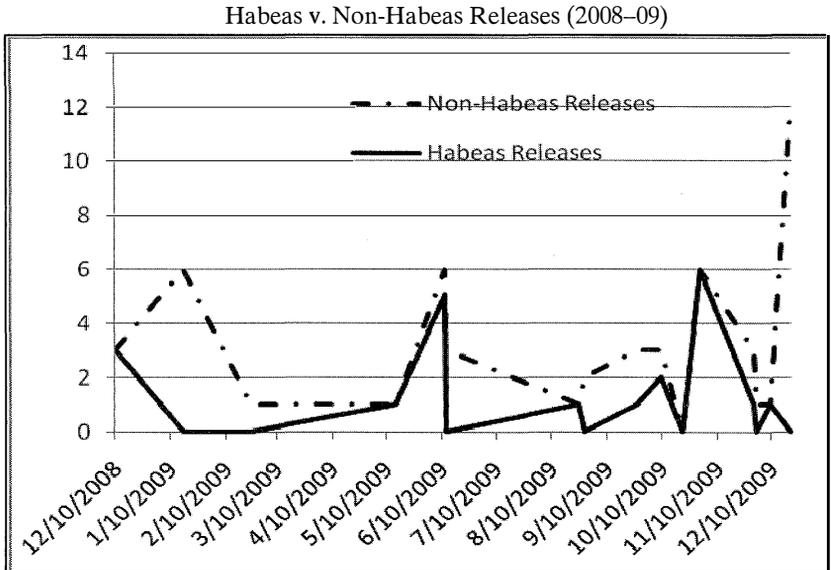
Figure 4 shows two sets of data: First, it illustrates “habeas releases,” i.e., releases of detainees who had prevailed in a district court habeas action, from August 2008 to December 2009. Second, it registers the “non-habeas releases” during the same period: releases of detainees who did *not* have a final judgment in a district court habeas action.<sup>87</sup> This data derives from the non-governmental sources noted above, and also government statements on releases. Every care has been taken not to double count, although the incomplete form of government statements about releases makes this a challenge.

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86. Data about the locus of capture for Bagram detainees broken down by time would be illuminating.

87. I have identified no case in which a detainee whose petition for habeas relief has been denied has been released. “Non-habeas releases” includes releases of persons in the absence of a final remedial order. Given the limited kinds of data available, however, it has been determined how many of the non-habeas releases are individuals with pending habeas petitions (or at what stage their petitions are). This data was generated by cross-referencing government statements about releases with information about habeas litigation generated by the *New York Times* and others.

Figure 4: Trends in Releases After Favorable Habeas Judgment (“Habeas Releases”) and In The Absence of Judicial Decree (“Non-Habeas Releases”) (December 2008–December 2009)



We might draw the following inferences from Figure 4 and underlying data. First, during the period in which habeas was available and the district courts were exercising jurisdiction pursuant to *Boumediene*, a total of 52 detainees were released. Second, from that total, 31 were what I have called “non-habeas releases.” In the same time period, there were 21 releases of detainees who had prevailed already in habeas actions in the district court. Otherwise stated, 60% of those released in this period were “non-habeas releases,” and 40% were “habeas releases.” We can also roughly calculate the proportion of total releases that have followed as a result of habeas. As of December 9, 2009, 560 detainees had been released or transferred from the Cuban base. Of that total, 3.75% were transferred subsequent to a final judicial order of release.

Another perspective on the effect of habeas jurisdiction is obtained by excluding non-habeas releases. In the period analyzed, there were 32 cases in which a district court had adjudicated a habeas petition to completion and granted the petition on the ground that the government lacked legal

authority to hold the person. In the same period of time, there were nine petitions for habeas relief denied. In total, there were 41 cases litigated to final judgment in the district court during this period. Within that set of cases, therefore, the habeas petitioner prevailed 78 percent of the time at the district-court level. To give some context to that number, compare it to the rate at which habeas is granted to petitioners convicted in state court and invoking federal court jurisdiction under 28 U.S.C. § 2254. The comparison, of course, is not one of like to like. State habeas petitioners have benefited from access to a court of record, while Guantánamo detainees have access only to internal administrative procedures. Some might argue that the more appropriate comparison is to federal court habeas release of state pre-trial bail and dismissal decisions. But the government has always insisted that the Guantánamo detainees are in effect seeking collateral review of the primary sorting mechanism for making military detention decisions, which is internal to the military. Consider then that a 2007 study of § 2254 habeas found that of 2384 noncapital habeas cases, only eight resulted in a grant of habeas relief, and one was reversed on appeal.<sup>88</sup> In that post-conviction context, district courts thus grant relief 0.3% of the time.

We see habeas's effect in another light by looking at the relationship of formal victory in a habeas action in the district court to the fact of physical release. Of the 32 cases in which a petitioner prevails, 21 have been followed by transfers or releases. That is, in 65.6 percent of cases in which a habeas petition is victorious at the district court in a habeas action, victory translates into physical release. It is worth noting that number does not include any cases in which the government chose to appeal a loss in the district court. That is, the rate of releases represents not just releases but cases where the government has chosen to forego appeals. Since past releases cannot be judicially undone on appeals, the percentage of releases as a fraction of the total number of cases has a floor.

Table 2 provides another perspective on this data. It summarizes habeas litigation by showing the percentage of cases in which a district court has reached a final adjudication and

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88. NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 at 1 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf>.

decided in favor of the detainee. It also shows the number of cases in which the district court has decided in favor of the government. Note that the table does not contain data on appeals. By definition, proceedings in which a detainee has been released have not been appealed. But in those cases in which an underlying detention persists, it of course remains open to a party to seek appellate correction.

Table 2: District Court Habeas Litigation  
(August 2008 – December 2009)

	Number	As a Percentage of all Habeas Cases Decided
Habeas Petitions Adjudicated (as of December 31, 2009)	41	100 %
Habeas Petitions Decided by a District Court in favor of the habeas petitioner (as of December 31, 2009)	32	78%
Number of ‘meritorious’ cases in which relief follows	21	51%
Number of ‘meritorious’ cases in which petitioner remains detained <sup>89</sup>	11	27%

Again, this data shows that the rate at which district courts are granting the writ is far higher than in the postconviction context. But there is an imperfect correlation between a district court decision to grant the writ and a subsequent release order.

This empirical snapshot of detention policy at Guantánamo that has been reviewed in this section reveals a surprisingly complex picture. After *Boumediene*, releases in the absence of a final judgment from a habeas corpus continue to dominate over

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89. About half of these are Uighur detainees whose situation the Supreme Court is slated to consider in the first half of 2010. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), cert. granted, 130 S. Ct. 458 (2009), vacated and remanded, 130 S. Ct. 1235 (2010), aff'd on remand, 605 F.2d 1046 (D.C. Cir. 2010).

releases in the wake of a district court remedial order. Non-habeas releases comprise a majority (60 percent) of total releases in the 2008-09 period. Yet the rate of detainee success in habeas actions has, at least through the end of 2009, been surprisingly high, at least in comparison to §2254 habeas. Within the pool of successful habeas petitioners in the district court, a majority of almost two-third obtain release without the protracted process of an appeal. If a petitioner litigated a case to conclusion in the district court, they were very likely to prevail, and if they prevailed they were likely to have secured release. Thus, although habeas may not have dominated as a modality of release either from 2002 to 2009, or from late 2008 to 2009, where it was used, release without the government's invocation of the appellate process followed in a surprising proportion of cases. Individual physical liberty may not be directly vindicated by habeas in the aggregate, but the connection between habeas and individual liberty in that narrow slice of cases seems robust.

#### D

To assess whether habeas plays the two functions ascribed to it by Justice Kennedy's majority *Boumediene* opinion, it is also necessary to ask whether "fundamental political" liberty<sup>90</sup> has been vindicated or confirmed since June 2009. As defined by Justice Kennedy, this rather elusive concept apparently obtains when citizens know that each branch of the federal government, and in particular the Executive, operates only within a domain defined and bounded by legal limits. "Fundamental political" liberty, that is, is promoted by legal clarity and the ousting of ambiguity. Thus, we must ask whether *Boumediene* eliminated legal ambiguity about the outer bounds of detention authority.

Three principal data points inform this inquiry: the Supreme Court's *Boumediene* opinion; the government's subsequent legal positions; and the District of Columbia Circuit Court of Appeals' January 5, 2010 judgment in *Al-Bihani v. Obama*,<sup>91</sup> which essays a more extended exposition of detention authority. The latter represents, at least at the time of this writing, the dispositive legal rule concerning the scope of government detention power at Guantánamo. Together, *Boumediene*, the government's legal response, and *Al-Bihani* do little or nothing to promote the

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90. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

91. 590 F.3d 866 (D.C. Cir. 2010).

“fundamental” political liberty celebrated in Justice Kennedy’s opinions. To the contrary, the evidence reveals a gap between *Boumediene*’s aspirations and its effects on black-letter doctrine.

Consider first the legal consequences of *Boumediene*. In his majority opinion, Justice Kennedy characterized the judicial function in habeas as one of conducting “a meaningful review of both the cause for detention and the Executive’s power to detain.”<sup>92</sup> That authority derives centrally from the 2001 Authorization for the Use of Military Force (“AUMF”).<sup>93</sup> Even though the Court had previously indicated it would flesh out the contours of that authority,<sup>94</sup> *Boumediene* provided no supplemental guidance as to the metes and bounds of permissible detention authority. Instead, the Court obliquely cast doubt on another aspect of the plurality opinion in *Hamdi*.<sup>95</sup> The net result of *Boumediene*, therefore, was to leave the substantive law of executive detention incrementally murkier than before. While doctrinal ambiguity is often one outcome of Supreme Court review, it is at least peculiar that an opinion justified as a means to promote legal certainty would leave so much for subsequent resolution through an inevitably fragmented process of district court adjudication and appellate clarification. *Boumediene*, that is, can be criticized for failing to promote the legal clarity that was one of its central normative premises. It was, on one view, an exercise in legality without law.

Second, *Boumediene* did not prompt any substantial change in the Executive’s legal position. But in the wake of both *Boumediene* and the subsequent shift from Bush to Obama, the government bifurcated its definition of detention authority. It now seems to apply one definition in litigation and another in internal deliberations. This can only undermine the clarity of boundaries on executive detention power.

Understanding this development demands a comparison of government legal positions before and after *Boumediene*. During the Bush Administration, the government applied a unitary

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92. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

93. Pub. L. No. 107-40, 115 Stat. 224 (2001). The Executive might also claim separate authority under Article II of the Constitution.

94. In *Hamdi*, the plurality opinion declined to define the scope of detention power beyond the facts at hand, but left the matter open for subsequent adjudication. *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004) (plurality op.) (“The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.”).

95. See *Boumediene*, 128 S. Ct. at 2269 (pointedly observing that the plurality in *Hamdi* “did not garner a majority of the Court”).

understanding of AUMF-related detention authority. In federal court, the Justice Department in 2008 invoked the definition of “enemy combatant” that had been applied in military status hearings. The latter would have permitted the detention of any “individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners [including] . . . any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”<sup>96</sup>

The Obama Administration, however, has seemingly developed a bifurcated approach to detention authority—a legal definition and a less stringent set of functional criteria for making release decisions. It thus appears to have one definition of detention authority for internal deliberations and a separate one for litigation. In the post-*Boumediene* habeas litigation, the Holder Justice Department has offered a new definition of detention authority under the AUMF that encompasses

persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . persons who harbored those responsible for those attacks[, or] . . . who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.”<sup>97</sup>

This definition appears to differ in one key regard from the Bush definition: While the Bush definition allowed detention of a person who “supported” al-Qaeda or the Taliban, the Obama definition requires “substantia[l] support.” How much difference that distinction creates is still uncertain. It is telling, though, that research has revealed no habeas proceeding in which the Obama Administration has reversed course by declaring that a detainee previously thought to fall under AUMF detention authority does not in fact do so.<sup>98</sup> So far, the operative value of the legal change appears *de minimus*.

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96. *Parhat v. Gates*, 532 F.3d 834, 837 (D.C. Cir. 2008) (quoting Combatant Status Review Tribunals (CSRTs) Order Establishing Combatant Status Review Tribunal (July 7, 2004)).

97. *Ahmed v. Obama*, 613 F. Supp. 2d 51, 54 (D.D.C. 2009) (quoting Respondents’ Revised Memorandum Regarding the Government’s Detention Authority Relation to Detainees Held at Guantanamo Bay at 3).

98. As explained below, taskforce decisions to release detainees do not show a change in legal position because the taskforce is not applying a legal definition of

By contrast, the Obama Administration appears to apply a wholly different calculus in internal deliberations about detentions. In directing an interagency taskforce to assess Guantánamo detentions,<sup>99</sup> President Obama did not require the taskforce to determine whether detentions were lawful under the AUMF. Rather, he ordered new determinations whether “continued detention is in the national security and foreign policy interests of the United States.”<sup>100</sup> In January 2010, the director of the interagency taskforce, Matthew Olsen, confirmed that forward-looking risk assessments, not backward-looking judgments of legality, guide release decisions. In an interview with the BBC, Olsen explained that the taskforce asks whether a “person [can] be safely transferred out of the United States,” and not whether the detainee fits within the AUMF’s contours.<sup>101</sup> The interaction between the legal floor and the seemingly discretionary functional standard for release is unclear.

The pattern of subsequent releases confirms the application of this forward-looking standard. The Administration has made categorical determinations against release based on risk rather than legality. In the wake of the December 2009 attempt to down a Detroit-bound airplane, for example, the Administration ceased detainee transfers to Yemen based on concerns about the southern Arabian nation’s ability to handle returnees<sup>102</sup> or “to implement adequate mitigation measures to address any threat the detainee may pose.”<sup>103</sup> The net result is a policy on detention in which wholly different standards are invoked in internal deliberations and in federal court litigation. Whether the bifurcation can be attributed to *Boumediene* or the change in administrations, it is hard to see the post-*Boumediene* situation as a return to clear, consistently applied constraints on executive detention authority.

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detention authority.

99. The taskforce is discussed in more detail below. See *infra* at III.A.

100. Exec. Order No. 13492 § 2(d), 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009).

101. Jon Manel, *The Man Who Decides the Fate of Guantanamo Detainees*, BBC NEWS, Jan. 17, 2010, <http://news.bbc.co.uk/2/low/americas/8454351.stm>.

102. See Steve Holland, *U.S. Suspends Guantanamo Prison Transfer to Yemen*, REUTERS (Wash. D.C.), Jan. 5, 2010. This was not an insight by the Obama Administration. Through 2008, U.S. government officials expressed concern about the Yemeni government’s capacity to repatriate detainees without undermining that country’s fragile stability. See Dan Eggen & Josh White, *Debate over Guantánamo’s Fate Intensifies*, WASH. POST, July 4, 2008, at A1.

103. Manel, *supra* note 101 (quoting Matthew Olsen).

A further data point for assessing *Boumediene*'s consequences for "fundamental political" liberty is the D.C. Circuit's January 5, 2010, opinion in *Al-Bihani v. Obama*,<sup>104</sup> in which the court of appeals first set forth its views on the scope of detention authority under the AUMF. The *Al-Bihani* Court drew on language in the 2006 Military Commissions Act and its 2009 amendments to hold that detention authority included those who "purposefully and materially supported hostilities against the United States or its coalition partners," and to reject arguments offered by both the habeas petitioner and the government that the laws of war bounded detention authority.<sup>105</sup> That is, the court of appeals looked to later-enacted statutes to give substance to the ambiguous terms of the 2001 AUMF.

*Al-Bihani* resolves some of the ambiguities left open by *Boumediene* but its approach to statutory interpretation undermines the promotion of "fundamental political" liberty. At a threshold matter, there may be little space between the Court's "purposefully and materially support[ing]" standard and the government's substantial support standard. Faced with what at best can be characterized as meaningful statutory ambiguity and a range of possible interpretive strategies, the court in effect adopted one almost wholly favorable to the government's claim of detention authority. *Al-Bihani* then is clearly not characterized by the concerns about limiting government expressed by the Supreme Court in *Boumediene*. But this is simply to say that the government won, which may not be especially telling.

More significantly, the Court of Appeals' methodological approach to statutory interpretation belies the *Boumediene* Court's account of the federal courts as a check on government. Rather than looking to the canonical sources of statutory interpretation, such as text, enactment context, or legislative history, the D.C. Circuit looked to a pair of statutes enacted in 2006 and 2009. It used these later-enacted statutes to determine whether the petitioner's 2002 detention under a 2001 statute was

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104. 590 F.3d 866, 872 (D.C. Cir. 2010). The D.C. Circuit has elaborated *Al-Bihani* in several further cases. See *Bensayah v. Obama*, No. 08-5537, 2010 WL 2640626 (D.C. Cir. June 28, 2010); *Barhoumi v. Obama*, No. 09-5383, 2010 WL 2553540 (D.C. Cir. June 10, 2010); *Awad v. Obama*, No. 09-5351, 2010 WL 2292400 (D.C. Cir. June 2, 2010).

105. *Al-Bihani*, 590 F.3d at 872 (quoting Military Commission Act of 2009, Pub. L. No. 118-84, tit. XVIII, 123 Stat. 2190, 2575-76 (2009) [hereinafter 2009 MCA]); see also *id.* at 883 (Williams, J., concurring in part and concurring in the judgment) (observing that "the laws of war have—even in the government's view—a role to play in the interpretation of the AUMF's grant of authority").

lawful. The Court of Appeals thus looked to legislative action four years into the habeas petitioner's ongoing detention to determine the lawfulness of that detention. To be sure, courts do on occasion look to later-enacted statute to give meaning to an earlier legislative provision. But this is rare. On one recent and controversial occasion, the Supreme Court stated that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."<sup>106</sup> But it did so in a case where Congress has expressly considered the legal question at issue and where later-enacted legislation logically conflicted with one possible interpretation of the earlier statute. Neither of these conditions obtain in *Al-Bihani*. Rather, the later-enacted statute concerns a different subject matter, and the logical nexus is not compelling.<sup>107</sup>

More significantly, the Circuit Court's decision to gauge detention authority in relation to later-enacted statutes is inconsistent with a goal of promoting "fundamental political" liberty by the elimination of ambiguities in the law and the imposition of clear constraints on government authority. If ongoing detentions can be defended by a detention power that is redefined by statute four years into the detention, there is little to prevent an amendment of the law so as to justify post hoc proper detentions that otherwise would be illegal. The Executive can detain and then craft requests for detention authority around what it knows about its captives. The constraining effect of legality dissolves. Rather than boosting legal predictability and stability, the D.C. Circuit's approach

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106. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 147–51 (2000).

107. The *Al-Bihani* Court's assumption that the MCA's definitions, which apply to military tribunals, apply to detention too is questionable. *See Al-Bihani*, 590 F.3d at 870. First, Congress addressed detention in the 2006 MCA, and yet chose not to define explicitly detention authority. Second, the MCA defines "unlawful enemy combatant" (which is a different term from "enemy combatant") for the purposes of military commission jurisdiction. The D.C. Circuit assumed that detention was a lesser incident of the power to subject a person to military commission jurisdiction. It draws this greater-includes-the-lesser assumption from international humanitarian law, which the opinion otherwise spurns. But the international law is based on a far narrower model of permissible military tribunal jurisdiction than that endorsed by the D.C. Circuit. The international law, as relevant here, "appear[s] to prohibit the prosecution of indirect participant and nonparticipant civilians before military tribunals with limited exceptions." Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 59 (2009). It is unclear whether the greater-includes-the-lesser argument can be uprooted from its original context and applied to a very different baseline definition of commission authority. It is thus far from clear that the D.C. Circuit's opportunistic and selective borrowing of international law is principled or coherent.

invites post hoc political interference at odds with Justice Kennedy's predicate of "fundamental political" liberty.

In sum, *Boumediene's* promissory note for more ample "fundamental political" liberty is still unredeemed. The Supreme Court's failure to define detention authority has opened the door to a new and confusing bifurcation of detention authority in the executive branch, and an ambitious and broad reading of detention authority by a court of appeals that leaves open ample possibility of post hoc manipulation by the political branches.

### III

How do these policy and doctrinal developments illuminate the relationship between habeas, liberty, and the separation of powers? The data presented here cannot answer that definitively. They concern only one temporally bounded policy (post-9/11 executive detention). Nor do the data allow for identification of causal effects. One especially nettlesome problem of inference is that post-*Boumediene* habeas came on line at roughly the same time as a major political transition from President George W. Bush to President Barack H. Obama.

This Part sets out a tentative account of the data. For the sake of clarity, I first address the most important potentially confounding variable—the concurrent political transition. I suggest there is scant reason to believe that the presidential transition dampened any libertarian effect from habeas. Returning to the data points explored in Part II, I tentatively advance some hypotheses and further inquiries about the constitutional role of habeas corpus.

### A

The Supreme Court decided *Boumediene* in June 2008. But the first district court release orders were not issued until December 2008, little more than one month before President Obama's inauguration. With the exception of Judge Leon, moreover, the Justice Department was able to persuade all of the judges of the D.C. District Court to delay adjudication of habeas petitions until the new Administration came into office. Hence, the political architects of Guantánamo detention policy never had to explain their discrete detention decisions in federal court. Habeas's effects on release rates, if they exist, are comingled with and confounded by the effects of that political transition.

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### A

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The change from a Republican to a Democratic Administration might be expected to correlate with an increased emphasis on libertarian over security values. Polling data gathered by the Pew Research Center from 2001 to 2007 reveals a “deep divide” on national security issues between Republicans and Democrats, with a 20 percentage point difference in their willingness to eliminate civil liberties.<sup>108</sup> So more releases in the absence of judicial direction, therefore, might be expected under President Obama than President Bush simply by dint of the constituencies responsible for the former’s electoral victory. This in turn might be expected to dilute the libertarian effect of habeas as petitioners who would otherwise obtain judicial relief are preemptively released by the Administration.

But this hypothesis is not borne out by the facts. The effect of the change in Administration on security policy more generally has been ambiguous. Some commentators find little practical difference.<sup>109</sup> The new Administration also has reasons to move more slowly than its supporters might wish. While left-libertarian members of the Administration may view the volume of Guantánamo detentions as excessive, the new President may be unwilling to antagonize the security agencies, such as the CIA. Presumably, it is difficult to secure desired policy cooperation without buy-in from a substantial part of that agency’s leadership and senior personnel.<sup>110</sup> Worse for left-libertarians, release of detainees during a Democratic Administration is more politically costly than release under Bush. Whereas few on either left or right attacked the Bush White House for excessive leniency on its release policy, President Obama expected and received assaults from the right on the issue.<sup>111</sup> At the margin then, each release is more costly at the polls for Obama than for Bush.

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108. Obviously, Republicans tend to be more pro-security. See Darshan Goux, Patrick Egan & Jack Citrin, *The War on Terror and Civil Liberties*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 322–25 (Nathaniel Persily, Jack Citrin, & Patrick J. Egan, eds. 2008).

109. See Peter Baker, *Obama’s War over Terror*, *N.Y. TIMES MAG.*, Jan. 17, 2010, at 30 (quoting James Carafano as saying about Obama’s approach to national security: “I don’t think it’s even fair to call it Bush lite . . . It’s Bush. It’s really, really hard to find a difference that’s meaningful and not atmospheric.”).

110. President Obama’s resistance to left-of-center calls for investigation and prosecution of detainee abuse may best be understand as an effort to keep security agencies on-side. In general, the degree to which subordinate agencies impose a constraint on decision-making by the White House is a topic that has not received sufficient attention in the national security literature.

111. See, e.g., *Obama Responds to Cheney’s Criticism*, *N.Y. TIMES*, Mar. 22, 2009, at

As I noted in Part II, the Obama White House crafted a mechanism for detention policy-making to reflect this political pressure: Delegating the hard decisions to someone else who would take the political heat.<sup>112</sup> Two days after his inauguration, on January 22, 2009, President Obama established an interagency taskforce to “undertake a prompt and thorough review of the factual and legal bases” for detentions at Guantánamo.<sup>113</sup> Styled as a body of neutral, but largely military, expertise,<sup>114</sup> the taskforce provided the Obama Administration with an argument that releases would be the product of professional deliberation and calculus rather than first-order liberal political preferences. Reliance on the taskforce mechanism meant delays in releases, while the taskforce was assembled and began its work of assembling dossiers on the detainees.<sup>115</sup> The taskforce also became a source of delay in the litigation, where the government argued that any discovery access to files created by the taskforce about given detainees would delay individual habeas proceedings by weeks or months.<sup>116</sup> The effect of delay was to disperse a set of hard decisions across an uncertain period of time, making it more difficult for the Administration’s political opponents to mobilize against it. Looking at the taskforce mechanism, it might thus be expected that the release rate for Guantánamo would drop immediately after the January 2009 inauguration, as indeed seems to have been the case. On this account, internal political change would not be a substitute for the libertarian effects of habeas.

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A17 (summarizing criticisms by former Vice President Richard Cheney).

112. It is well known that delegation is a way for legislators to evade hard choices while reaping the benefits of a decision. See MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 93–94 (1981). I am simply pointing out how the president can benefit from a similar tactic.

113. Exec. Order No. 13,492 § 2(d), 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009).

114. See *id.* at §4(b) (listing principals, including the Attorney General, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff, and also emphasizing the inclusion of “employees with intelligence, counterterrorism, military, and legal experience”). Military expertise dominates numerically over legal expertise, although the taskforce’s director is a career Department of Justice attorney with special expertise in national security.

115. See *Obama Task Force Determine Fate of Terror Detainees*, AGENCE FRANCE PRESSE, Feb. 20, 2009.

116. See *In re Guantánamo Bay Litig.*, Mem. Of Points & Auths. in Support of Resp’s Motion for Reconsideration of Orders Regarding Discovery from Guantánamo Review Task Force & Motion Consolidating Order Regarding Task Force Discovery, Misc No. 98-442 (TFH), dkt no. 553-2, May 12, 2009, at 2, 13 (on file with author) (predicting delays of between four and twelve months).

In the litigation trenches, moreover, government strategy has been characterized by stability rather than change. Recall that Justice Department litigation strategy between 2002 and 2009 in the habeas cases focused on jurisdictional issues. Its net effect was to deny or at least defer judicial consideration of the merits in habeas cases. Under Obama's direction, one might initially expect, government lawyers may be less inclined to seek appellate review or otherwise delay a release. More cases might go forward and more releases might result. An unsystematic review of a sample of government papers via Westlaw, however, suggests that the personnel litigating the Guantánamo cases have not changed significantly. Even if the Obama Administration wished to change the way that the Guantánamo cases were litigated, moreover, it would be a complex matter to obtain the personnel changes across two departments to achieve this end. Finally, "it takes time for presidents to staff the administrative state,"<sup>117</sup> with higher offices attended to before line positions.<sup>118</sup> It is thus plausible to expect that government litigation strategy would not change significantly with the Bush-Obama transition because of the difficulties confronting all new presidents in reorienting policy and the tendency to do so from the top down.

In sum, the effect of transition from the Bush White House to an Obama Administration on detainee policy is far from predictable. On the contrary, it is highly ambiguous. But perhaps the most plausible expectation is that the political transition would lead to a dip in aggregate release rates as the taskforce came on line, but that the government's litigation strategy would likely remain constant.<sup>119</sup> Against this backdrop, there is little reason to expect that the libertarian effects of habeas would be diluted against the larger backdrop of regime change.

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117. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 918 (2009).

118. ANNE JOSEPH O'CONNELL, LET'S GET IT STARTED: WHAT PRESIDENT-ELECT OBAMA CAN LEARN FROM PREVIOUS ADMINISTRATIONS IN MAKING POLITICAL APPOINTMENTS 1-2 (2009), [http://www.americanprogress.org/issues/2009/01/pdf/residential\\_appointments.pdf](http://www.americanprogress.org/issues/2009/01/pdf/residential_appointments.pdf).

119. Conversations with habeas counsel suggest that this is so. Counsel with whom I spoke pointed to government litigation strategy over attorney access, the discovery of exculpatory materials, and the timing of both returns and mandated disclosures as evidence that the government continued to pursue a strategy of deferment or limitation. The question whether government litigation strategies change with shifts in an Administration's political orientation is a complex one and merits a more systematic treatment than this.

## B

Even once the political change in the White House is accounted for, the data presented in Section II still pose a complex interpretive challenge. Even setting aside problems with data released by the government, changes in detention policy cannot be causally linked to activity in the courts without considerable hesitation. Nevertheless, it is possible to draw some general conclusions, and to attempt some more granular speculation about the likely influence of habeas upon policy.

One central finding stands out: While the data is in many respects ambiguous, it strongly suggests that the effect of *Boumediene* on detention policy was not significant. It is striking that at the most, *less than four percent of releases* from the Cuban base have followed a judicial order of release—and even in these case it is not wholly clear that release would not have happened sooner or later. Moreover, the annualized number of releases *drops* after *Boumediene*. Even in those few cases in which the habeas writ has been granted, nagging questions persist about the scope and effective force of the federal court's remedial authority. Courts to date (with a few exceptions) have been reluctant to direct outright release, and have instead issued delicately phrased pleas to “try harder” to the Executive (although in more than two dozen cases, the data in Table 2 show, the Executive heeds this plea). From a distance, therefore, habeas seems far from an effective tool for checking executive authority. The ambitious claims made in the literature for and against *Boumediene* are thus misguided.

Further, there is no positive relationship between the doctrinal consequences of *Boumediene* and its progeny on the one hand, and the “fundamental political” liberty celebrated by Justice Kennedy. The black-letter law of detention, and the implementation of that law by the government, is no clearer, no more stable, and no more coherent than it was before *Boumediene*. The latter case cast some doubt on the guiding force of *Hamdi*, while the D.C. Circuit's *Al-Bihani* decision blew past *Hamdi* in its haste to embrace legislative language from 2006 and 2009. The *Al-Bihani* Court's methodology invites post hoc gerrymandering of detention policy by Congress. The net result is bleak on either one of *Boumediene*'s metrics: Habeas is not central to the protection of physical liberty, at least in the experience of the Guantánamo detainees. And “fundamental political” liberty, to the extent that it is deepened by judicial confirmation of clear bounds to executive authority, has been

disserved, if not wholly displaced, by the combination of *Boumediene*'s fecklessness and *Al-Bihani*'s invitation to mischief. Federal courts, it seems, are too hesitant and circumspect in their approach to executive detention decisions to vindicate "fundamental political" liberty via the elaboration of black-letter rules. The data, on this reading, should be little comfort for those who claim to value the separation of power. Neither part of *Boumediene*'s justifying logic, in other words, has yielded much by way of practical result. Its consequences are on the one hand doctrinal ambiguity and on the other practically uncertainty.

But this is not to say that the federal courts' exercise of habeas jurisdiction has had no effect upon the executive policy space. To observe an absence of large, direct effects from habeas is not to rule out the possibility of smaller, indirect effects. Habeas, that is, *may* serve liberty indirectly. Although the larger claims on behalf of habeas might be unwarranted, it is certainly possible, and even probable, that habeas has a meaningful incentive effect that can be traced in the data. To identify such an indirect effect entails situating the writ in a larger institutional context of the courts' interactions with other branches of government. The data presented here does not allow a detailed investigation of such indirect connections. But it is suggestive. In the balance of this paper, therefore, I sketch a tentative account of how federal court action both before and after *Boumediene* may have altered the Executive's options based on the limited data available.

Start with the period before *Boumediene*, when the natural assumption would be that patterns of releases and detentions are unrelated to what goes on in the courts. But this assumption may be overstated. From the perspective of a rational Executive deciding on detention policy under uncertainty, the Supreme Court's rulings in *Hamdi* and *Rasul* might be viewed as warnings from the Court—call them shots across the bow—that the government's approach to detention policy lacked the indicia of professionalism and reliability that the Court searches for in granting the deference often evinced on national security and foreign affairs matters.<sup>120</sup> As I have argued elsewhere,<sup>121</sup> these

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120. For an argument that this was at work in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), see Jody Freeman and Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 94–95.

121. See Aziz Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225.

decisions catalyzed important structural changes to detainee policy within the government but skirted even the hint of individualized release.

Between *Rasul* and *Hamdi*, the Court forced the Executive into a wholesale restructuring of detainee processing. Until those decisions, the government had done little by way of release. 2004 is the first year in which a non-trivial number of releases can be observed. Until *Rasul* and *Hamdi*, moreover, military officials would have had little reason to institute a meaningful processing and release policy. It is highly unlikely that marginal fiscal effects have much motivating effects in this area. It is far from clear that bureaucrats in general are ever sensitive to marginal fiscal costs.<sup>122</sup> And the idea that terrorism detention should be driven by fiscal concerns is implausible. On the other side of the ledger, individual releases are *politically* costly as admissions of error by the government. Even if the nation would be better off with a detention policy that appeared less lawless, institutional incentives might thus preclude development of such a policy. On this account, *Rasul* and *Hamdi* break an equilibrium characterized by an absence of releases by adding a new factor to officials' calculations. In the wake of those decisions, officials had to account for the risk that courts would intervene directly, with potentially embarrassing consequences.<sup>123</sup>

The observed pattern of releases, described in Figures 1 and 2 above, is at least consistent with this account. There are spikes in release in November 2003, soon after the Supreme Court granted the *Rasul* petitioners' request for certiorari review,<sup>124</sup> and in September 2004, two months after the *Rasul* opinion was issued.<sup>125</sup> That is, increases in the rate of releases might correspond to judicial action raising the probability of intrusive judicial supervision. These correspondences, however, are at best rough: The time lag between judicial events and policy changes is between weeks and months. Confounding factors simply cannot be eliminated in either case.

The data nonetheless allows the inference that *Rasul* and *Hamdi* had two important indirect effects: They triggered

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122. See Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 370–71 (2000).

123. To the extent that officials are concerned about the power of their branch in the abstract, the prospect of more robust judicial interference may have costs beyond the reputational.

124. *Rasul v. Bush*, 540 U.S. 1003 (2003) (mem.).

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

sunshine and generated a “support infrastructure” that imposed larger political and publicity costs for continued detentions. First, those decisions ratcheted up the number of Guantánamo detainees with lawyers. In 2004, the habeas litigation in the Supreme Court involved a mere fourteen individuals.<sup>126</sup> By 2009, even after serial depletion of the detainee population, there have been more than 200 habeas actions filed. Many of the lawyers work for large commercial law firms, doing habeas pro bono. Several such firms, such as Venable LLP, Jenner & Block, WilmerHale, and Debevoise & Plimpton LLP, have close and continuing contacts with government.<sup>127</sup> Some lawyers quit commercial practice to work full-time on habeas litigation. Coordinating this group, the Center for Constitutional Rights runs an email list-service for the several hundred lawyers, located across the country, who represent detainees. The net result of this activity was a “vibrant . . . support structure” distantly akin to ones observed in mid-twentieth century America prior to the civil rights revolution.<sup>128</sup> At a minimum, *Rasul* and *Hamdi* opened the door to the growth of this support structure. More ambitiously, it is possible that the decisions had a legitimating effect on mobilization efforts in the private sphere on behalf of the detainees.

Litigation leveraging this support structure meant lawyers visiting the Cuban base for the first time in 2004.<sup>129</sup> It meant not merely greater litigation pressure on the government, but, more significantly, a much greater flow of potentially embarrassing information back to the United States. In some cases of obviously erroneous detention, the government chose release rather than protracted litigation that could detract from the larger portrait painted of Guantánamo as containing only highly dangerous detainees.<sup>130</sup> Sunshine, that is, was one of the indirect results of the *Rasul* and *Hamdi* decisions that generated new costs for the government.

Also consistent with this narrative is the parallel rise in detention operations at Bagram. The increasing use of Bagram

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126. *Id.* at 470.

127. *See generally* THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 31–32 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009) (describing early stages of litigation).

128. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 20–22 (1998).

129. Denbeaux & Hafetz, *supra* note 127, at 55–56.

130. *See, e.g.*, MURAT KURNAZ, FIVE YEARS OF MY LIFE: AN INNOCENT MAN AT GUANTÁNAMO 18, 219–20 (2008).

for detainees captured as far afield as Dubai and Thailand<sup>131</sup> is plausible evidence that *Rasul* and *Hamdi* prompted not only more robust internal procedures for detention operations, but also jurisdictional circumvention. Just as the initial choice of Guantánamo was driven by a concern to minimize “litigation risk,” so after *Rasul* and *Hamdi* it was predictable that officials would look for new ways of reducing the costs of judicial supervision. Hence the flight to Bagram. Today, the prospect of increased judicial supervision of Bagram may well precipitate a flight to more durable redoubts from federal court superintendence. The recent U.S. decision to hand Bagram over to Afghan authorities, which in effect raises a possible new jurisdictional hurdle to ongoing habeas litigation, corroborates this.<sup>132</sup>

The Executive’s response to *Boumediene* provides further evidence of the judiciary’s indirect influence on detention policy. On April 2, 2007, the Supreme Court initially denied certiorari in *Boumediene*. The Court’s decision on June 29, 2007, to reverse course by granting a petition for rehearing in *Boumediene* was a surprise, and so provided new information about the Court’s intentions.<sup>133</sup> Petitions for rehearing are rarely granted by the Supreme Court. A Bayesian Executive would treat the grant of certiorari in *Boumediene* as telling evidence that closer judicial scrutiny was forthcoming. The data in Figures 1 and 2 for the six-month period from June 2007 onward show a higher rate of release correlated with the *Boumediene* certiorari grant. Again, this is some evidence of an indirect effect from habeas jurisdiction. Moreover, the idea that the Court responds to signals of professionalization (or the lack thereof) gains credibility from the manner of the Court’s decision to grant certiorari in *Boumediene*. As Daniel Meltzer has persuasively argued, that volte-face is best understood in light of disclosures by former military officers alleging that the military’s internal process used to sort detainees was rigged to generate outcomes sought by the government.<sup>134</sup> Jurisdiction is thus the progeny of judicial distrust.

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131. See *Al-Maqaleh v. Gates*, 604 F. Supp. 2d 205, 209 (D.D.C. 2009) *rev’d* 605 F.3d 89 (D.C. Cir. 2010).

132. See Alissa J. Rubin, *U.S. Readies New Facility for Afghan Detainees*, N.Y. TIMES, Nov. 19, 2009, at A8.

133. *Boumediene v. Bush*, 551 U.S. 1161 (2007) (mem.).

134. Meltzer, *supra* note 57, at 47–50. It may be more accurate to say that the traditional deference owed the military was ousted by evidence of political influence.

Now consider the policy landscape in the wake of *Boumediene*. By the end of 2008, the effect of hundreds of releases had been to increase the concentration of detainees with allegedly more substantial ties to terrorism, and to dilute the number of detainees with only weak connections to al-Qaeda or the Taliban. A lion's share of easy cases have thus been resolved. The liberatory effects of sunshine and litigation infrastructure were equally subject to diminishing returns. Moreover, the shift from the Bush to Obama presidencies may have undermined the political value of disclosure, which went for detainees' advocates from being a convenient way of embarrassing a disliked government to a delicate question to be negotiated with a presumptively favorable Administration.<sup>135</sup> Remaining cases often presented difficulties because of foreign policy complications attendant on release.<sup>136</sup> Others, including the authors of many Yemenis, raised security concerns related to conditions in their country of release. (Indeed, as of September 2009, a third of the 78 detainees cleared for transfer were Yemeni, while 13 were Chinese Uighurs, whose release was opposed by the Chinese government.)<sup>137</sup> That is, by the time of *Boumediene*, the odds were that habeas would be too little, too late, as a remedy to unlawful detention.

Despite these obstacles, the small minority of detainees who have pressed habeas actions not only proceed to final judgment but tend to obtain a favorable outcome of release. How might this assuredly incremental effect be explained? One hypothesis would be that releases following habeas actions are substitutes for, rather than complements to, releases in the absence of habeas jurisdiction. That is, even the figure of 3.75% releases by habeas is an overstatement. Net releases would, in fact, not

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135. It is further worth observing (somewhat loosely) that President Obama's election, and his public decision to close Guantánamo, deflated a political alliance between left-liberal activists and a large segment of the public and foreign policy elite that had disliked the effect Guantánamo had on foreign relations. Through his January 22, 2009, announcement and his June 4, 2009, Cairo speech, the new President in effect razed the political coalition that had built up during the Bush years without changing much by way of policy. Obama's corrosive effect on the left-liberal reforming coalition may have been the most important national-security related change accomplished in January 2009. In the new light of the Obama presidency, disclosures of new abuse or arguments about the injustice at continuing detention had to overcome a cognitive dissonance in their audience.

136. This seems to be the case for the ethnic Uighurs, who are petitioners in the Kiyemba case in the U.S. Supreme Court. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), cert. granted, 130 S. Ct. 458 (2009), vacated and remanded, 130 S. Ct. 1235 (2010) *aff'd on remand* 605 F.3d 1046 (D.C. Cir. 2010).

137. See Governance Studies at Brookings, *supra* note 80, at 12.

differ with or without habeas. To be sure, the thesis of habeas as complete substitute rather than as complement cannot be ruled out. But it seems unlikely to explain all the releases. First, in habeas litigation, the government routinely expends considerable time, personnel, and even credibility with the federal bench arguing that individuals should be detained. There is no reason to take this effort by the federal government at anything other than face value. Second, and more powerfully, the evidence suggests that when the federal government decides to release a detainee who has a pending habeas action, it does so without continuing to contest the habeas action by appeals.<sup>138</sup> Given that the government abandons defense of habeas actions when it determines a detainee should be released, there is no reason to believe that its representations in otherwise contested actions are anything other than sincere. It may be that a district court loss truly conveys new information to the government. In short, attributing 3.75% of releases to habeas may be an overestimation, but it is also unlikely that the proper estimate is zero. Habeas, in short, has some effect in the cases in which a court reaches a final judgment.

With respect to those habeas actions that do prevail, it is plausible to posit that habeas counsel with stronger cases have tended to push more aggressively in court, rather than hoping to negotiate a favorable outcome with the government. The first wave of habeas litigation in the district court thus likely selected for strong cases in favor of release. In these cases, the district court can dissolve a log-jam at the individual detainee level, just as the *Hamdi* and *Rasul* judgments nudged the Executive into more wholesale reconsideration of detainee processing. Judicial action in these cases is evidence of a direct libertarian effect from habeas. But that direct effect is numerically far less important than the indirect effects of habeas jurisdiction being confirmed in *Rasul* and *Hamdi*. That is, the bulk of releases (from 2004-08) have taken place against the “shadow” of habeas jurisdiction.

In this light, there is a strong analogy between habeas litigation and theories of criminal procedure that emphasize the indirect influence of constitutional rights upon plea-bargained outcomes. As in the criminal adjudication context, the actual

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138. See, e.g., Order Staying Proceedings, *Batarfi v. Gates*, No. 05-0409 (EGS), dkt. 178 (D.D.C. March 30, 2009) (on file with author) (staying proceedings to allow taskforce to accomplish petitioner’s transfer).

exercise of constitutional rights in habeas may be less important than the “shadow” cast by the government’s expectation of those rights.<sup>139</sup> Detention policy thus largely unspools in the shadow of the Suspension Clause, not under its direct gaze. In the criminal context, a small number of cases do not settle through pleas because of the inability of lawyers on each side to converge in their assessment of the expected trial outcome. Similarly, the residual core of litigated habeas may be explained by the persistence of uncertainty as to trial outcomes. Habeas cases that proceed to judgment represent instances of high variance in litigants’ expectations about outcomes. While the government believes it has a strong case, detainee counsel believe that it is only bureaucratic inefficiencies or sheer error that blocks release. District court litigation, on this account, is a product of epistemic uncertainty about the bases for detention as between habeas counsel and their government counterparts.

However the litigation is explained, its effect at the margin is small—at most 3.75% and perhaps little as zero. So if Justice Kennedy is right to point to a connection between habeas and the freedom from unlawful constraints on physical liberty, the connection is at best complex and indirect. Further, the data reviewed in this essay are simply too ambiguous to *confirm* such a relationship, even if they are sufficient to *reject* the thesis that the relationship is a large one. The available public record is far too hazy to permit any precise estimate of habeas’s effect on executive detention policy, beyond the conclusion that any direct effect is likely small. Moreover, the forms of habeas review remain very much a work in progress, subject to congressional or high court reworking.

Despite this uncertainty, I will recklessly hazard here some predictions. First, easy cases for release will run out as low-hanging fruit are consumed.<sup>140</sup> Increasingly, detainees will lose in the district courts, particularly since the D.C. Circuit’s judgment in *Kiyemba v. Obama*<sup>141</sup> signals the circuit court’s limited tolerance for creative remedial options. The Supreme Court’s decision to send that case back to the lower courts based on

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139. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309–17 (1983). *But see* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (challenging the “shadow-of-trial” model).

140. See, e.g., Order Staying Proceedings, *Batarfi v. Gates*, *supra* note 138, (staying proceedings to allow taskforce to accomplish petitioner’s transfer).

141. 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 130 S. Ct. 458 (2009), *vacated and remanded*, 130 S. Ct. 1235, (2010) *aff’d on remand* 605 F.3d 1046 (D.C. Cir. 2010).

government assertions of changed facts, rather than addressing it on the merits, further signals that the high court is unwilling to interfere too much with political branch choices. Those detainees who prevail, but do not secure release because of forward-looking risk assessments by the interagency taskforce,<sup>142</sup> will also obtain less and less sympathy on the remedial front. District courts judges have already expressed unease at pushing too hard upon the Executive. In a December 2009 hearing, for example, Chief Judge Hogan bemoaned the “unfortunate” fact that “the Legislative Branch of our government, and the Executive Branch have not moved more strongly to provide uniform clear rules and laws for handling these cases.”<sup>143</sup> More tellingly, even the release orders currently issued in the habeas actions do not call directly for physical release. In ambiguous terms, most require the government to engage in “all necessary and appropriate diplomatic steps to facilitate” release.<sup>144</sup> Only two, Judge Huvelle’s order concerning the juvenile detainee Muhammed Jawad and Judge Kessler’s concerning Alla Ali bin Ali Ahmed, directly order release.<sup>145</sup> Jawad’s case, though, was exceptional, and had already been a subject of controversy.<sup>146</sup> This pattern suggests that while courts might press the government on procedural and evidentiary issues, there remains

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142. The taskforce completed its assessment in January 2010, and recommended that about fifty detainees be detained under law-of-war authority. See Peter Finn, *Panel on Guantanamo Backs Indefinite Detention for Some*, WASH. POST, Jan., 22, 2010, at A1. Notably, it seems as if that the presence of a judicial release order is merely one factor (of many) the taskforce considered in determining whether release was appropriate.

143. Transcript of Hearing before Hon. Thomas F. Hogan, *Abdu Anam v. Obama*, No. CA 01-1194, at 6-7 (D.C.C. Dec. 14, 2009) (copy on file with author).

144. See, e.g., *Ahmed v. Obama*, 613 F. Supp. 2d 51, 66 (D.D.C. 2009) (Kessler, J.); see also *Al-Ginco v. Obama*, 626 F. Supp. 2d 123, 130 (D.D.C. 2009) (Leon, J.) (same); *Basardh v. Obama*, 612 F. Supp. 2d 30, 35-36 (D.D.C. 2009) (Huvelle, J.) (same); *Al-Rabiah v. Obama*, 658 F. Supp. 2d 11, 42 (D.D.C. 2009) (Collar-Kotelly, J.).

145. See *Order, Bacha v. Obama*, No. 05-2385 (EJH) at 1 (D.D.C. July 30, 2009), available at [http://s3.amazonaws.com/propublica/assets/detention/gitmo/jawad\\_court\\_order.pdf](http://s3.amazonaws.com/propublica/assets/detention/gitmo/jawad_court_order.pdf) (ordering that “beginning on August 21, 2009, when 15 days following the submission of the aforesaid information to the Congress have passed, respondents shall promptly release petitioner Jawad from detention at the U.S. Naval Station at Guantanamo Bay and transfer him to the custody of the receiving government”); *Ahmed v. Obama*, No. 05-1678 (GK), dkt. 249 (D.C.C. Oct., 1 2009) (on file with author). Thanks to Shane Kadidal for providing a copy of this document. I am dubious that the D.C. Circuit’s since vacated opinion in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), can explain the district courts’ behavior. While several district courts have invoked *Kiyemba* in softening the terms of a release order, in fact Judge Leon began issuing non-release final orders before *Kiyemba* was handed down. Still, *Kiyemba*’s disavowal of effective relief likely had an *in terrorem* effect, and likely will continue to do.

146. See William Glaberson, *Guantanamo Prosecutor Is Quitting in Dispute Over a Case*, N.Y. TIMES, Sept. 24, 2008, at A20.

at bottom a concern about noncompliance. That is, courts continue to tread cautiously in the post-*Boumediene* habeas cases, unsure of the boundaries of their own ability to press the Administration to alter course. When push comes to shove, molar security concerns will dominate granular liberty interests, even for detainees found to be unconnected to any terrorist group.

At the same time that indirect and direct effects of habeas jurisdiction fade, the federal courts have done just enough to deflate significant social mobilization in favor of further releases. *Boumediene* celebrates legality but without furnishing any constraining law. At the time of this writing, the received wisdom in policy circles<sup>147</sup> calls for fresh legislative involvement in detention issues. Such calls are made under circumstances wherein the only kind of legislative action that could pass both Houses would expand detention authority and further restrict the fragmented and incomplete influence of habeas review. The calls for legislation not only trade on a critique of judicial activism with partisan roots, but, more importantly, fail to account accurately for either the subordinate position of courts or the primacy of political actors' efforts to anticipate, circumvent, and otherwise marginalize judicial action. The Court, that is, has largely succeeded in diffusing effective libertarian political mobilization around detention as a national policy issue without achieving large policy change on the ground.

This analysis further has implications for future research. Important recent scholarship on habeas has focused on procedural questions of proof and evidentiary standards as a locus of "significant policy questions about competing risks and their distributions."<sup>148</sup> More ambitiously, other scholars have asserted that the courts use procedure "as a corrective to decision-making by one (or both) of the political branches."<sup>149</sup>

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147. See BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 1 (2010), [http://www.brookings.edu/~media/Files/rc/papers/2010/0122\\_guantanamo\\_wittes\\_chesney/0122\\_guantanamo\\_wittes\\_chesney.pdf](http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf).

148. Matthew C. Waxman, *Facing the Challenges of Continued Detention and Repatriation: Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lens*, 42 CASE W. RES. J. INT'L L. 245, 246 (2009); see generally Jenny Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

149. Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 665 (2009). Oddly, Landau largely relies on opinions by the D.C. Circuit Court of Appeals concerning the scope of review under the now defunct Detainee Treatment Act §1005(e)(2), 10 U.S.C. § 801. Cf. *Bismullah v.*

Although this procedural turn may produce valuable insights, it should be complemented with an effort to understand the incentives and felt limitations confronting federal judges in the habeas cases. How conscious, for example, are judges of political constraints on their ultimate remedial authority? To the extent that the judiciary's relationship with the Bush Administration came to be characterized by mistrust, has the shift to the Obama Administration sapped judges' incentives to regulate detention decisions closely? However tricky such questions are to answer for evidentiary reasons, it may well be that the perceived balance of authority and legitimacy between the judicial and executive branches shapes the course of habeas litigation more than doctrinal formulations that until now have attracted legal scholars' attention.

### CONCLUSION

*Boumediene* has been called “one of the most important Supreme Court decisions in recent years.”<sup>150</sup> But at best *Boumediene* secured liberty from unlawful constraint only at the margins—the most important work had been done long before by *Rasul* and *Hamdi*—and failed in its pursuit of a more ambitious separation-of-powers aim. The analysis here does not condemn habeas as wholly ineffective. Rather, it suggests that misty nostrums of separated powers provide little guidance or insight into how federal courts and their coordinate political branches interact to benefit or burden the exercise of human liberty. The effects of habeas jurisdiction have been uncertain and perhaps marginal. Before better data illuminates the relationship between judicial actions and executive policy, rhetoric either praising or condemning *Boumediene* is at a minimum premature.

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Gates, 551 F.3d 1068, 1072–73 (D.C. Cir. 2009) (invalidating §1005(e)(2) as nonseverable from portions of the later-enacted Military Commission Act, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (2006) (codified at 28 U.S.C. § 2241(e)).

150. Dworkin, *supra* note 7, at 18.

## METHODOLOGICAL APPENDIX

Data for the Figures 1, 2, and 4 and Table 1 were derived in the following way. The Department of Defense and Department of Justice websites contain archives of daily press releases that each relate to a release from Guantánamo and that each include the number of detainees remaining on the base at a certain date, and the total number released up to that point. These statistics were recorded, double-checked, and cross-referenced against press sources and other compilations of data. The data was also cross-referenced and supplemented with press reports from the end of the relevant time period. Annualized release data was calculated by subtracting reported statistics from the last press release of one year from the reported statistic on the last press release of the next year.

The data in Figure 4 derive from an additional source. On the one hand, the data of “non-habeas releases” comes from the aforementioned press releases. Data about “habeas releases” was derived from Propublica, the *New York Times*, and the Brookings Institute, and then cross-referenced against the press releases. This was possible because the government issued press releases after a person was released subsequent to a district court habeas decision as well as in the absence of such a decision. In general, it was possible to corroborate release claims. Data for Figure 3 was drawn from two articles in the *New York Times*. The government keeps no running tally of Bagram detentions in public portions of its websites.