

The Guantánamo Game: A Public Choice Perspective on Judicial Review in Wartime

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INTRODUCTION

In the years since 9/11, all three branches of government have struggled to shape the detention policies at Guantánamo Bay. For Congress and the president, managing foreign detainees is requisite to their constitutional duties in wartime. But for the Supreme Court—which has increasingly asserted itself in this debate—it is a somewhat novel role.

Rarely in American history has the Supreme Court so forcefully intervened in wartime policymaking as it has in the last five years. The Court's four major decisions on the legality of the executive's detention scheme—*Rasul v. Bush*¹ and *Hamdi v. Rumsfeld*² in 2004, *Hamdan v. Rumsfeld*³ in 2006, and *Boumediene v. Bush*⁴ in 2008—strengthened detainee rights, enlarged the role of the judiciary, and rebuked broad assertions of executive power.

Not surprisingly, these decisions also prompted strong reactions from the other two branches. President George W. Bush attempted to immunize his detention policies from judicial review, while Congress sought to curtail the Court's jurisdiction over such cases entirely. Through these responses, each branch struggled to turn its substantive preferences into binding law.

In this Comment, I use positive political theory (PPT), an offshoot of public choice theory, to model this interaction. PPT depicts national policy as the product of a sequential game played among the branches, with each branch

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1. 542 U.S. 466 (2004).

2. 542 U.S. 507 (2004).

3. 548 U.S. 557 (2006).

4. 128 S. Ct. 2229 (2008).

behaving strategically to enact a preferred policy.⁵ The outcome of the game turns on the preferences of the players, their formal powers, and how well each can gauge the interests of the others.

PPT offers an important tool for understanding the struggle over habeas rights at Guantánamo, for three reasons. First, it applies a new analytical method to an issue that, despite considerable normative attention from scholars, has yet to be examined from a public choice perspective. Second, PPT reveals the political calculations at work as each branch struggles to set policy—even as those strategies are obscured by electoral posturing and legal rhetoric. Finally, PPT offers a novel way to understand the role and desirability of judicial review in wartime.

With these goals in mind, this Comment uses PPT to model the history of Guantánamo and the political struggle to provide the detainees with either greater or lesser access to the civilian courts.

For example, following 9/11, President Bush carefully used his executive power to shield Guantánamo from judicial and congressional scrutiny. That strategy succeeded until the Supreme Court intervened in 2004 in *Rasul*, which established a statutory basis for detainees to contest their detention.⁶

For Congress, however, the Court's decision in *Rasul* extended habeas rights too broadly and departed too strongly from the policies of President Bush. Congress responded with the Detainee Treatment Act of 2005 (DTA), narrowing the Court's jurisdiction.⁷ Importantly though, the DTA did not return policy to the *ex ante* status that President Bush favored. Rather, the law wove an intermediate path between the president and the Court by granting detainees a limited measure of judicial review.

Notably, a similar sequence occurred in 2006, when the *Hamdan* decision led to the Military Commissions Act (MCA): the executive asserted broad authority on detainees, the Supreme Court limited its reach, and Congress subsequently adopted a middle approach. A third round may yet be underway, prompted by the Court's *Boumediene* decision in 2008.

The PPT models developed in this paper illustrate why. They show how, contrary to popular understanding, congressional silence in the years following 9/11 was not a sign of acquiescence to the president's policies, but a symptom of an institutional paralysis created by the Bush administration itself. The models also demonstrate how the Court's decisions in 2004 and 2006 freed Congress from this bind by allowing it to legislate and put its own stamp on wartime policy. Finally, the models yield insights into the strategic choices confronting President Barack Obama as he wrestles with the impact of

5. See, e.g., Tonja Jacobi, *The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 100 NW. U. L. REV. 259, 260 (2006).

6. 542 U.S. at 483.

7. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005), (codified at 10 U.S.C. § 801 (2006)).

Boumediene and his own preferences for national security policy.

This Comment proceeds as follows. In Part I, I introduce the PPT tools that model national policymaking. These models, derived from the work of William Eskridge, Keith Krehbiel, William Howell, and others, simulate the policymaking process as a strategic, dynamic, sequential game played among all the branches. Each branch attempts to set policy according to its preferences, but must act within the structural constraints on its power. Importantly, this means the Supreme Court often decides cases in such a way as to minimize the chance that Congress will reverse the Court.

In Part II, I turn to the history of habeas policy since 9/11, establishing the chronology of events that constitute the “habeas game.”

In Part III, I model this history through PPT. Using spatial depictions of the legislative game, I illustrate the sequence of decision making by the president, the Court, and Congress through each round of the game. The models help reveal the strategic choices of each actor and the consequences of each particular decision.

In Part IV, I step back to consider two explanations for the Court’s behavior over the course of the habeas game. Keying in on the fact that Congress reversed the Court twice, in the DTA in 2005 and the MCA in 2006, I consider whether the Court is simply a poor strategic actor—e.g., whether it miscalculated the likely responses to its rulings, as some scholars contend—or whether other values were at play. In particular, I examine whether the Court may have wielded judicial review less to vindicate its own policy preferences than to promote the democratic involvement of each branch in wartime policy. This “democracy-promotion” model posits that the Court has strategic preferences that complement its policy goals—a concern not just about the *what* of policy formation, but also about the *who* and the *how*. This model also complements a broad range of existing work on judicial review in wartime, including the scholarship of Cass Sunstein, Samuel Issacharoff, Richard Pildes, Robert Pushaw, and others.⁸

Finally, in the Conclusion, I consider the strategic environment that President Obama now confronts. In the wake of *Boumediene*, the president may wish to create a new national security court to adjudicate the detention of foreign nationals, he may wish to rely on civilian courts and traditional habeas rules, or he may seek something in between. The models developed in this paper should inform that choice, as they depict how the other branches might respond to the policy President Obama eventually adopts.

8. See discussion *infra* Part IV.B.

I

POSITIVE POLITICAL THEORY AND JUDICIAL BEHAVIOR

Positive political theory (PPT) provides a novel way to understand the formation of national policy at Guantánamo Bay. A relative of public choice and game theory, PPT perceives judges to be “strategic actors who maximize utility within a constrained environment.”⁹ It analyzes this interaction as a sequential game to set policy. In this Part, I review the origins and development of several PPT theories, with an eye toward building a model to approximate the habeas game.

A. Positive Political Theory and the Court

PPT is an “application of game theory to politics.”¹⁰ It envisions judges as strategic actors who seek to maximize their preferences through interactions with other players, such as Congress, the president, and administrative agencies.¹¹ These interactions occur as a sequential game, with each party “calibrating its actions in anticipation of how other institutions would respond.”¹²

PPT assumes that Supreme Court justices have preferences they seek to enact through strategic statutory and constitutional decisions. In other words, the Court does not decide cases in a vacuum, but rather is wary of, and responsive to, the wishes of other political actors.¹³ The outcome of a strategic interaction among these players turns on the initial policy status quo, the preferences of each player, the structural powers of each branch, and the sequence of play.

PPT relies on stylized spatial models to illustrate these interactions. For example, in an early application of the theory, William Eskridge and John Ferejohn formally modeled the legislative process through what they call the

9. Jacobi, *supra* note 5, at 259.

10. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1406 (1996).

11. *Id.*

12. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 29 (1994).

13. Drawing on the attitudinal model of judging, PPT theories typically begin with the premise that judicial preferences correspond to ideological or policy preferences. *See* Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 592 n.27 (2001). In contrast to the attitudinal model, which presumes that judges vote their ideological preferences regardless of the wishes of other branches, PPT recognizes that judges must “be attentive to the preferences of other institutions . . . if they want to generate enduring policy.” *Id.* Moreover, PPT does not depend on judges being motivated solely by ideology, so long as there is *something* they seek to maximize. *Id.* Motivations could include: respecting the legislative bargain of the enacting Congress, approximating the median preferences of the current Congress, preserving judicial integrity and power, deferring to the executive in certain policy areas, or simply deciding what outcome the public interest favors. *See generally* ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 226–27 (2000).

“Article I, Section 7 Game.”¹⁴

The outcome of this game turns on whether Congress can muster enough votes to pass legislation and then, potentially, override a presidential veto. The Senate has the additional wrinkle of the filibuster, which requires sixty votes to defeat and therefore empowers the minority party. Eskridge and Ferejohn observe that if the president prefers a proposed congressional bill to the status quo, Congress needs only amass a majority in the House and sixty votes in the Senate to change policy.¹⁵ But if the president opposes the bill, Congress will need to secure two-thirds support in both houses to enact the legislation.¹⁶ The Article I, Section 7 game is thus simply a spatial representation of the basic rules of presentment and bicameralism.¹⁷

Eskridge later added the judiciary to this dynamic mix to model the policy-setting struggle between Congress and the Supreme Court.¹⁸ Eskridge observes that the Court’s typical statutory canons—however formalistic they appear—in fact grant the Court tremendous power to alter and shape the meaning of legislation, thus allowing the Court to shift national policy on its own through creative statutory interpretation.¹⁹

Nonetheless, this power is demarcated by the constant threat of congressional reversal. If the Court interprets a statute in a way that the current Congress disfavors, or if congressional preferences shift over time to disfavor the old interpretation, Congress will step in to rewrite the statute, and the Court’s policy preference will be frustrated.²⁰

On the other hand, a strategic Court, aware of this risk of reversal, will try to interpret statutes in a way that avoids triggering a congressional override. This strategy also means that the Court will tailor its rulings to heed the wishes of the *current* Congress—the one that might reverse the Court—rather than the *enacting* Congress that passed the legislation.

Of course, such behavior contravenes the traditional rule-of-law norm that the Court should interpret a statute to reflect the intent of the enacting Congress.²¹ Nonetheless, Eskridge gathers empirical evidence to show the Court often behaves with this strategy in mind. Eskridge’s work thus provides early support for the idea that the court is not merely a passive enforcer of legislative bargains, but an active participant in the policy game—a strategic

14. William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 523 (1991).

15. *Id.* at 530.

16. *Id.* at 531.

17. *Id.* at 528–29.

18. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

19. *Id.* at 373–74.

20. *Id.* at 387–89.

21. *Id.* at 390.

player.²²

B. Pivotal Politics and Congressional Power

A strategic model can also be used to analyze Congress's role in the legislative process and the ways in which this role complements that of the judiciary. Keith Krehbiel in particular has made a major contribution to this branch of PPT with his theory of "pivotal politics."²³

Krehbiel observes that, at least in the Senate, true power revolves not around the median vote or the committee structure, but around "pivot points."²⁴ Pivot points represent the votes of key senators required to overcome legislative obstacles, such as the sixtieth senator needed to break a filibuster, and the sixty-seventh senator needed to override a presidential veto. This concept of pivot points is at the core of the habeas game, and I review it at some length.

Krehbiel begins by constructing a unidimensional policy space across which each senator has an ideal preference point for a given issue (see Figure 1).²⁵ The president has a preference as well. The policy in question can be any specific issue—farm subsidies, tax levels, military spending—but the more liberal preference is generally depicted on the left, the conservative one to the right.²⁶ Each player's preference follows a single-peaked, symmetric utility function, which means that a lawmaker is indifferent between policy choices equidistant from his or her ideal point, and favors the policy closest to it.²⁷ The game further assumes complete information—that preferences are known by all players and stable for the duration of the game.²⁸

In the legislative game, a number of positions are important, as diagrammed in Figure 1. The preference of the median lawmaker lies at *m*. Assuming strategic gameplay and no barriers to proposing, passing, or voting on bills, *m* will be the equilibrium outcome for any policy issue.²⁹ The

22. *Id.* at 391–96. Some of the criticisms of these arguments will be discussed *infra* Part I.D.

23. KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998).

24. *Id.* at 23.

25. *Id.* fig.2.2 (original figure).

26. *Id.* at 21.

27. *See id.* at 22–23 for a complete description of these baseline assumptions.

28. These assumptions, of course, do not capture the full complexity of legislative behavior. Nonetheless, they are common in the PPT literature. *See, e.g.,* Epstein et al., *supra* note 13, at 588 n.23; William N. Eskridge, Jr., *The Judicial Review Game*, 88 NW. U. L. REV. 382, 384 n.13 (1993); Boris Bershteyn, Note, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 YALE L.J. 359, 365 n.26 (2004). Krehbiel in particular explains why many of these idealized assumptions do not detract from the insights of the model. KREHBIEL, *supra* note 23, at 187–89. Nonetheless, I consider some larger objections to PPT in Part I.D. *infra*.

29. *See* KREHBIEL, *supra* note 23, at 35–39, for a formal discussion on why policy eventually settles on the preferences of the median legislator. Committees complicate this picture, as illustrated in Eskridge & Ferejohn, *supra* note 14. However, given how little a role committees

president's preference lies at p .

Krehbiel's model also includes the pivot points, the legislators who occupy key positions in the congressional scheme. The filibuster pivot f represents the vote of the sixtieth senator needed to invoke cloture and defeat a filibuster. The veto pivot v represents the sixty-seventh vote needed to override a presidential veto. Figure 1 diagrams the location of these points on a policy space, assuming a liberal president (they will be flipped for a conservative one).

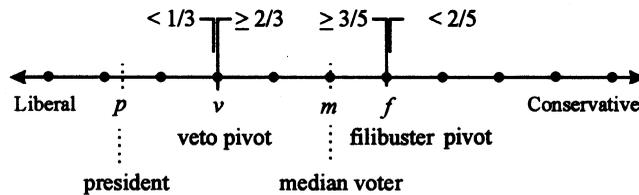


Figure 1: The policy space

In the policy game, legislators advance a strategy to maximize their utility—that is, to set policy closest to their preference. Before the game begins, the status quo policy q is exogenously assigned somewhere along the policy space—representing the current policy environment that Congress confronts as it begins the lawmaking process. A bill can then be proposed to shift q , but it is subject to the strategic voting, filibustering, and veto behavior of other legislators and the president.

The players' absolute preferences are represented by p , m , f , and v —but the actual votes of these pivotal legislators will be determined by comparing the proposed bill (*b) to the status quo (q). If the proposed bill is closer to a legislator's ideal preference than q is, the legislator will support it. If it is further, the legislator will not.³⁰

Figure 2 illustrates this game for the Senate, omitting the House. In this model, the president is more conservative than the Senate median (m). The filibuster pivot f represents the preference of the 41st most liberal senator. In other words, the Democrats can block a conservative president from shifting policy to the right by filibustering any proposed bill. The exact outcome of the game depends on where we assign q , which is the status quo that both Congress and the president seek to shift. In other words, the result depends on the initial policy—who wants to protect it, and who wants to change it.

played in fashioning habeas legislation (discussed *infra* Part II), they are largely superfluous to the model.

30. See KREHBIEL, *supra* note 23, at 21–26 for a complete description of the assumptions and operation of the game.

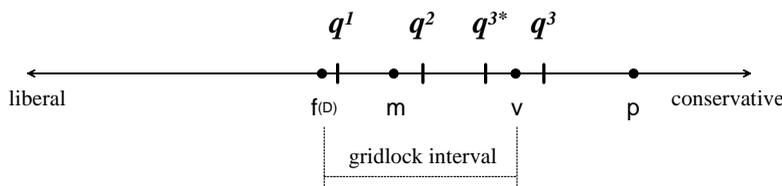


Figure 2: A basic model for pivotal politics

For example, imagine a status quo set at q_1 . Both the president and a majority of the Senate prefer a more conservative policy. Absent any parliamentary rules, the Senate will set policy at m and the president will sign the bill, happy to shift policy in his or her preferred direction. But it is impossible to accomplish this outcome, because a core group of at least forty-one liberal senators prefers the status quo (q_1) to m , and will filibuster any attempt to shift q_1 to the right. The result is that policy remains the same.

If the status quo policy instead begins at q_2 , a majority of the Senate prefers a more *liberal* policy—and the Senate could indeed pass a bill at m —but the president will veto it, because he wants to prevent any policy shift to the left. Policy remains unchanged.

Now consider a policy set at q_3 , a very conservative status quo. The president opposes any shift in policy to the left, but at least sixty-seven senators—including the veto pivot, at v —prefer such a change. The Senate will thus set final policy at q_{3*} , making the veto pivot indifferent between q_3 and q_{3*} (or slightly favoring the new policy), and ensuring the Senate has the sixty-seven votes to override any presidential veto. If the Senate attempts to shift policy even further to the left of q_{3*} —say, all the way to m —then the veto pivot will no longer be indifferent. He will prefer the status quo at q_3 to the median bill at m , and the Senate will lack the votes to override the president's inevitable veto. Thus, if the status quo begins at q_3 , the Senate can shift policy to the left only marginally—just as far as the veto pivot will allow.

Krehbiel's model immediately generates two important insights. First, the location of the status quo determines the outcome of the game. Second, within a broad range of status quo policies stretching from f to v , policy change is impossible. Between these points, either a filibustering minority of senators or the president is able to defeat any proposed change, using the formal powers of their respective positions. Krehbiel terms this “the gridlock interval.”³¹

The gridlock interval is one of the most important implications of the Krehbiel model. It essentially means that across a broad range of issues, policy is static, and Congress is powerless.³² Due to the power of the Senate minority

31. *Id.* at 38.

32. *Id.*

party, the gridlock interval exists in unified as well as divided government (as the intense effort of the Democrats to get to sixty votes in the Senate in the 2008 election demonstrates). Because the Senate needs sixty votes to pass legislation and sixty-seven votes to override a presidential veto, these supermajority requirements essentially paralyze Congress across a range of policy spaces—no matter which party controls the gavel.

The equilibrium outcome for this model can be solved and diagrammed across a range of possible status quos. The results are replicated in Figure 3, assuming a conservative president.³³

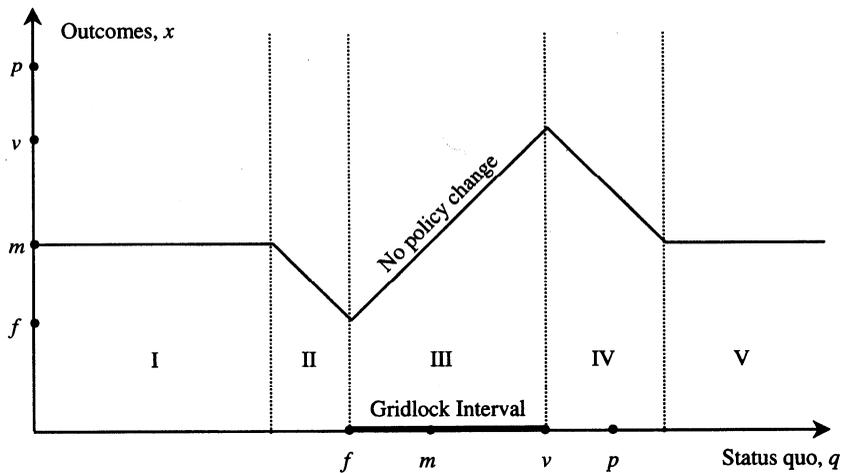


Figure 3: An equilibrium model of pivotal politics

The horizontal axis models the preferences of various key senators and the president, along with all possible locations at which the status quo q can be assigned. The vertical axis represents the final outcome that will result from any initial q .³⁴

Krehbiel divides the outcomes of this equilibrium model into separate intervals, each of which leads to vastly different results.

To begin, Interval III is the gridlock interval. As described above, for any q within it, policy will remain unchanged. Either the filibustering Senate minority party or the president will prevent any change to policy within this interval.

Intervals I and V represent an extreme q —a status quo far outside the preferences of Congress *and* the president. As a result, due to strategic game play, the final policy for any such status quo will be the median m .³⁵ Krehbiel

33. *Id.* at 35 fig.2.7 (original figure).

34. *See id.* at 34–38 (discussing equilibrium outcomes and citations to a formal proof).

35. *Id.* at 35–36. It may be counterintuitive that an extreme q results in policy set at m , but

expects such situations to be empirically rare, because it would be unusual for the government to allow the status quo to reach such extremes before it intervenes.³⁶ Nonetheless, Krehbiel neglects to consider the possibility that an exogenous force or actor—and the Supreme Court in particular, as we will see—could set policy in Interval I or V, thus promoting a convergence of the final policy to m .³⁷

Interval II is more interesting. In Interval II, the status quo is set just to the left of f , meaning Congress can shift policy toward m —but only by so much. If the Senate tries to shift policy all the way to m , the filibuster pivot will prefer the old status quo, and a proposed bill will be defeated. On the other hand, if f is kept indifferent between q and the proposal bill, policy will shift accordingly. Krehbiel calls this the “partial convergence” interval.³⁸ It represents the Senate minority using its filibuster power to shift policy in an incremental direction toward the median senator—but only part of the way there.

By focusing on the filibustering power of the minority party, Krehbiel’s equilibrium model explains why unified control of government does not always change policy. It also explains why the vast majority of Senate votes approving legislation pass on large, bipartisan margins, due to the supermajorities needed to defeat a filibuster or a presidential veto.³⁹

Krehbiel’s analysis offers a useful model of the legislative process. William Howell has built upon it to develop a more robust model that takes account of judicial preferences and a president’s unilateral executive power.⁴⁰

C. The President’s Unilateral Power

Howell begins with the observation that the president has tremendous power to influence policy unilaterally. He or she is not dependent on Congress to change the status quo, but can do so on his or her own through executive orders, administrative regulations, presidential appointments, and the like.

Howell thus seeks to improve upon models which “largely ignore” the ability of presidents to act unilaterally.⁴¹ By examining unilateral powers while incorporating the same basic game theory as Krehbiel, Howell suggests that “[t]he limits of [a president’s] unilateral powers are as wide or narrow as

this can be understood as the result of the median legislator being able to defeat any proposal to set policy to one side of m (e.g., more legislators will always prefer the median policy to a more extreme policy).

36. *Id.* at 36.

37. *See infra* Part III.A–B.

38. KREHBIEL, *supra* note 23, at 36. A similar analysis holds for Interval IV when the veto pivot is in play.

39. *See id.* at 82–85.

40. WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003).

41. *Id.* at 13.

Congress and the courts permit.”⁴² In graphical terms, Howell’s insight is that q is not fixed and exogenous, but can be shifted unilaterally by the president. It is then up to Congress or the courts to respond.

How much (and in which direction) the president can unilaterally shift policy is captured by the discretionary parameter d , as illustrated in Figure 4.⁴³ In practice, d represents such actions as issuing an executive order, hiring and firing staff, giving orders to the military, directing political appointees of the agencies, and wielding budgetary authority.

Congress and the Courts often allow such actions—but not always. In the policy game, the width and direction of d turn on what actions the president can unilaterally take without provoking congressional or judicial intervention.

The president has two chief advantages over the other branches: he or she can move first, and can move quickly. This gives the president an enormous advantage over Congress, which faces tremendous transactional costs to legislate,⁴⁴ as well as over the Supreme Court, which might not receive a case until years after it is first filed.

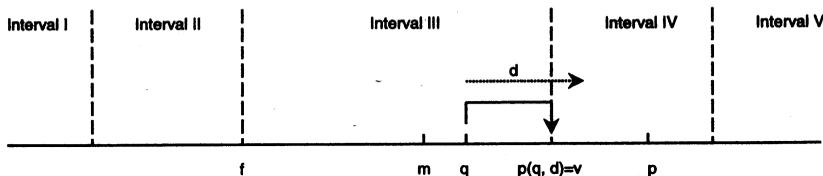


Figure 4: The president’s unilateral power to shift policy

Figure 4 illustrates presidential powers in action, with a conservative president and a more liberal Congress. For example, assume the issue is environmental enforcement against large companies, with liberals favoring more and conservatives less. The existing level of enforcement is set at q , well within the gridlock interval. Under the Krehbiel model, this would be the end of the game, because Congress will not allow any legislative shift to the right, and the president will veto any shift to the left. But under the Howell model, the president retains powers independent of Congress to shift q despite its location in the gridlock interval. The president could accomplish this shift by appointing a new Environmental Protection Agency (EPA) head during Senate recess, directing the Office of Information and Regulatory Affairs (OIRA) to clamp down on new rulemaking, or placing informal pressure on political appointees to soften enforcement. All of these actions will shift policy, and none of them require congressional action.

42. *Id.* at 23.

43. *Id.* at 39 fig.2.5B (original figure).

44. *See, e.g.,* Eskridge, *supra* note 18.

How far can the president unilaterally shift policy? As far as Congress allows. Borrowing Krehbiel's insight into the gridlock interval, we see the president can shift policy all the way to v , the edge of the gridlock interval, without provoking a congressional response.⁴⁵ Move any further and Congress will intervene legislatively to shift policy back to the median preference, m . But, unless the president exceeds v , Congress will lack the votes to shift policy and sustain a veto override—and thus will remain stuck in gridlock.

The president may also preempt Congress. In Figure 5, the president prefers to preserve the conservative status quo.⁴⁶ But because q is well to the right of v , Congress is likely to step in and shift policy into the gridlock interval, to the point where the veto pivot is indifferent, thus ensuring Congress will be able to override any presidential veto. The president can preempt this move, however, by unilaterally shifting policy *on his or her own* to the rightward edge of the gridlock interval. This moves policy away from the president's preferred position, true, but to a lesser extent than would have occurred had Congress intervened.⁴⁷

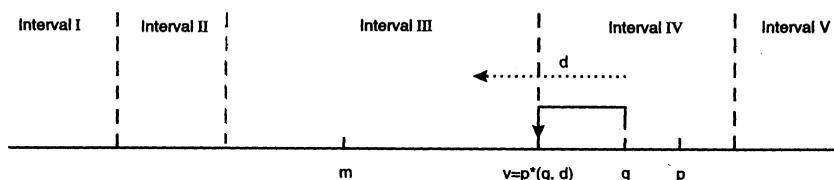


Figure 5: The pre-emptive power of the president

As these examples illustrate, the president retains tremendous power to manipulate the gridlock interval, and Congress is limited in its ability to respond for a variety of political and structural reasons. The president's informational advantages, the transaction costs of legislation, and the multiple potential legislative veto points all work against Congress.⁴⁸ Thus, a president behaving strategically and with perfect information about congressional preferences should never allow Congress to get the upper hand. In this two-player model, Congress occupies an extremely weak position because of the structural constitution of the branch.

45. This analysis omits for a moment the judiciary, and also makes the standard PPT assumption that the president knows the location of the pivot points.

46. HOWELL, *supra* note 40, at 58 fig.3.1B (original figure).

47. Such complex moves would seem rare. Howell offers the example of South Africa policy in the 1980s, when President Ronald Reagan, despite being opposed to any alteration of his policy of "constructive engagement" with the apartheid regime, unilaterally imposed some (but not all) of the sanctions included in a bipartisan bill that was headed for strong passage. The move shifted policy to the left, but it also defused congressional support for the more drastic bill, forestalling a larger correction to the president's policy. *Id.* at 58–59.

48. *Id.* at 134.

Of course, the Court may be an independent check on executive power, which is problematic for Howell's model. The judiciary may reverse the president if d extends too far—or in the wrong direction. To capture the judicial role, Howell ultimately adopts the public choice insights of Eskridge, among others, and gives the judiciary its own preference point, j , that it seeks to enforce, as illustrated in Figure 6.⁴⁹ In this scenario, the Court only overturns presidential action when the president shifts policy *away* from j .⁵⁰

Omitting for a moment Congress, the finite parameter d becomes a vector demarcated by the preference of the judiciary. In other words, the president cannot pull in an opposite direction from the Court.

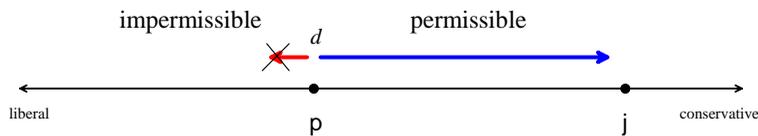


Figure 6: The impact of judicial preferences on unilateral power

Howell then solves the equilibrium model for both Congress and the Court, assuming a sequence in which the president acts first and either the Court or Congress can respond.⁵¹ This model neglects to consider Congress-Court disputes, however, a sequence that I consider in Parts III.A and III.B.

For now, it is enough to note a few insights from Howell's model. First, the president can manipulate the gridlock interval to achieve a range of policies.⁵² Because Congress can only intervene to reverse presidential action when it has the two-thirds majority needed to override a veto, the president is free to push policy independent of legislative will.

Second, the only other check on this power is the judiciary, and particularly the Supreme Court. The Court will intervene when its own preferences are offended by presidential action.⁵³ But, as Howell explains, the likelihood of such intervention is empirically and historically quite low.⁵⁴ The Supreme Court is reluctant to reverse presidential actions, for a number of reasons.

49. *Id.* at 45–46.

50. *Id.*

51. *Id.* at 46–47.

52. *Id.* at 53–54.

53. As discussed *supra* note 13, the strategic model assumes that the Court has preferences, but those preferences need not be driven solely by ideology. The Court could just as well be motivated by its preferred legal rules, its conception of the judicial rule, or its fidelity to an enacting Congress.

54. HOWELL, *supra* note 40, at 136–74.

First, Howell notes that the judiciary can issue decisions, but it cannot enforce them without the executive. Thus, the Court is reluctant to reach a decision that the president might ignore—which could severely limit the institutional power of the Court. Howell draws on several studies (and builds his own) to suggest that, as a result, the Court rarely overturns unilateral presidential actions (which also explains why *d*, the parameter capturing the president's unilateral power, is quite large vis-à-vis the judiciary).⁵⁵

Second, the president has more latitude in certain policy areas, such as national security, where the courts are reluctant to confront the president. Throughout history, courts have avoided direct conflicts with a wartime president on foreign affairs.⁵⁶ I consider this phenomenon—and how the Supreme Court may have finally upended it—in Part IV.

Third, the Supreme Court has developed several techniques of constitutional and statutory interpretation to enshrine such deference: the political question doctrine, the constitutional avoidance canon, the clear statement rule, among others. Howell argues that only when Congress or special interest groups oppose the president on a salient public issue does the Court even consider intervening.⁵⁷ In general, the Supreme Court gives the president a wide berth to move policy—again, subject to the limitations noted in this Comment.

Howell's central point is ultimately uncontroversial: the president's unilateral power is constrained only by the willingness of the Court or Congress to intervene.

D. Caveats & Criticisms

The PPT models developed above can be powerful tools for understanding political dynamics. With respect to the Supreme Court, PPT combines an attitudinal insight—that judges act on their policy preferences—with a more complex understanding of how those preferences will be expressed. PPT helps illustrate the importance of the sequence of decision making, the role of each institutional actor in setting policy, and the interaction of many causal factors as determinants of policy.⁵⁸

There are important limits to these models, however. To begin, there are three methodological assumptions that merit discussion.

First, the typical PPT assumption of perfect information among all institutional players is problematic. If this assumption seems debatable

55. *See id.* at 136–78.

56. Congress may be similarly disinclined, given historic deference to the president, the difficulty in acquiring the same information available to the president, and the meager electoral benefits of challenging a wartime president. *See id.* at 109.

57. *See id.* at 158–72.

58. Jacobi, *supra* note 5, at 275–76.

regarding Congress, it seems almost indefensible about the judiciary. For a host of reasons—judges’ institutional detachment from politics, their small staffs and lack of political training, the discouragement of formal contact with the other branches—the Court seems especially prone to miscalculation. In the context of recent national security issues, an assumption of perfect information in either Congress or the judiciary may be especially unrealistic, because President Bush actively shielded national-security-related information from the other branches.⁵⁹

Howell and Krehbiel have their own answer to the perfect-information assumption, arguing mainly that introducing an “uncertainty” variable to the model complicates but does not reject the basic equilibrium solutions for the game.⁶⁰ More intuitively, legal scholars such as Eskridge freely acknowledge that the Court can (and does) miscalculate congressional preferences, precisely because it has imperfect information.⁶¹ My models also suggest the Court may blunder in assessing legislative preferences.⁶² Relaxing the perfect information assumption, therefore, leads to more strategic mistakes and tougher strategic calculations—but it does not undermine the basic goals of each actor.⁶³

A second methodological objection is the notion of the judiciary (or the Supreme Court) as a unitary actor. This is problematic given the robust scholarship that models the complex decision making that occurs on multi-member courts.⁶⁴ On the other hand, the unitary court is a common assumption in the PPT literature, where it is treated as a “modeling imperative” necessary to make the theories “mathematically tractable.”⁶⁵ Moreover, as I discuss in note 170, it may be appropriate to relax the objection to the unitary court in the context of the habeas cases, because all of them were decided by a nearly

59. See generally Gia B. Lee, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197 (2008); Note, *Mechanisms of Secrecy*, 121 HARV. L. REV. 1556, 1560 (2008); Rahul Sagar, *On Combating Abuses of State Secrecy*, 15 J. POL. PHIL. 404 (2007); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 918–19 (2006).

60. HOWELL, *supra* note 40, at 49; KREHBIEL, *supra* note 23, at 188.

61. Eskridge, *supra* note 18, at 388.

62. See *infra* Part IV.A.

63. But see Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2184 (2002) (arguing that, in part, the failure of perfect information actually causes the Court to pursue a strategy of statutory interpretation that will maximize the enactment of clear legislative preferences).

64. See, e.g., Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992); Charles M. Cameron & Lewis A. Kornhauser, *Modeling Collegial Courts (3): Judicial Objectives, Opinion Content, Voting and Adjudication Equilibria* (N.Y. Univ. Public Law & Legal Theory Working Papers, Paper No. 94, 2008), available at <http://lsr.nellco.org/nyu/plltwp/papers/94/>.

65. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 580–81 (2005) (describing the assumption of the unitary court as “unobjectionable” as a methodological premise—until theorists start to draw normative conclusions from such models).

identical coalition of justices, and also because of Justice Kennedy's dominant role on the Court as the median justice. If it helps, therefore, assume that "the Court" really means a particular coalition led by Justice Kennedy—problematic as that may be.

The third methodological assumption common to PPT scholars is that policymaking unfolds as a one-shot, static, sequential game, with each branch acting in turn. In the Eskridge model, the Court acts first. In the Howell model, it acts last. But what if the judiciary can act first, last—and then again and again? In such a sequence, a strategic judiciary enjoys increased power against the other branches. It can intervene repeatedly against a contrary congressional interpretation, waging multiple attempts to bend policy to its will. As I discuss in Part IV.A, this is one way of understanding what the Court has done since 9/11. Rather than undermine PPT, however, this phenomenon lends credence to other scholars who have begun to recognize and account for this strategic advantage.⁶⁶

Aside from these methodological issues, there are some larger critiques of PPT that must be considered.

For one, many readers may object to the very premise of PPT: that judges behave strategically. It is indeed troubling to believe that, in deciding cases, judges may ask not only, "What does the law say?", but also "What will Congress do?"⁶⁷ Such behavior belies our ideal of the judge as an impartial arbiter of the law.⁶⁸

Nonetheless, PPT scholars have begun to gather qualitative, anecdotal, and empirical evidence to support their formal theories.⁶⁹ They also make the basic point that judges *must* behave strategically, both because they are sophisticated professionals who want to see their work vindicated, and because the institutional weaknesses of the judiciary demand attentiveness to the other branches.⁷⁰ This phenomenon may be particularly powerful in the context of national security where, as I discuss in Part IV.B, judges have shown a particular deference to Congress and the president.

More broadly, critics also contend that PPT simply cannot account for the range of influences on political behavior. For example, as Howell and Krehbiel

66. See, e.g., Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1456 (2001) (interpreting the Civil Rights Act of 1991 through this lens).

67. For an empirical argument that judges do *not* consider Congress, see Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (finding little empirical support for the idea that judges consider congressional preferences in deciding cases).

68. See generally Eskridge & Frickey, *supra* note 12, at 29 ("To some lawyers . . . the notion that the Supreme Court engages in strategic behavior may be shocking.")

69. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 148–50 (1998); Cross & Nelson, *supra* note 66, at 1483–93; Epstein et al., *supra* note 13, at 601–10.

70. Jacobi, *supra* note 5, at 261, 265.

acknowledge, PPT fails to include a formal representation of many of the forces that political scientists believe drive congressional behavior: political party allegiance, agenda-setting, transaction costs, issue salience, and the committee process.⁷¹ One critic goes further to suggest that once public choice theory yields to the possibility of other influences on political behavior, its explanatory power drops to zero—it simply cannot account for complexity.⁷²

Howell and Krehbiel freely admit these limitations, although they contend their models explain congressional outcomes at least as well as theories centered on other phenomena.⁷³ Other scholars have begun to model how more informal sources of congressional power, such as public suasion, hearings, lobbying, informal contacts, and budget controls influence the strategic behavior of the courts.⁷⁴ Still other works attack this problem by modeling Court strategy through the lens of the principal-agent relationship—the need of the Court to control and confine the discretion of the lower courts.⁷⁵

None of these models purport to explain judicial behavior *in toto*—and neither do mine. But they do suggest that PPT is not necessarily undermined by its simplicity—that it can account for the nuance and complexity of political relationships, as well as the various strategic goals of a discerning court. Ultimately, PPT is an explanatory tool, and one that proves particularly helpful in understanding policy at Guantánamo Bay.

II

THE HISTORY OF THE HABEAS FIGHT SINCE 9/11

In this Part, I review the events that followed 9/11 regarding detainee habeas rights and the scope of judicial review. In Part III, I depict the events though a formal PPT model of the three branches.

A. Before and After September 11, 2001

The interplay among the president, Congress, and the Court over the scope of habeas jurisdiction stretches back to the early days of the Republic. The Constitution guarantees that the writ of habeas corpus shall be suspended only during invasion or rebellion,⁷⁶ and a federal statutory right to habeas has been in operation more or less since 1789.⁷⁷ Moreover, this law has extended to

71. HOWELL, *supra* note 40, at 48–54; KREHBIEL, *supra* note 23, at 187–89.

72. Cynthia R. Farina, *Faith, Hope, and Rationality: Or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109 (2000).

73. HOWELL, *supra* note 40, at 48–54; KREHBIEL, *supra* note 23, at 187–89.

74. See, e.g., Cross & Nelson, *supra* note 66, at 1459–71.

75. McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105 (2006).

76. U.S. CONST. art. I, § 9.

77. Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2055 (2007).

both aliens and citizens if they are detained within the jurisdiction of the United States.⁷⁸ For most of the country's history, therefore, the federal habeas statute was blind to the citizenship of the petitioner.

The 9/11 attacks brought the issue of noncitizen habeas rights to the forefront of public debate. Suddenly, the United States faced the prospect of detaining thousands of foreign nationals suspected of aiding or abetting terrorism—yet with no official war underway, no legal mechanism to detain them, and no clear picture of their rights.

Congress and the president responded quickly. On September 18, 2001, Congress passed the Authorization for the Use of Military Force (AUMF), giving the president broad authority to “use all necessary and appropriate force against those nations, organizations, or persons he determines” to have been responsible for 9/11.⁷⁹

Two months later, President Bush issued an executive order establishing a system of military tribunals to try suspected terrorists.⁸⁰ In the executive order, the president cited the AUMF, his inherent constitutional power as commander in chief, and portions of the United States Code dealing with court martial jurisdiction for the authority to establish the tribunals.⁸¹ Though the language of the order seemed to eliminate any right of appeal to a federal court for anyone detained under the order, the president's then-legal counsel, Alberto Gonzalez, stated that the order did not foreclose detainee habeas appeals.⁸² Moreover, the relevant federal habeas statute, 28 U.S.C. § 2241, continued to authorize district courts to entertain habeas petitions wherever they had jurisdiction, including over alien petitioners.⁸³

Shortly thereafter, during early January of 2002, the administration opened a detention facility at Guantánamo Bay, Cuba.⁸⁴ From the beginning, the Bush administration maintained that the facility was outside the territorial jurisdiction of the United States, and therefore no court had jurisdiction to entertain the habeas appeals of its noncitizen detainees.⁸⁵ Furthermore, the

78. *Id.*

79. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

80. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 F.R. 57833 (Nov. 16, 2001).

81. *Id.*

82. Albert Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

83. 28 U.S.C. § 2241 (2001), amended by Pub. L. No. 109-148, Div. A, Title X, § 1005(e)(1) (2005) and Pub. L. No. 109-366, § 7(a) (2006).

84. Donald Rumsfeld, U.S. Sec'y of Def., Department of Defense News Briefing with Secretary Rumsfeld and General Myers (Jan. 11, 2002), <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2031>.

85. See Brief for the Respondents in Opposition at 13–17, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334); Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 894 (2007). See generally Neal Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006).

administration did not provide any opportunity for detainees to challenge their confinement before review boards or commissions until the Supreme Court's decisions in *Rasul* and *Hamdi* in 2004 forced it to do so.⁸⁶ Before *Rasul*, the administration refused to release the names of those held at the base, prohibited access to lawyers, and kept virtually all information about Guantánamo from the public.⁸⁷

As such, the detainees were held in legal limbo. There was “no systematic effort . . . to determine whether the detainees were combatants.”⁸⁸ Further, the administration showed no interest in placing the detention scheme on sounder legislative footing.⁸⁹ Both Democratic and Republican members of the Senate Judiciary Committee reported being “rebuffed” by the president in 2002 when they tried to introduce bills allowing for military tribunals.⁹⁰ The administration insisted that the president had the unilateral authority to authorize the detention scheme—and President Bush likely believed no court would hold otherwise.⁹¹

B. *Rasul and Hamdi*

Heading into the Supreme Court's first confrontation with these issues in early 2004, the administration argued that detainees had no legal right to challenge any aspect of their detention.⁹²

In *Rasul v. Bush*, the Supreme Court rejected this argument.⁹³ Through their friends and relatives, fourteen foreign nationals detained at Guantánamo had filed petitions in the United States District Court for the District of Columbia challenging the legality of their detention. Relying on a 1950 decision that held that aliens detained outside the jurisdiction of the United States may not seek habeas relief, the district court dismissed the complaints for lack of jurisdiction; the D.C. Circuit Court of Appeals affirmed, and the Supreme Court granted certiorari.⁹⁴ Before the Supreme Court, the administration sought to defend the prior rulings, arguing that the Guantánamo facility was outside the sovereign jurisdiction of the United States, and thus neither statutory nor constitutional habeas rights applied.⁹⁵

86. Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 817 (2007).

87. Jonathan Hafetz, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantánamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127, 129, 136 (2006).

88. Greenberger, *supra* note 86, at 817; *see also* Hafetz, *supra* note 87, at 135 (“In short, the United States largely succeeded in establishing a system of unreviewable, and essentially secret, detention at Guantánamo before the Supreme Court's 2004 decision in *Rasul v. Bush*.”).

89. Allen, *supra* note 85, at 896.

90. *Id.*

91. *See* JACK GOLDSMITH, *THE TERROR PRESIDENCY* 120–29 (2007).

92. *See* Brief for the Respondents in Opposition, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334).

93. 542 U.S. 466 (2004).

94. *Id.* at 472–73 (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

95. *Id.* at 481–82.

On June 28, 2004, the Supreme Court broadly rejected this position in a 6-3 ruling, holding that the federal habeas statute, 28 U.S.C. § 2241—which had not been altered after 9/11—extended to foreign detainees at Guantánamo.⁹⁶ The Court took pains to rest its ruling on statutory grounds, avoiding larger questions about the constitutionality of the government’s detention scheme.⁹⁷

Nonetheless, it was a broad ruling, holding that alien detainees at Guantánamo—and possibly worldwide—had the right to access civilian courts in the United States.⁹⁸ As one prominent civil liberties advocate argued, “*Rasul* made clear that jurisdiction does not turn on the status of the detainee or on formal notions of sovereignty, but rather on whether the respondent can be reached by the writ and on the nature and extent of U.S. control over the territory in which the prisoner is held.”⁹⁹ However, the decision was silent on all but the jurisdictional issue, leaving undecided the substance of the statutory review the detainees could claim.

In *Hamdi v. Rumsfeld*, a companion case decided the same day, a plurality of the Court ruled that the president could lawfully detain a U.S. citizen captured on the battlefield in Afghanistan as an enemy combatant.¹⁰⁰ However, the court held that despite his classification as an enemy combatant, the detainee was entitled to core procedural protections: notice of the factual basis for the detention, a fair opportunity to rebut the factual assertions, and a neutral decision-maker.¹⁰¹

While *Hamdi* technically applied only to detainees possessing U.S. citizenship, many legal scholars interpreted *Hamdi* and *Rasul* together as requiring core procedural protections for even alien detainees.¹⁰² Thus, the two cases evinced a major shift in America’s post-9/11 detention scheme, at least when compared to the baseline of no procedural rights that the Bush administration perpetuated after 9/11. Following the decisions, alien detainees were entitled to access civilian courts through habeas petitions, and likely could count on procedural protections even in a military tribunal.¹⁰³

Not surprisingly, the administration soon faced a wave of habeas challenges from detainees, and the resulting legal process provided public accounts of Guantánamo, ending the strict secrecy the administration had sought to enforce.¹⁰⁴

96. *Id.* at 483.

97. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 178 (Supp. 2007).

98. See *id.* at 180–81 (discussing the ambiguity about whether the ruling applied solely to Guantánamo).

99. Hafetz, *supra* note 87, at 140.

100. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

101. *Id.* at 533.

102. Greenberger, *supra* note 86, at 817.

103. *Id.*

104. Hafetz, *supra* note 87, at 140 (“After *Rasul* held that Guantánamo detainees could test

C. After Rasul: The Creation of the CSRTs

Just nine days after *Rasul*, the administration responded by creating Combatant Status Review Tribunals (CSRTs) to review each individual detention at Guantánamo.¹⁰⁵ The CSRTs ostensibly included a number of procedural protections designed to comply with *Rasul*, *Hamdi*, and existing Defense Department regulations: the detainee could hear the factual basis for detention, rebut it with testimony and evidence, and have the assistance of a military officer in the process.¹⁰⁶

The inclusion of these procedural protections in the CSRTs evinced a rather fundamental shift for the Bush administration. Before *Rasul* and *Hamdi*, the administration maintained that no court had authority to hear any case by any alien detainee, and that therefore the Department of Defense was free to incarcerate such prisoners at will, without any formal hearings.¹⁰⁷ After *Rasul*, detainees had both a statutory right to habeas review and, depending on the reach of *Hamdi*, possibly a constitutional right to Due Process to determine the propriety of their detention. Many scholars applauded these developments for properly balancing national security needs with constitutional liberties.¹⁰⁸

Nevertheless, many contended that the “paper” rights *Rasul* and *Hamdi* created were, in practice, nonexistent. Detainees and their lawyers alleged excess secrecy at Guantánamo, the absence of meaningful trial-like procedures, the use of secret evidence, and the lack of access to evidence and counsel.¹⁰⁹ Further, the administration immediately sought to dismiss pending federal cases after *Rasul* and *Hamdi*, arguing that while the detainees might have the right to a habeas petition, there were no substantive rights such a petition could vindicate—and therefore no court should hear their challenges.¹¹⁰ And, once again, despite congressional calls for the administration to seek legislation, President Bush refused to go to Congress to place the detention scheme on

by habeas corpus the lawfulness of their confinement in federal court, the district court ordered the government to provide habeas attorneys with unmonitored access to their clients. New habeas petitions were filed, and attorneys began visiting Guantánamo, meeting with detainees, and preparing challenges to their clients’ detention.”); Neil A. Lewis & Kate Zernike, *Measures Seek to Restrict Detainees’ Access to Courts*, N.Y. TIMES, Sept. 21, 2006, at A22.

105. See Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (regarding an “Order Establishing Combatant Status Review Tribunal”).

106. FALLON ET AL., *supra* note 97, at 181.

107. See Brief for Respondents at 13–17, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334).

108. See Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061 (2005).

109. Greenberger, *supra* note 86, at 818; Hafetz, *supra* note 87, at 141; see also *id.* at 146 (“Even after *Rasul*, the government . . . maintained that any access [to counsel] was discretionary and that detainees had no right to counsel under the Constitution, laws, or treaties of the United States.”).

110. FALLON ET AL., *supra* note 97, at 181.

firmer footing.¹¹¹

Thus, the administration's response to *Rasul* and *Hamdi* was marked by two broad and somewhat contradictory trends. On the one hand, the administration acceded to certain formal procedures for the detainees, mainly by creating the CSRT process. On the other hand, it sought to undermine that very process by blocking any further judicial inquiry into the detention scheme.

D. The Detainee Treatment Act of 2005

The initial reaction to *Rasul* and *Hamdi* in Congress was a strange silence, with "no lawmaker [speaking] on the House or Senate floor about the results and only a handful [of] issued press releases about the cases."¹¹² Between the administration's limited concessions following the cases, and its determination to keep Congress out, there was little impetus to revisit the issue, especially in a Senate controlled by the Republicans 55-45.

But the prospect of further Supreme Court intervention changed this calculus. In November of 2005, the Supreme Court granted certiorari in *Hamdan v. Rumsfeld*, a foreign national's challenge to his Guantánamo detention.¹¹³ Three days later, Congress abruptly took up the issue of detainee rights.¹¹⁴

On November 10, Senator Lindsey Graham (R-SC) proposed an amendment to the Detainee Treatment Act (DTA), a pending part of a \$440 billion military budget bill, to strip the courts of all jurisdiction over detainee habeas claims.¹¹⁵ The Graham Amendment would have amended 28 U.S.C. § 2241 to prevent any "court, judge, or justice" from hearing the habeas claim of any detainee at Guantánamo.¹¹⁶ This amendment struck at the core of detainee rights established by the Supreme Court and would have reversed the decision in *Rasul*. Coming just days after a bitter fight over the "McCain Amendment" to prohibit torture, the Graham Amendment caught many legislators off-guard.¹¹⁷

In place of habeas jurisdiction, the Amendment created a limited mechanism for D.C. Circuit review of the final decisions of the CSRTs.¹¹⁸ Such

111. GOLDSMITH, *supra* note 91, at 135-36; Tim Golden, *Detainee Memo Created Divide in White House*, N.Y. TIMES, Oct. 1, 2006, § 1, at 1.

112. Neil Devins, *Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction*, 91 MINN. L. REV. 1562, 1566 (2007).

113. 546 U.S. 1002 (2005) (granting petition for writ of certiorari).

114. John Yoo, *National Security and the Rehnquist Court*, 74 GEO. WASH. L. REV. 1144, 1163 (2006).

115. S Amend. 2515 to S. 1042, 109th Cong. (2005).

116. *Id.*

117. Eric Schmitt, *Senate Approves Limiting Rights of U.S. Detainees*, N.Y. TIMES, Nov. 11, 2005, at A1.

118. S Amend. 2515 to S. 1042, 109th Cong. (2005).

review was to be limited to whether the CSRTs complied with applicable Department of Defense procedures.¹¹⁹

Senator Graham's amendment quickly made its way through the Senate with little debate or public comment. The day after he proposed it, the amendment passed the Senate on a 49-42 vote, with five Democrats joining forty-four Republicans to support the bill.¹²⁰

A public outcry soon followed, as commentators and activists began to appreciate the magnitude of the habeas-stripping provision.¹²¹ Senate Democrats regrouped in opposition, and Senator Jeff Bingaman (D-NM) promised an amendment to reverse the Graham Amendment and restore habeas rights for detainees.¹²²

Four days after the initial vote, the Senate returned to the DTA. Senator Bingaman and the Democrats proposed an amendment to restore habeas rights.¹²³ Importantly, though, the Bingaman proposal did not leave *Rasul* untouched. Instead, it channeled all habeas claims into the D.C. Circuit, limited those claims to issues of the lawfulness of the detention, forbade any claims based on living conditions, and required a detainee to first undergo a CSRT determination before invoking habeas protections.¹²⁴ In other words, even the Democratic counter-proposal to Graham did not preserve *Rasul* in its entirety.¹²⁵

Even so, the Bingaman Amendment failed on a 44-54 vote.¹²⁶ Still, the forty-two votes *against* the initial Graham Amendment and the forty-four votes *for* the Bingaman proposal suggest that a significant number of senators—at least more than forty, the number required for a filibuster— favored some form of habeas rights for alien detainees.

With the original Graham Amendment clinging to life—but the Democratic alternative dead—the Senate next considered a compromise bill fashioned by Senator Graham and Senator Carl Levin (D-MI). The Graham-Levin compromise amendment positioned policy somewhere between Graham's initial proposal and the Bingaman Amendment.¹²⁷ Like the initial Graham Amendment, the compromise eliminated habeas relief for detainees

119. *Id.*

120. Record Vote No. 319 on S. Amend. 2516 to S. Amend. 2515 to S. 1042, 109th Cong. (2005), 151 CONG. REC. S12, 667 (daily ed. Nov. 10, 2005).

121. *See, e.g.,* Eric Schmitt, *Democrats Provided Edge on Detainee Vote*, N.Y. TIMES, Nov. 12, 2005, at A11.

122. *Id.*

123. S. Amend. 2523 to S. 1042, 109th Cong. (2005).

124. *Id.*

125. *See* 151 CONG. REC. S12, 727–28 (daily ed. Nov. 14, 2005) (statement of Sen. Bingaman) (describing effect of amendment).

126. Record Vote No. 324 on S. Amend. 2523 to S. 1042, 109th Cong. (2005), 151 CONG. REC. S12, 800 (daily ed. Nov. 15, 2005).

127. S. Amend. 2524 to S. 1042, 109th Cong. (2005).

and centered all judicial review in the D.C. Circuit. However, unlike the Graham Amendment, it expanded the scope of such review to include whether the CSRTs operated consistently with “the Constitution and laws of the United States.”¹²⁸ The compromise amendment also changed the effective date of the jurisdiction-stripping provision, seemingly allowing pending habeas cases to remain before the Court.¹²⁹

The Graham-Levin compromise amendment passed the Senate on an 84-14 vote.¹³⁰ After minor procedural changes in the House-Senate conference committee,¹³¹ the bill cleared the House, and the Senate passed the final military budget bill including the DTA on a voice vote on December 21, 2005.¹³²

The DTA was thus a clear rebuke to the Court’s decision in *Rasul*. But it also did not return policy to the baseline of no judicial review that the Bush administration had first demanded. Instead, the DTA eliminated *Rasul*’s recognition of a statutory habeas right, but left intact a mechanism for judicial review through the D.C. Circuit—one far more expansive than the president had wanted.¹³³ For some scholars, then, the DTA meant that Congress had

128. *Id.* The compromise amendment also provided the same level of review for the decisions of military commissions, the more elaborate military tribunals that the Bush administration envisioned would try the detainees for specific offenses. The legality of military commissions would be at issue in *Hamdan*, but they are ancillary to this Comment.

129. This issue of retroactivity divided the Supreme Court when it later took up the issue in *Hamdan*. Three justices believed the language of the DTA stripped the Court’s jurisdiction over *future* cases, but five justices disagreed—effectively giving the Court a statutory basis on which to hear the case. In defense of the majority’s decision, it should be noted that a number of the Senators who spoke on the floor before the final vote on the DTA, including a co-sponsor of the final compromise amendment, explicitly noted that it preserved the Court’s jurisdiction in *Hamdan*, in contrast to the original Graham amendment. *See* 151 CONG. REC. S12, 802 (daily ed. Nov. 15, 2005) (statement of Sen. Levin); 151 CONG. REC. S12, 799 (daily ed. Nov. 15, 2005) (statement of Sen. Kerry); 151 CONG. REC. S12, 803 (daily ed. Nov. 15, 2005) (statement of Sen. Reid). By contrast, no supporter of the original Graham amendment suggested at the time that it would remove jurisdiction. *See* Devins, *supra* note 112, at 1571 n.56. (“This lack of response [to Levin] is particularly noteworthy because Graham spoke immediately after Levin on two of the three occasions in which Levin contended that the Act was prospective in application.”) Moreover, the only explicit language to support the idea that the jurisdiction-stripping provision applied to pending cases was inserted *after* the vote. *Hamdan v. Rumsfeld*, 548 U.S. 557, 580 n.10 (2006) (plurality opinion); *see also* Devins, *supra* note 112, at 1571. Finally, “the fact that eighty-four Senators voted for the amended bill provides strong evidence that the Senate did not intend to foreclose Supreme Court review in *Hamdan*.” *Id.*

130. Record Vote No. 325 on S. Amend. 2524 to S. 1042, 109th Cong. (2005), 151 CONG. REC. S12, 803 (daily ed. Nov. 15, 2005).

131. One change was somewhat significant: the final Senate bill stripped jurisdiction over habeas actions only, while the conference-committee bill extended this prohibition to all actions filed against the United States. *See* 151 CONG. REC. S14, 257 (daily ed. Dec. 21, 2005) (statement of Sen. Levin).

132. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005), (codified at 10 U.S.C. § 801 (2006)). Final voice vote is available at 151 CONG. REC. S14, 275 (daily ed. Dec. 21, 2005).

133. *See* Yoo, *supra* note 114, at 1164.

finally “recognize[d] the need for ‘federal court oversight.’”¹³⁴ Whether such oversight was robust enough to survive Supreme Court scrutiny was another question.

E. Hamdan

Indeed, the DTA did not end the struggle among Congress, the president, and the Court. Six months after the president signed the DTA, the Supreme Court ruled in *Hamdan* that the military commissions at issue in the case had not been expressly authorized by any congressional act (including the DTA) and that, under existing U.S. laws and treaty obligations, such commissions were illegal.¹³⁵ More importantly for this Comment, the Court also found that it still possessed *statutory* jurisdiction to entertain Hamdan’s habeas appeal, because the DTA’s amendments to 28 U.S.C. § 2241 ousting the Court of jurisdiction only applied to future cases, not pending ones.¹³⁶ On this point, the Court’s holding was narrow, declining to reach the question of whether Hamdan had a constitutional right to habeas.

Hamdan was nevertheless a strong rebuke of administration efforts to shield Guantánamo from judicial scrutiny. The Solicitor General argued before the Court that it had no authority to hear the case following the DTA,¹³⁷ that the president had the unilateral constitutional power to convene the military commissions, and that, even if he lacked such power, the AUMF and the DTA explicitly authorized the commissions.¹³⁸

The Supreme Court rejected every one of these arguments—though like in *Rasul*, it did so on statutory rather than constitutional grounds. The Court found that Congress, acting through the Uniform Code of Military Justice (UCMJ), the AUMF, and the DTA, had “at most acknowledge[d] a general presidential authority to convene military commissions.”¹³⁹ But, the president had not satisfied the requirements of the UCMJ to use such authority, and, further, the procedures utilized to try Hamdan violated the Geneva Conventions, incorporated by reference into the UCMJ.¹⁴⁰

As in *Rasul* and *Hamdi*, the court contemplated—and indeed invited—a congressional response. As Justice Breyer said:

The Court’s conclusion ultimately rests upon a single ground: Congress has not issued the executive a “blank check.” Indeed, Congress has denied the president the legislative authority to create

134. Devins, *supra* note 112, at 1572 (quoting Sen. Levin).

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

136. *Id.* at 571–85.

137. Brief for Respondents at 12, *Hamdan v. Rumsfeld*, 2005 U.S. Briefs 184 (2006) (No. 05-184).

138. *Hamdan*, 548 U.S. at 592–94.

139. *Id.* at 594–95.

140. *Id.* at 625–26.

military commissions of the kind at issue here. Nothing prevents the president from returning to Congress to seek the authority he believes necessary.¹⁴¹

F. The Military Commissions Act of 2006

In *Hamdan*, the Supreme Court invited President Bush to seek authorization for the military commissions, and that is precisely what he did. In early July of 2006, just weeks after the decision, the president began working with congressional Republicans to fashion the MCA to grant the administration explicit authority to convene new military tribunals.¹⁴²

Within Congress, there was little doubt that some form of military commission process would eventually be authorized.¹⁴³ As discussed below, there were no serious proposals within Congress to allow either indefinite detention without any process or, at the other extreme, full criminal trials within the civil justice system. Moreover, the *Hamdi* and *Hamdan* decisions provided a basic roadmap for what sort of process was constitutionally required.

Nonetheless, even after *Hamdan*, the administration insisted on very limited procedural protections for the detainees, a position to which the Republicans in the House largely acceded. More importantly for this Comment, by late September, Senate Republicans had crystallized in their support of efforts to strip the courts of *all* habeas jurisdiction—both pending and future—by amending 28 U.S.C. § 2241 once again.¹⁴⁴

Backed by the Bush administration, the Senate version of the bill removed the statutory hook that the Court had used to reach the merits in *Hamdan*: the provision of the DTA that seemed to apply the jurisdiction-stripping language only to future cases.¹⁴⁵

The Democrats largely opposed this move, but failed to beat it back. Shortly before the final vote on the MCA, Senator Arlen Specter (R-PA) introduced an amendment deleting the MCA's jurisdiction-stripping

141. *Id.* at 636 (Breyer, J., concurring) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)). Justice Kennedy elaborated, “All of which returns us to the point of beginning—that domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.” *Id.* at 637.

142. Kate Zernike, *Administration Prods Congress to Curb Rights of Detainees*, N.Y. TIMES, July 13, 2006, at A1.

143. Kate Zernike & Sheryl Gay Stolberg, *Detainee Rights Create a Divide on Capitol Hill*, N.Y. TIMES, July 10, 2006, at A1.

144. See Neil A. Lewis & Kate Zernike, *Measures Seek to Restrict Detainees' Access to Courts*, N.Y. TIMES, Sept. 21, 2006, at A22; Kate Zernike, *Crucial Senator Says a Few Problems Remain in Bill on Terror Tribunals*, N.Y. TIMES, Sept. 9, 2006, at A9; Kate Zernike & Sheryl Gay Stolberg, *Differences Settled in Deal Over Detainee Treatment*, N.Y. TIMES, Sept. 23, 2006, at A9.

145. See S. 3930.IS § 6, 109th Cong. (2006); see also *supra* note 129 (discussing the retroactivity of the DTA).

language.¹⁴⁶ The Specter Amendment would have thus preserved the *Hamdan* status quo, whereby the Court continued to have jurisdiction over all pending habeas cases.

Nonetheless, after extensive debate, the Specter Amendment failed on a 48-51 vote.¹⁴⁷ Despite the defeat of his amendment, Specter supported the final bill, noting “the Court will clean it up.”¹⁴⁸

The final version of the MCA passed the Senate on September 28, 2006, by a 65-34 vote, with twelve Democrats supporting the final bill.¹⁴⁹ With respect to limiting habeas rights and judicial review, the MCA went significantly further than the DTA.¹⁵⁰ First, the MCA unambiguously stripped the court’s jurisdiction over pending as well as future cases.¹⁵¹ Second, the MCA expanded the scope of the jurisdiction-stripping, applying it not only to aliens held at Guantánamo, but to any alien *wherever seized or held* who had been determined to be an enemy combatant (including presumably those within the United States).¹⁵² However, the MCA left the scope of the nascent D.C. Circuit review mechanism untouched.¹⁵³ A little more than a month later, the Republicans lost control of Congress in the midterm elections.

G. Boumediene

The Supreme Court took up the jurisdiction-stripping provision of the MCA the following year in *Boumediene v. Bush*.¹⁵⁴ In the case, Lakhdar Boumediene and his fellow petitioners, who had been captured abroad and held pursuant to adverse CSRT determinations, brought a series of habeas challenges alleging statutory, treaty, and constitutional violations.¹⁵⁵ The D.C.

146. S. Amend. 5087 to S. 3930, 109th Cong. (2006).

147. Record Vote No. 255 on S. Amend. 5087 to S. 3930, 152 CONG. REC. S10, 369 (daily ed. Sept. 28, 2006).

148. Jeffrey Toobin, *Killing Habeas Corpus: Arlen Specter’s About-Face*, NEW YORKER, Dec. 4, 2006, at 46. For an interesting argument that this comment shows that the MCA was “intentionally unconstitutional,” see Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281 (2008).

149. Record Vote No. 259 on S. 3930, 152 CONG. REC. S10, 431 (daily ed. Sept. 28, 2006). The Senate bill mirrored one passed earlier by the House, eliminating the need for a conference committee and sending the legislation immediately to the president. Kate Zernike, *Senate Approves Broad New Rules to Try Detainees*, N.Y. TIMES, Sept. 29, 2006, at A1.

150. See Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, and 20 U.S.C.)

151. See 28 U.S.C. § 2241(e) (2006).

152. *Id.*

153. Fallon and Meltzer believe this mechanism for D.C. Circuit Review, combined with the appellate authority of the Supreme Court, affords a good deal of room for judicial review of executive detentions—at least with respect to questions of law—and is therefore not the total banishment of the courts that some critics contend. Fallon & Meltzer, *supra* note 77, at 2100.

154. *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting certiorari).

155. Brief for Respondents at 2, *Boumediene v. Bush*, 2007 U.S. LEXIS 8757 (Nos. 06-1195 and 06-1196).

Circuit dismissed their claims, holding that the detainees had no constitutional right to habeas corpus, and thus Congress had acted lawfully in withdrawing habeas jurisdiction in the DTA and MCA.¹⁵⁶

The constitutional foundation of the lower court's ruling posed a difficult issue for the Court. Because the MCA bore none of the ambiguity of the DTA on jurisdiction-stripping, the Court had lost the statutory "hook" to hear the case—28 U.S.C. § 2241 would no longer be of any help. If it ruled, the Court would have to confront the constitutional reach of habeas.

Nonetheless, in a 5-4 decision authored by Justice Kennedy, the Court ruled that foreign nationals detained at Guantánamo had a constitutional right to habeas.¹⁵⁷ The Court held that section 7 of the MCA, which had eliminated such jurisdiction, was an unconstitutional suspension of the Writ.

Further, the Court found that the D.C. Circuit review procedure created by the DTA did not afford an "adequate substitute" for habeas—mainly because it did not allow detainees to present independent exculpatory evidence to the reviewing court, among other constitutional infirmities.¹⁵⁸ The DTA process was not sufficient to vindicate the underlying constitutional rights of the detainees. Thus, for the first time in its post-9/11 decisions, the court gave constitutional anchor to its conception of judicial review over Guantánamo.

On the other hand, the decision was decidedly less expansive than it could have been. For one, it seemed to limit its reach to those detainees held at Guantánamo Bay, given the peculiar "*de facto* sovereignty" the United States maintained over the base.¹⁵⁹ Some commentators have speculated the government could thus escape the dictates of *Boumediene* by transferring the detainees to foreign air bases, or even foreign custody.¹⁶⁰

As another example of its limited reach, *Boumediene* did not spell out what additional procedures might constitute an "adequate substitute" for habeas, were Congress to elect to revise the D.C. Circuit review process, or establish a new "national security court" to hear habeas appeals.¹⁶¹ The Court also allowed ongoing habeas cases to be consolidated into a single forum,¹⁶² sanctioned the use of the state secrets privilege to limit access to information in

156. 476 F.3d 981 (D.C. Cir. 2007).

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

158. *Id.* at 2272–73. The Court hinted at other constitutional problems, such as the inability of detainees to contest the CSRT's findings of fact, and the lack of clear authority for a reviewing court to order the release of a detainee. *Id.* at 2274.

159. *Id.* at 2253.

160. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 229 (Supp. 2008). *But see* Wazir v. Gates, No. 06-1697 (D.D.C. Apr. 2, 2009) (extending habeas under *Boumediene* to certain prisoners detained at Bagram Airfield in Afghanistan).

161. 128 S. Ct. at 2274 ("[W]e do not hold that an adequate substitute must duplicate [28 U.S.C.] § 2241 in all respects").

162. *Id.* at 2276.

the cases,¹⁶³ and left untouched the provision of the MCA that precludes a detainee from invoking the Geneva Convention in court.¹⁶⁴

In short, the Court “expressly left unresolved important substantive questions [about] the scope of the Executive’s power to detain.”¹⁶⁵

For these reasons, *Boumediene* arguably did not end the habeas game, but left to both Congress and the president the discretion to shape its reach—or supplant it entirely with an “adequate substitute.”

III

MODELING THE HABEAS GAME AFTER 9/11

The interplay among the three branches since 9/11 constitutes a remarkable narrative. Rarely in American history have all three branches struggled over a key issue of constitutional law in such a short amount of time. This interaction raises a number of questions about national politics and judicial power.

Some of the questions are political: Why did it take Congress more than four years to intervene on executive detention after 9/11? Why were Democrats unwilling or unable to filibuster provisions of the DTA and MCA with which they clearly disagreed? Better still, why was the vote on the MCA not close, and the vote on the DTA even more lopsided, despite the controversy each engendered?

Other questions concern judicial behavior: Why did the Supreme Court shift policy so dramatically away from that of the Bush administration in *Rasul*—and did it expect Congress to respond? Why did the Court decide *Hamdan* in the wake of the DTA? Why did it decide *Boumediene* in the wake of the MCA? Has the Court consistently sought to unilaterally move policy toward its own preferences, regardless of the interests of the other branches—or are other values at work? Finally, how will a new Democratic President and Democratic Congress respond to *Boumediene* and the prospect of significant habeas rights for detainees?

PPT can yield a number of insights into these questions, often with a rigor that purely descriptive accounts of the last few years cannot match. In this Part, I develop a PPT model of the interplay among the branches since 9/11.

163. *Id.*

164. See FALLON ET AL., *supra* note 160, at 228 (assessing the constitutionality of these provisions following *Boumediene*).

165. Matthew C. Waxman, *Administrative Detention 3* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 08156), <http://lsr.nellco.org/columbia/pllt/papers/08156>.

A. *The Habeas Game, Round 1: Post-9/11 Presidential Power, Rasul, and the DTA*

The “habeas game” can be modeled across a unidimensional policy space, as described in Part I. Importantly, the policy continuum does not represent *all* substantive aspects of detention—only the single variable of the degree of judicial review accorded to detainees.¹⁶⁶ On the left of the policy space, detainees have full statutory and constitutional habeas rights, with *de novo* civilian review of all detention decisions. There are no limits on the jurisdiction of any U.S. court. On the right, the policy is one of total absence of judicial review. The president or the Department of Defense may detain aliens indefinitely, with no access to civilian or military tribunals, and no court has jurisdiction to hear any petition or appeal.

The game is played as the Supreme Court, the president, and the U.S. Senate struggle to set policy somewhere on the continuum in accord with their preferences.¹⁶⁷ The first two rounds of the model cover the 108th and 109th

166. The model thus accounts for six major events shifting this dependent variable, as described in the prior Section: (1) the president’s assertion following 9/11 that detainees had no right to access the courts; (2) the Supreme Court’s conferral of full statutory habeas rights on detainees through the interpretation of the existing habeas statute, 28 U.S.C. § 2241 (2006); (3) Congress’s amendment of § 2241 in the DTA to oust the Court’s jurisdiction; (4) the *Hamdan* decision construing the DTA narrowly to apply only to future habeas claims; (5) Congress’s amendment of § 2241 in the MCA to make clear that the jurisdiction-stripping applied to all cases, pending and future; and (6) the Court’s decision in *Boumediene* conferring a *constitutional* habeas right on detainees. The model thus does not account for “multidimensionality,” the fact that many of the court decisions and pieces of legislation did not address only judicial review, but also substantive issues as well, such as the legality of military commissions. However, because the extent of judicial review was the threshold jurisdictional issue in *Hamdan*, as well as the main issue in *Rasul* and *Boumediene*, and was a key component of both the DTA and MCA, it is legitimate to account for this variable in the policy space. Put another way, as the discussion in Part II illustrates, the scope of habeas was of such paramount (if not threshold) importance to each of these events that it is reasonable to believe the players acted strategically to vindicate their preferences on it. Moreover, reducing multidimensional disputes to a single (salient) policy variable is a typical assumption in PPT literature. See, e.g., KREHBIEL, *supra* note 23, at 187.

167. Significantly, this model omits the House of Representatives from the game for a number of reasons. First, the Senate filibuster gives the Senate minority party a considerable amount of power not present in the House of Representatives. Because the habeas game involves a Republican president with conservative preferences tussling with more moderate elements in Congress, the Senate will *a priori* be the limiting factor on the president. Second, the legislative history of both the DTA and MCA bears out this reading: whereas the House often simply supported presidential policies, the Senate was the locus of the major compromises on the DTA and MCA, and the final Senate versions of the DTA and MCA dictated the final bill. See Carl Hulse & Kate Zernike, *House Passes Detainee Bill As It Clears Senate Hurdle*, N.Y. TIMES, Sept. 27, 2006, at A1; Kate Zernike, *Differences Settled in Deal Over Detainee Treatment*, N.Y. TIMES, Sept. 22, 2006, at A9; Kate Zernike, *Senate Approves Broad New Rules to Try Detainees*, N.Y. TIMES, Sept. 29, 2006, at A1. Moreover, although the House can control appropriations, the Republican majority never showed any interest in using the purse to control Guantánamo. The 2006 election obviously shifted this dynamic (as discussed in the conclusion), but for the time period modeled, the GOP House leadership has most often acted simply as a proxy for the president. The Senate, with its filibuster rules, has not.

Congresses (January 2003 to January 2007), during which the Republicans maintained a narrow majority in the Senate.¹⁶⁸ The final round considers *Boumediene* and the impact of the 2006 election.

Notably, congressional preferences have evolved with each round, as support for judicial review has garnered more and more votes in various procedural amendments to the major pieces of legislation.¹⁶⁹ The judiciary, on the other hand, is treated as a more static institution,¹⁷⁰ as is President Bush, who, according to popular account, has been steadfastly opposed to shifting policy away from executive power.¹⁷¹

As in the Howell and Krehbiel models, m represents the preferences of the median Senator. The point $f_{(D)}$ represents the Democratic filibuster pivot on the left; $f_{(R)}$ the Republican filibuster pivot on the right; v the veto pivot; and p the presidential preference. Figure 7 illustrates the policy map.

Round One includes three events that determine policy: the status quo before *Rasul*, with the president's unilateral assertion of power ($q1$),¹⁷² the policy shift effected by the Court with *Rasul* ($q2$), and the congressional response with the DTA ($q3$).

As with many PPT models, the location of the status quo determines the outcome of the game. It is thus important to locate it initially, and the actions of President Bush following 9/11 are instructive. As detailed in Part II.A, American policy after 9/11 was largely set by the president in his Executive Order of November 13, 2001.¹⁷³ Under this authority, detainees had no habeas

168. The model also assumes that m did not shift much between the 108th and 109th Congresses, when the Republicans picked up four seats in the Senate. However, all of the legislative actions included herein occurred during the 109th Congress, the one that passed the MCA and the DTA. This Comment includes the 108th Congress only as a reference point, so that we may “begin” the game with the political environment that the Court confronted in *Rasul*.

169. See *infra* note 208 and accompanying text.

170. A static Court may be a problematic assumption, given that the composition of the branch changed between *Rasul* and *Hamdan*, when Justices Alito and Roberts replaced Justices O'Connor and Rehnquist. This is especially true given the complex models of voting outcomes on multi-member courts. See note 64, *supra*, and accompanying text. On the other hand, the same coalition of five justices has been in the majority in *Rasul*, *Hamdan*, and *Boumediene*: Stevens, Souter, Breyer, Ginsburg, and Kennedy. More significantly, Justice Kennedy, who is popularly considered the swing vote between the liberal and conservative blocs, wrote an important concurrence in *Rasul*, a narrowing concurrence in *Hamdan* (which, as the fifth vote, determined the reach of the plurality opinion), and the main opinion in *Boumediene*. It may not be a stretch to conclude that, in the habeas game, a strategic unitary Court means a strategic Justice Kennedy. See also Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 66–73, 95–96 (2008) (explaining why Justice Kennedy has been a particularly dominant median justice on the Court, and how, “for most cases, such a swing [vote] will exert considerable control over the dispute’s resolution, as well as the opinion’s rationale”).

171. See generally GOLDSMITH, *supra* note 91.

172. Normatively, many would argue that President Bush altered the historical “status quo” by asserting unprecedented authority following 9/11. However, this Comment does not use the term in that sense. It suggests only that President Bush is the first-mover in the game; his initial response to 9/11 thus established the baseline to which the other branches responded.

173. See *supra* note 80.

rights and no right to challenge their detention. No court could review Department of Defense decisions. The only major congressional declaration on the issue—the AUMF—contemplated broad powers for the president to fight terrorism. Although the extent of the AUMF continues to be debated, there is little question that Congress largely deferred to the president on detainee policy.

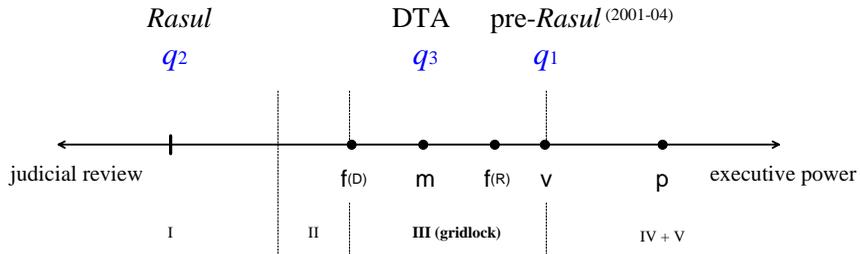


Figure 7: The habeas game, round 1

Thus, it seems rather unobjectionable to argue that President Bush set the status quo far to the right of the policy space. But how far right? Here, the Howell model is instructive. As Howell notes, the president can unilaterally shift policy all the way to the veto pivot v , without being reversed by Congress.¹⁷⁴ If Congress tried to shift policy left in response, the president would veto any change, the sixty-seventh senator would prefer the status quo, and policy would remain static.¹⁷⁵

Thus, the president needed only a core group of thirty-four senators to protect his detainee policy after 9/11. This gave the president tremendous power to keep his policy far to the right of median preferences—yet still within the gridlock interval. Figure 7 illustrates this dynamic by setting the status quo, q_1 , at v , the veto pivot.

The Supreme Court’s intervention in *Rasul* dramatically upset the status quo. *Rasul* created a policy of full habeas rights and full access to civilian courts for Guantánamo detainees, while *Hamdi* strongly hinted that they were entitled to procedural protections as well. Given how starkly these decisions reversed Bush administration policy, they shifted policy well to the left.

But to exactly what point on the left? Professor John Yoo argues that “it is difficult to judge how far past the preferences of the median legislator the

174. HOWELL, *supra* note 40, at 37.

175. See Figure 2 for an illustration, Part I.A, *supra*. Professor Yoo contends that the president’s policy rested at $f(R)$, near the preferences of the 41st most conservative Senator needed to filibuster any attempt to shift policy left. Yoo, *supra* note 114, at 1166–67. But this understates the difficulty of reversing the president, who can rely on not just the Republican filibuster to protect his unilateral policy, but on the threat of a veto, allowing him to shift policy further to the right.

courts would set policy because *Rasul* left unstated what procedures and substantive laws would apply.”¹⁷⁶ However, both the substantive contours of *Rasul*, and the resulting legislative behavior, suggest the court’s decision can be located more precisely.

First, note that because Congress reversed the Court with the DTA, *Rasul* fell outside the gridlock interval—by definition. Thus, q_2 belongs in Interval I or II.

When policy resides in Interval II, or the “partial convergence interval,” Congress can shift policy to the right—but only incrementally. The shift will be symmetric around the Democratic filibuster pivot, the legislation tends to pass with about sixty votes, and the final policy will rest to the left of the Senate median.¹⁷⁷

By contrast, in Interval I, the “full convergence” interval, a large majority in the Senate favors a change, the Democratic filibuster pivot is less influential, Congress resets policy at the congressional median, and the final vote on the bill tends to be well above a supermajority.¹⁷⁸

The combination of *Rasul* and the DTA are far more consistent with the latter sequence. The DTA passed by a margin of 84-14, well above the supermajority requirement. Substantively, it enacted the Graham-Levin proposal, a compromise between the more extreme Graham amendment on the right (which mostly eliminated judicial review), and the Bingaman amendment on the left (which mostly reinstated habeas).¹⁷⁹ Indeed, if *Rasul* had landed in Interval II, the final policy would have been set to the left of m , and may very well have included the Bingaman Amendment. Instead, the final version of the DTA did not—but it still passed overwhelmingly.

Thus, *Rasul* set policy in Interval I, and Congress responded by resetting policy at m , the legislative median.

This makes intuitive sense as well. The DTA reversed *Rasul*’s grant of full statutory habeas rights, but it also created a mechanism for judicial review in the D.C. Circuit, a policy President Bush opposed. In substantive terms, the DTA split the difference between Bush and the Court.

In turn, this model helps explain some of the legislative behavior on the bill. First, it explains what happened to the Bingaman and Graham Amendments—namely, that neither had the sixty votes needed to end the game. The Graham Amendment was too far to the right of the congressional median, garnering a 49-42 majority, but lacking the votes to survive an eventual Democratic filibuster had a compromise not been reached in the following days. On the other hand, the Bingaman Amendment was too far to the left,

176. *Id.* at 1167.

177. KREHBIEL, *supra* note 23, at 36–37.

178. *Id.* at 35–37, 83–85; *see also* Part I.B fig.3, *supra*.

179. *See supra* Part II.D.

winning only forty-four votes and lacking the Republican support needed for a majority. Only the Graham-Levin compromise pleased both the Democratic filibuster pivot and a majority of Republicans.

The model in Figure 7 also explains why the Democrats did not mount a filibuster to the final bill. With forty-five Democrats in the Senate and forty-one needed for a filibuster, the pivotal Democrat was necessarily a quite conservative member of the caucus. Facing a choice between launching a filibuster or supporting the DTA, the pivotal Democrat opted for the DTA.

Indeed, as early as the first vote on the Graham Amendment, it became apparent the Democrats would have trouble maintaining a filibuster. Five Democrats defected to support the initial Graham Amendment. Consistent with the model, they voiced objections to leaving *Rasul* in place, telling the *New York Times* that “they drew the line at allowing the prisoners unfettered access to United States courts.”¹⁸⁰ With only forty-five Democrats in the caucus, these five effectively controlled the filibuster pivot, and thus the outcome of the game. Their votes and statements made it clear they were not interested in defending the *Rasul* status quo.¹⁸¹

In turn, this dynamic explains the behavior of the rest of the Democratic caucus. With the plausible threat of a filibuster having evaporated, the compromise amendment between Levin and Graham was the best deal Democrats were going to get. It set policy at the median rather than further right, and it preserved a measure of judicial review. Given these circumstances, the DTA cleared on a larger bipartisan vote—just as the Krehbiel model predicts when the status quo is set in Interval I.¹⁸²

Stepping back, the first round of the habeas game reveals government policy swinging between two extremes before finally settling on a middle path determined by Congress. Note, however, that Congress was *unable* to reach this

180. Schmitt, *supra* note 121.

181. This is not to say that these Democrats *absolutely* favored the DTA as a matter of policy; indeed, two of the five voted for the Bingaman proposal as well. It only means that they preferred the DTA to *Rasul*. The choice was a comparative one. Hypotheses as to why these Democrats held such preferences—perhaps they were driven by politics, perhaps by policy, perhaps both—are interesting, but it is important to remember that whatever exogenous pressures determine a legislator’s vote, those pressures are ultimately expressed as the preference point of the member. In turn, when choosing between a pair of policy alternatives, legislators favor the alternative closest to their preference, a standard political science assumption. See Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 263–64 (1988); Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORG. 8, 12 (1992) (discussing the connection between constituent opinion and legislative preferences).

182. Interestingly, one consequence of pivotal politics is that “most lawmakers . . . are likely to be unhappy for one reason or another” with the final outcome of the game—even when they vote for the policy change.” KREHBIEL, *supra* note 23, at 236. This phenomenon was certainly borne out in practice by the many Democrats who voted for the DTA while complaining about it. See, e.g., 151 CONG. REC. S12, 803 (daily ed. Nov. 15, 2005) (statement of Sen. Reid) (explaining that he would vote for the DTA but hoped its jurisdiction-stripping “is either improved in conference or deleted altogether,” and claiming that he really preferred the Bingaman proposal).

policy before the Supreme Court intervened, because President Bush successfully took advantage of the gridlock interval to shield his policies.

This phenomenon offers one possible explanation for the almost four years of congressional silence that followed 9/11. It was not necessarily that a majority in Congress approved of the president's detention authority. Rather, the majority was unable to act at all, because thirty-four conservative Senators protected the president's power.

Only once the Supreme Court shifted policy outside the gridlock interval did Congress have the leverage to legislate. The resulting bill set policy back toward the center of American politics. In other words, *Rasul* broke the gridlock.¹⁸³

B. *The Habeas Game, Round 2: Hamdan and the MCA*

The DTA should have ended the game—at least according to the one-shot, sequential model developed by Krehbiel and Eskridge. The Court interpreted a habeas statute, Congress overrode the interpretation, and the game was over.

The Supreme Court did not agree. In June of 2006, the Court in *Hamdan* ruled against the government again, finding that the DTA did not remove the Court's statutory habeas jurisdiction over pending cases, and that the military commissions used to try Hamdan were unauthorized.

Why did the Court act? The easiest answer, from a PPT perspective, is that the Court did not get what it wanted the first time. In *Rasul*, the Court tried to enshrine its full statutory jurisdiction to hear detainee claims. Congress responded by narrowing (or possibly removing) that jurisdiction, forcing the Court to act again to enact its preference.¹⁸⁴

On the other hand, it is possible the jurisdictional issue was largely incidental in *Hamdan*—that the Court was mainly concerned with ruling on the military commissions, and needed to find a jurisdictional hook. If the Court was driven by the military commissions, is it fair to model *Hamdan* along the “judicial review” dimension, when that issue was arguably of only minor import to the case?¹⁸⁵ I believe yes, and the explanation helps explain why the Court may have felt compelled to act in the first place.

First, in reaching its decision, the *Hamdan* Court did not rest on the jurisdictional hook over pending cases that the DTA arguably left intact. The

183. The legislative history of the DTA offers some interesting hints that this may have been the case. See, e.g., 151 CONG. REC. S12, 659 (daily ed. Nov. 10, 2005) (statement of Sen. Specter) (“While the three decisions by the Supreme Court in June of 2004 did not answer the problem, they did get us started.”); *id.* at S12, 656 (statement of Sen. L. Graham) (“The Supreme Court has been shouting to us in Congress: Get involved. . . . Since you haven’t spoken, we are going to confer habeas rights until you act.”).

184. See Cross & Nelson, *supra* note 66, at 1456 (noting that a strategic court will not let Congress end the game, but will act repeatedly to vindicate its preference).

185. For problems with modeling multidimensional policymaking, see *supra* note 166.

Court also pointedly ignored the D.C. Circuit review mechanism fashioned in the DTA, indicating a strong assertion of jurisdiction.¹⁸⁶

Second, the Court may have had good reason to believe that the president was undermining even *that* mechanism, and that he was thereby frustrating congressional intent in the DTA. In PPT terms, the Court may have perceived the president to be using his unilateral power to drag policy back to the rightward edge of the gridlock interval, contravening congressional will—just as the president had done after 9/11.¹⁸⁷

For example, shortly after the DTA, the president immediately moved to dismiss all pending habeas cases, despite the fact that the legislation was ambiguous about when it would go into effect—and may have been explicitly written to preserve the Court’s jurisdiction.¹⁸⁸ Additionally, there were indications in early 2006 that the president was already seeking ways to short-circuit the nascent D.C. Circuit review mechanism.¹⁸⁹ Finally, with respect to the military commissions, the process enacted by the administration contained so few procedural protections that the basic adequacy of the record (and hence the meaningfulness of any review) was in jeopardy.¹⁹⁰ Indeed, doubts surfaced about the good-faith efforts of the Bush administration to even *convene* tribunals—which would frustrate judicial review completely, as the DTA only provided for D.C. Circuit review of final tribunal decisions.¹⁹¹

Thus, the Court’s assertion of statutory jurisdiction was an important rejoinder to the efforts of the Bush administration. In PPT terms, the Court may have been reacting to the president’s use of *d*, the discretionary parameter representing his unilateral powers, to shift policy away from the Congressional compromise that resulted in the DTA.

Figure 8 captures this dynamic, in which *d* points away from *m*, the congressional median that enacted the DTA, and which is represented as the “new” status quo for round two of the game, at q_j . In the Howell model, this

186. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 616 (2006) (declining to abstain based on D.C. Circuit review mechanism because it was not “automatic”). *But see id.* at 671 (Scalia, J., dissenting) (noting that the DTA’s review mechanism allows petitioner to challenge “every aspect of the military commissions, including the fact of their existence . . . [and] that the President lacks legal authority to try him”).

187. See GOLDSMITH, *supra* note 91, at 132 (describing the president’s response to Congress and the Court as part of a larger effort to “maintain and expand the President’s formal legal powers”).

188. See *supra* note 129.

189. See, e.g., Transcript of Oral Argument at 53, *Al Odah v. United States*, 2008 WL 2661942 (D.C. Cir. 2006) (No. 05-5064) (government counsel asserted that the petitioner/detainee would have no right to present factual evidence to the D.C. Circuit conducting a review pursuant to the DTA).

190. See Greenberger, *supra* note 86, at 817, 821–23.

191. By the time the Court decided *Hamdan*, only four of the more than 700 detainees held at Guantánamo since 2002 had been charged with war crimes and none had stood trial by the time of the decision. *Id.* at 829.

arrangement is a classic trigger for judicial intervention.¹⁹²

Regardless of what prompted the Court's intervention, the Court's response in *Hamdan*, represented by q_2 , shifted policy back to the left, toward a policy of judicial review of detainees. How far? Once again, the failure of Congress to mount a filibuster means *Hamdan* fell outside the gridlock interval.

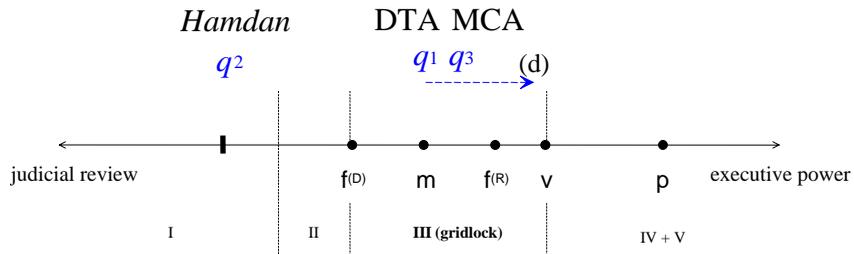


Figure 8: The habeas game, round 2

The particulars of the legislative response bear out the locations of the preferences in the model. Acting at the Court's invitation,¹⁹³ Congress through the MCA authorized military commissions and left untouched the D.C. Circuit review mechanism, but stripped the Court's jurisdiction over all cases, pending and future. It also removed the judiciary's authority to hear habeas petitions not just from alien detainees at Guantánamo, but from enemy combatants detained or captured anywhere in the world, including within the United States.¹⁹⁴

Partly for these reasons, the MCA was significantly more controversial than the DTA. Nonetheless, as with the DTA, the Democrats elected not to filibuster the final bill,¹⁹⁵ but instead sought a "perfecting amendment" to preserve the Court's habeas authority.¹⁹⁶ When that amendment failed on a narrow 48-51 vote,¹⁹⁷ twelve Democrats joined the Republicans to pass the final MCA bill, which passed 65-34.¹⁹⁸

As with the DTA, the lack of a filibuster shows that the Democratic filibuster pivot $f(D)$, roughly the forty-first most liberal member of the Senate (and hence a rather moderate Democrat) preferred the legislation to the Court decision—that is, preferred the MCA over *Hamdan*.¹⁹⁹

192. See HOWELL, *supra* note 40, at 46.

193. See *supra* note 141.

194. 28 U.S.C. § 2241(e)(1) (2006).

195. See Diller, *supra* note 148, at 321 (noting that "despite decrying the MCA on the Senate floor . . . Senator Reid, the leader of the forty-five senate Democrats, did nothing to stop its passage," and instead promised the GOP leadership he would not mount a filibuster).

196. Specter Amendment, S. Amend. 5087 to S. 3930, 109th Cong. (2006). See *supra* Part II.F.

197. Record Vote No. 255 on S. Amend 5087 to S. 3930, 109th Cong., 152 CONG. REC. S10, 369 (daily ed. Sept. 28, 2006).

198. Record Vote No. 259 on S. 3930, 109th Cong. (2006), 152 CONG. REC. S10, 420 (daily ed. Sept. 28, 2006).

199. See *supra* note 181 (explaining that such a decision does not necessarily represent an

Had *Hamdan* actually fallen within Interval II, this Democrat might have had more freedom to set policy, and a more Democratic bill might have emerged, one incorporating the Specter Amendment that narrowly failed 48-51. Instead, however, *Hamdan* fell within Interval I, the Specter Amendment did not make it into the final bill, and the congressional response once again placed policy at the legislative median, where the final version of the MCA passed 65-34.

Once again, if the Court sought the gridlock interval with its decision, it failed.²⁰⁰ Instead, Congress cleaned up any lingering doubt about the Court's jurisdiction over pending cases and reaffirmed the D.C. Circuit as the sole avenue for judicial review of detention.

C. *The Habeas Game, Round 3: Boumediene*

The MCA was not to be the last word. In *Boumediene*, the Court took up the issue of judicial review for a third time. Importantly, though, the Court faced a dramatically altered political terrain from the one it confronted in *Hamdan*. With the Democrats in control, the need for razor-thin calculations about the GOP Congress fell away. Instead, the Court played on friendlier turf. Figure 9 diagrams the political shift, and what it meant for the Court's decision in *Boumediene*.

In Figure 9, the policy space in the top half represents the preferences of the previous 109th Congress that passed the DTA and the MCA, and which the Court dealt with in *Hamdan*. The Specter Amendment to restore the Court's jurisdiction over pending cases is represented at *s*—just short of the congressional median *m*, in keeping with its narrow 48-51 failure. Just to the right is the final version of the MCA.

In 2006, if the Court wanted to preserve habeas rights, it had only a narrow zone within which to rule. Figure 9 diagrams this zone as the black bar stretching from just shy of the congressional median (in the gridlock interval) to just shy of Interval II. A decision preserving habeas that fell within the *gridlock* portion of this zone would have been the last word; a decision that fell within the *Interval II* portion would have led to a legislative response to the left of the congressional median—thus also preserving habeas rights, most likely through the Specter Amendment. In *Hamdan*, the Court may have thought its decision would fall within this narrow zone, but, as Figure 8 illustrates, it guessed poorly. Instead, *Hamdan* fell outside the zone, and the resulting legislation eliminated habeas rights for detainees.

absolute preference, only a relative one); see also Diller, *supra* note 148 (speculating that Democrats sought the electoral benefits of supporting the MCA while quietly hoping the Court would declare the bill unconstitutional).

200. Perhaps the Court thought that, with Bush's popularity in free-fall in 2006, the legislative median had shifted to include habeas rights. The narrow failure of the Specter Amendment (48-51) suggests the Court was almost right. The median congressional preference was drifting toward support for habeas rights—just not quickly enough to save the Court's ruling.

By 2008, the calculus had shifted—for both Congress and the Court, though more for the latter. For Congress, the elevation of the Democrats suggested that the narrow defeat of the Specter Amendment might now be reversed. A number of commentators accordingly urged the new Democratic majority to revisit the MCA in 2007.²⁰¹ Indeed, the Court may have been hoping Congress would take up the issue when it initially denied certiorari in *Boumediene* in March of 2007.²⁰² Yet the public choice model explains why this outcome was already foreclosed: a filibustering minority of Republican senators—not to mention the president with his veto—would have protected the MCA from any attempt to shift policy to the left.

In fact, that's precisely what happened. In September of 2007, Senators Specter and Leahy offered an amendment to a defense appropriations bill to repeal the jurisdiction-stripping provision of the MCA.²⁰³ The Republicans were forced to resort to a filibuster to block it, and the amendment received fifty-six votes, just four shy of cloture.²⁰⁴ If Congress had voted up-or-down, therefore, the amendment would have passed. But even with a Democratic Congress, habeas policy remained firmly stuck within the gridlock interval. While the 2006 election shifted congressional *preferences*, it did not shift congressional *capabilities*.

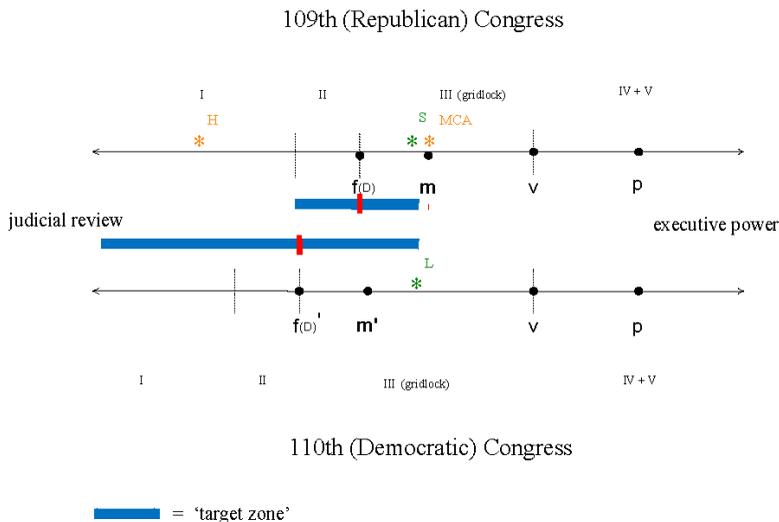


Figure 9: The habeas game, round 3

201. See Toobin, *supra* note 148.

202. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (denying certiorari).

203. S. Amend. 222 to H.R. 1585, 110th Cong. (2007).

204. Record Vote No. 340 to H.R. 1585, 110th Cong., 153 CONG. REC. S11, 697 (daily ed. Sept. 19, 2007).

But the situation was much different for the Court. The change in *m* following the 2006 election expanded the Court's room to maneuver. For one, the gridlock interval widened considerably on the left, as more Democrats were elevated to the Senate. But more importantly, with the congressional median now encompassing habeas rights—as shown by the fifty-six votes for the Levin Amendment—*any* decision that provoked a congressional response would result in habeas protection. It was no longer important for the Court to land in Interval II rather than Interval I—*either* interval would result in the Court's favored policy. Put another way, the Court knew that if Congress were to pass a new detention statute in the wake of its decision in *Boumediene*, the legislation would be written by Democrats, not by Republicans.

Thus, in *Boumediene*, the Court had the freedom to issue a decision that could land either inside or outside the gridlock interval, with the final policy reasonably certain to rest comfortably near the Court's ideal of habeas rights.

The black bar in the bottom half of Figure 9 illustrates this dynamic. The central (and counterintuitive) point is that, while the 2006 election did not expand Congress's freedom to set policy, it did expand the Court's. It had a greater "target zone" in which to aim to set its preferred policy.

Where, then, to locate *Boumediene* in the policy space? Substantively, the decision announced a constitutional right to habeas for detainees, but it did not spell out the reach of that right. It suggested that a more robust review might suffice as a substitute, but it rejected the DTA's mechanism. It extended the Writ to Guantánamo, but was ambiguous about whether it extended further.²⁰⁵ Given these moderate aspects, the vote on the Leahy-Specter Amendment, and that fact that the 110th Congress did not respond to the decision, I would argue that *Boumediene* fell somewhere near the congressional median—and thus well within the gridlock interval.

D. Patterns and Observations

Boumediene thus completes the first three rounds of the habeas game. From the models developed above, a number of patterns emerge.

First, the Supreme Court had repeatedly reined in the president's power to shield detainees from judicial review. Whether understood as simply an attempt to enact its own preferences, or as a response to the perceived excesses of the Bush administration,²⁰⁶ the Court helped shift policy to the left following 9/11.

205. For the discussion of the substance of the decision, see *supra* Part II.G.

206. See, e.g., Neal K. Katyal, *Executive and Judicial Overreaction in the Guantánamo Cases*, CATO S. CT. REV., Fall 2004, at 49 ("One answer may be that the executive branch overplayed its hand in these cases. By asserting that it had the ability to build an offshore facility to evade judicial review, do what it wanted at that facility to detainees under the auspices of the commander-in-chief power, and keep the entire process (including its legal opinions) secret, the executive branch appears to have provoked a judicial backlash [in *Rasul*].").

Second, however, Congress has not gone along with the Court. Following *Rasul* and *Hamdan*, Congress reversed the Court, shifting policy back to the right. *Boumediene* may yet “stick,” but at least through the first two rounds of the habeas game, if the Court was hoping to avoid congressional override, it failed.

On the other hand, the legislative responses to the decisions did not set policy back at the other extreme—near the Bush administration’s ideal. Instead, they established some measure of judicial review through the D.C. Circuit. As a former head of President Bush’s Office of Legislative Counsel (OLC) stated, even with the president’s victory in the MCA, the administration “lost a lot” from “what it could have gotten from a more cooperative Congress in 2002–03.”²⁰⁷

Moreover, time and trends only favor the prospect of strong judicial review. The support for habeas rights within the U.S. Senate has steadily increased from forty-two, to forty-four, to forty-eight, to fifty-six votes. Thus, the Court may have finally found majoritarian support for its conception of judicial review—albeit on the third try.²⁰⁸

IV

THE COURT AS STRATEGIC ACTOR: CALCULATING OR MISCALCULATING?

Given these patterns, how should we understand the Court’s behavior since 9/11? Has it behaved as the savvy strategic actor envisioned by positive political theory—or has it stretched policy so far from the preferences of the other branches that it prompted a backlash? Or is it possible such a “backlash” has been the goal all along? In this Part, I consider two somewhat contrasting explanations for the Court’s behavior—“miscalculation” and “democracy-promotion.” I then explore the implication of these models for both PPT and the larger scholarly work on judicial review in wartime.

The first explanation posits that the Supreme Court may have repeatedly *miscalculated* the preferences of the other branches—undermining one of the standard assumptions of PPT theory, perfect information. If we accept the premise that the Court is a strategic actor seeking to enact its preferences, then, under the miscalculation theory, it has done a lousy job of it. Both *Rasul* and *Hamdan* provoked prompt congressional overrides, and *Boumediene* may yet give way to some sort of national security court. Under this “miscalculation” explanation for the Court’s behavior—advanced most prominently by Yoo—the Court makes mistakes in gauging the preferences of the other branches, and

207. GOLDSMITH, *supra* note 91, at 139.

208. This represents votes against the original Graham amendment to the DTA (2005), for the Bingham amendment to the DTA (2005), for the Specter amendment to the MCA (2006), and for the Specter-Leahy Amendment (2007).

thus is a poor strategic player.²⁰⁹

Alternatively, it is possible that the Supreme Court is not trying and failing to enact its preferred policy. Instead, it is *inviting* a congressional response to its decisions, so as to break the gridlock interval and free Congress to legislate. Crucially, under this thinking, the Court is not just trying to vindicate a policy preference, but is seeking to promote other values, such as democratic deliberation and congressional participation in wartime decision-making. I term this the “democracy-promotion” model.

These are two different stories about the Supreme Court. Each complicates a standard view of PPT theorists. The miscalculation model suggests that, if the Court’s goal is to avoid congressional override, it is not very good at it. The democracy-promotion model asks whether avoiding congressional override is the Court’s goal *at all*—perhaps other values beyond pure policy preferences dictate the Court’s behavior.

Thus, these twin ideas suggest different conclusions about the viability not only of the PPT models discussed in this paper, but also about interbranch relations and the power of the Supreme Court. In the following Part, I consider the evidence for—and implications of—both the miscalculation model and the democracy-promotion model. I also explore how the insights of each comport or clash with other scholarly conclusions about judicial behavior in wartime.

A. The Miscalculation Model

John Yoo lays out the case for the miscalculation model most simply. If the Court was “acting rationally,” it would not issue decisions certain to be overturned.²¹⁰ Rather, it would seek to exert some control over the final outcome by issuing a decision that lands in the gridlock interval. Therefore, because the Court was overruled so quickly, it stands to reason the Court miscalculated the preferences of Congress.

Thus, Yoo believes that in *Rasul*, the Court expected its interpretation of 28 U.S.C. § 2241 to remain good law, but was mistaken. In *Hamdan*, the court aimed similarly, expecting to rely on a Democratic filibuster to protect the decision, but “it was wrong again.”²¹¹

209. See Yoo, *supra* note 114.

210. *Id.* at 1167. This model thus begins with the standard PPT assumption that the Court’s goal is to enact its preferences and avoid a legislative override. See Eskridge, *supra* note 18. The democracy-promotion model, by contrast, challenges this assumption.

211. Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from Federal Courts*, 95 CALIF. L. REV. 1243, 1251 (2007). Significantly, the Court may have miscalculated in two different ways: First, it could have explicitly aimed for the gridlock interval in the current Congress, hoping a Democratic filibuster would stall any proposed MCA bill prior to the 2006 election. Alternately, it might have expected that Congress would not take up an MCA bill until *after* the election, by which time the gridlock interval itself might have shifted to protect the Court (e.g., by elevating the Democrats into power). (A similar dynamic may have driven the Court’s thinking in *Rasul*, which came down prior to the 2004 midterm

For Yoo, this failure indicates “yet another area where judicial abilities are quite limited.”²¹² Other critics adopt a similar characterization. Jeffrey Rosen, for instance, accuses the Court in *Rasul* and *Hamdi* of “focusing self-referentially on the role of judges,” “unilaterally asserting [its] own authority to oversee the president, without inviting congressional participation,” and viewing Congress with “scarcely concealed contempt.”²¹³

As such, the miscalculation model may explain the rapid response of Congress. For example, not only did Congress respond with a bill within three months of *Hamdan*, it made crystal clear its intent to strip the Court’s jurisdiction over all habeas cases, pending and future. Several senators discussed the MCA as correcting the “error” the Court had made in interpreting the DTA.²¹⁴ Congress also employed an extraordinary (and theoretically superfluous) qualifier to reinforce this point in the text of the bill, in which the provision eliminating habeas applied not just to “all cases,” but also “without exception.”²¹⁵

The idea that the Court miscalculates challenges one of the basic assumptions of PPT, that the Court has perfect information about the other branches and, thus, statutory overrides will be relatively rare.²¹⁶ Yet most legal scholars would not be surprised to find that the Court lacks perfect information. There are several reasons to think the Court is especially *bad* at judging political behavior.

For one, many scholars from both sides of the partisan divide have argued that the modern Court exhibits a disdain for Congress that makes it particularly likely to miscalculate its preferences (or simply not care in the first place, as the attitudinalists hypothesize²¹⁷). On the left, “popular constitutionalists” complain of the judicial supremacy on display in the Court’s federalism and Fourteenth Amendment decisions.²¹⁸ On the right, commentators rail against decisions on abortion, privacy, and the First Amendment that contravene legislative will.²¹⁹

elections.). The miscalculation model does not differentiate between these two types of miscalculation, insofar as both represent a mistaken prediction about future political events.

212. Yoo, *supra* note 114, at 1168. Of course, this point makes the tremendous logical leap that if the Court is poor at interpreting congressional preferences, it is also poor at interpreting the law. I do not believe the perfect information assumption can bear this burden—to put it mildly.

213. JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 179, 183 (2007); *see also* Jana Singer, *Hamdan as an Assertion of Judicial Power*, 66 MD. L. REV. 759 (2007).

214. *See* 151 CONG. REC. S12, 656 (daily ed. Nov. 10, 2005) (statement of Sen. L. Graham).

215. *See* Pub. L. No. 109-366, 120 Stat. 2600 (2006).

216. Eskridge, *supra* note 18.

217. *See* Segal, *supra* note 67.

218. *See, e.g.*, LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1998).

219. *See generally* Steven G. Calabresi, *Out of Order: Clinton’s Court and its Assault on Justice*, 79 POL’Y REV. 14 (1996) (criticizing left-wing activism by Clinton judges).

Both sides seem to agree that the modern Court believes it is not merely co-equal with, but superior to, Congress. As one commentator noted: “There is near universal agreement about the modern Court’s embrace of the rhetoric of judicial supremacy.”²²⁰ If this is the case, it should not be surprising that the Court so badly underestimated the congressional response to its rulings. Arguably, it has grown accustomed to getting its way.²²¹

But even granting that the Court responds to Congress, it is important to remember that, in both practice and rhetoric, the Court stands apart from the messiness of legislative bargaining. It may partner broadly with the ruling regime,²²² but there is no evidence that it is particularly good at calculating filibuster points. Indeed, that calculation is so difficult that the parties take special care to entrust it to a key legislator, the “whip.” Further, justices do not mingle regularly with members of Congress, do not consult Senate aides, are not particularly trained or versed in the Senate Rules of Order, and so on. Because the Court can only discern broad trends rather than razor-thin voting margins, it is not institutionally equipped to predict (and then respond to) complex legislative machinations.²²³ And if the Court is incapable of discerning congressional preferences, it is more likely to miscalculate when it tries to do so.²²⁴

Moreover, even if the Court could accurately deduce congressional preferences, it faces institutional constraints that severely limit its ability to land in the gridlock interval with a decision. The *Rasul*, *Hamdi*, and *Hamdan* decisions provoked deeply split decisions with multiple dissents. Given the narrow support for *any* decision, the opinion-writer (or Justice Kennedy) may have lacked the freedom to express his or her exact preferences. Indeed, the opinions themselves are loaded with so many qualifiers, cross-references, and partial concurrences that it is remarkable the Court settled on dispositions at all.

In other words, the Court is not a legislature, writing on a *tabula rasa*. The institutional constraints that attend the act of judging suggest that when the Court aims for a particular policy, it can only fire buckshot, not a bullet. This is

220. Devins, *supra* note 112, at 1584; *see also id.* at 1564 (identifying *Hamdan* as an expression of judicial supremacy); Yoo, *supra* note 114, at 1151 (“[O]ne issue that seemed to unite members of the Rehnquist Court was the supremacy of the federal courts in interpreting the Constitution.”).

221. *See also* John Yoo, *Sending a Message*, WALL ST. J., Oct. 19, 2006, at A18 (“*Hamdan* was an unprecedented attempt by the court to rewrite the law of war and intrude into war policy. The court must have thought its stunning power grab would go unchallenged. After all, it has gotten away with many broad assertions of judicial authority before.”).

222. Robert Dahl, *Decision Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279 (1957).

223. *See* LAURENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 97 (1997) (summarizing evidence for this weakness).

224. This may be especially true if legislators *themselves* are unsure of congressional preferences, which seems to be the case with the DTA and MCA, given the narrow votes that surrounded them.

particularly important given the scholarship that illustrates the complexity of decision making on multi-member courts.²²⁵ The Court may find it hard to establish a clear policy in the way a legislature does, and thus be more likely to stumble when it seeks to land safely in the gridlock interval.

The final evidence for the miscalculation model is the fact that the Court had good reason to think its decisions *would* withstand congressional scrutiny. For the first three years of the war on terror, Congress had been virtually silent in checking executive power. The AUMF was the first and last major pronouncement on the issue, except for the reorganization of the Department of Homeland Security and the Patriot Act. Given the transaction costs of legislation, the narrow split in Congress, and the virtual silence that greeted the administration's actions, the Court could have reasonably concluded Congress would not respond to its decisions in *Rasul* and *Hamdi*. With *Hamdan*, the resurgent fortunes of the Democrats in 2006 may have led to the same conclusion.²²⁶

All of these factors militate in favor of the miscalculation model, which explains why the Court could have guessed so poorly about the effects of its decisions. The miscalculation model, in turn, suggests that PPT scholars must rethink the assumption of perfect information, at least with respect to the judiciary. Indeed, uncertainty and miscalculation may be a cause of many of the overrides documented in the literature.²²⁷

At the same time, the miscalculation model suffers from a number of weaknesses that must be noted. First, if the Court attempted to insulate its policy decisions from congressional rebuke, it did a spectacularly bad job of it. Not simply because its decisions were overruled—but because the Court anchored them with so little weight. *Rasul*, *Hamdi*, and *Hamdan* were all

225. See *supra* note 64.

226. Ironically, with Democrats taking control of Congress in 2006 and the presidency in 2008, the Court in *Boumediene* may have finally hit upon the friendlier political environment to protect its decisions, as discussed in Part III.C and the Conclusion. If so, this would also upend the assumption of a one-shot, sequential game, illustrating that the Court enjoys a strategic advantage as a repeat-mover, and lessening the “costs” of miscalculation. See generally Cross & Nelson, *supra* note 66 (arguing that PPT models must take this repeat-mover advantage into account).

227. See EPSTEIN & KNIGHT, *supra* note 69, at 140 (exploring this possibility); see also Cross & Nelson, *supra* note 66, at 1451–58 (speculating that the *usually* low risk of reversal may lead the Court to rationally ignore congressional preferences). A further issue to consider is whether policy-makers should seek to “perfect” this game by correcting the uncertainty. For example, are there ways to ensure players have more perfect information, and thus can reach efficient outcomes without the political upheaval of upsetting interbranch relations? One idea would be for the court to become “better politicians”—e.g., better at understanding congressional processes. Simply encouraging justices to pick up the phone to talk to members of the Senate—however anomalous that would be under our fiction of impartial judging—may help the judiciary understand the political dynamic. Moreover, as several commentators have noted, the paucity of justices with significant political experience suggests a troubling insularity on the Court that may contribute to miscalculation. The institution may be better served by adding a Governor or Senator to the Court, as occurred in the 1940s, 1950s, and 1960s.

statutory decisions that were easily reversed. Resting the decisions on constitutional principles—Due Process, the Suspension Clause, or the like, as the Court eventually did in *Boumediene*²²⁸—would have provided far better ballast. Yet until *Boumediene*, the Court went out of its way to avoid constitutional holdings, which suggests that other values may be at work.²²⁹

Second, all the decisions of the Court have seemed explicitly to *invite* a response from Congress, which would be a curious tactic for a Court trying to cement its own preferences. In *Hamdi*, Justice O'Connor wrote, "Whatever power the United States Constitution envisions for the executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."²³⁰ In *Hamdan*, Justice Kennedy stated that "domestic statutes control this case" and "because Congress has prescribed these limits, Congress can change them."²³¹ In *Boumediene*, the Court noted that Congress could still fashion an adequate substitute for habeas that need not incorporate all historic protections of the Writ.²³² If the Court hoped each decision would land in the gridlock interval, why invite a congressional response?

Finally, the strongest evidence against the miscalculation model is that, even if the Court failed to enact its preferences, it still moved policy *closer to its preferred point* with each decision, and it did so by empowering Congress to legislate. This suggests other forces may be at work.

B. The Democracy-Promotion Model

In contrast to the miscalculation model, the democracy-promotion model posits that the Court may act strategically in order to spur Congress to respond.

As detailed in Part III, both *Rasul* and *Hamdan* broke the gridlock interval that had shielded the president's policies, liberating Congress to legislate. Congress eventually then set policy near its median preferences and thus, arguably, better reflected majority will.²³³

228. Although, as discussed in Part II.G, *Boumediene* still allows for a broad range of congressional responses.

229. To be sure, even a court seeking to maximize its preferences may have strategic reasons for preferring a statutory ruling over a constitutional one. *See infra* note 272.

230. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

231. *Hamdan v. Rumsfeld*, 548 U.S. 557, 637, 653 (2006).

232. 128 S. Ct. at 2274 ("[W]e do not hold that an adequate substitute must duplicate [28 U.S.C.] § 2241 in all respects.").

233. This is a different phenomenon from the Court merely choosing to credit the preferences of the current Congress over the enacting Congress—the democratic propriety of which is a source of constant debate among theorists. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 127 (Supp. 1992). Rather, the democracy-promotion model recognizes that the president's unilateral power may be contravening the majoritarian preferences of *both* the enacting and current Congresses, which may demand a judicial response.

This “democracy-promoting” function suggests the Court may have separate goals apart from, and in addition to, achieving its policy preferences. These goals, which may be thought of as institutional or separation-of-powers norms, reflect an underlying concern with the *process* of resolving political questions—not just the substance of their answers.²³⁴

In *Hamdan*, the Court’s language suggests just such a concern with process. For example, Justice Breyer’s concurrence encourages the president to return to Congress to “seek the authority he believes necessary,” and Justice Kennedy’s concurrence promotes the value of a “deliberative and reflective process engaging both of the political branches.”²³⁵

As one scholar concluded, the Court in *Hamdan* “depicted itself as a policeman—possessing jurisdiction to make sure that the executive was acting under congressional authorization but lacking the power to set military policy [itself].”²³⁶ Indeed, the lawyer for *Hamdan* explicitly chose to anchor his critique of the military commissions in these “democratic” norms—rather than the more risky constitutional and Due Process doctrines—because they seemed more likely to command a majority.²³⁷

The democracy-promotion model also fits well into the larger narrative of the Bush response to 9/11. Again and again, Bush refused opportunities “to get the entire terrorism program on a stronger and more explicit legal footing” by securing congressional approval of his policies.²³⁸ As a result, the Supreme Court intervened to force the president to return to Congress. Or, as an administration critic put it more strongly, “Like a bad caricature of Chief Justice Marshall, the administration adopted creative constitutional and statutory interpretations to nullify statutes in each setting instead of asking Congress to modify the statutes themselves.”²³⁹ It is precisely this trend of abrogating or ignoring statutes rather than legislatively correcting them that the Supreme Court rejected in its decisions.²⁴⁰

234. See, e.g., Jack Balkin, *Hamdan as a Democracy-Forcing Decision*, BALKINIZATION.COM, June 29, 2006, <http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html> (“What the Court has done is not so much countermajoritarian as democracy forcing. It has limited the President by forcing him to go back to Congress to ask for more authority . . . and if Congress gives it to him, then the Court will not stand in his way.”).

235. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring in part); *id.* (Kennedy, J., concurring).

236. Devins, *supra* note 112, at 1587.

237. See Neal Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006). Indeed, Katyal seems to have rooted a portion of his argument in the public choice tradition, noting that the power of the presidential veto gives lie to the idea that—as argued by the government in *Hamdan*—congressional silence through 2006 equaled acquiescence to the military commissions. This is because as a “practical matter, [it was] impossible to gain supermajorities in both houses to reverse the President’s Military Order.” *Id.* at 94–97.

238. GOLDSMITH, *supra* note 91, at 135.

239. Katyal, *supra* note 237, at 103.

240. See *id.* at 105 (“The reason the Administration fought *Hamdan* so hard, and why it refused to seek congressional approval for its tribunals in November 2001 when it had Congress

Stepping back, it is clear that, until passage of the DTA, the habeas game was marked by executive action and congressional silence. The democracy-promotion model supposes that one of the Supreme Court's main goals in its decisions was to put an end to this silence. Thus, the Court "simultaneously rebuffed the executive and returned the enemy combatant issue to elected government."²⁴¹ The models developed in Part III explain why such intervention was necessary: the gridlock interval prevented Congress from responding on its own. Under the democracy-promotion model, the Court did not try to set policy and fail; it tried to involve Congress and succeeded.

The contention that the Court is motivated by democratic norms and separation-of-powers concerns is common outside the PPT literature.²⁴² Note, however, that the model envisions a slightly more robust role for the Court than simply fostering "dialogue" or "deliberation" through statutory construction²⁴³ or judicial review.²⁴⁴ Instead, the democracy-promotion model posits that the Court spurs Congress not just to talk, but to act.²⁴⁵ This idea in turn complements a number of other scholarly works on the role of judicial review in wartime.

For example, the democracy-promotion model coincides nicely with the work of Professors Issacharoff and Pildes. They contend that in wartime, the Court has historically cared far more about the decision-making *process* than the substance that results:²⁴⁶

strongly on its side, is that military commissions per se have never been the motivating principle. Rather, the commissions were an exemplar of a reactionary constitutional ideology: that the president's speed, unity, and dispatch mean that he can ignore statutes, or interpret them away, under his inherent power. The true legacy of *Hamdan* will be, I believe, to eviscerate this dangerous, anticonstitutional reasoning." On the other hand, some scholars believe the Court's concern with institutional balance is simply a way to vindicate civil liberties concerns without weighing in on constitutional issues. Peter Quint, for instance, notes that Justice Kennedy was not concerned with congressional action in the abstract, but with legislation that is "tested over time and insulated from the pressures of the moment." Peter E. Quint, *Silences and Peculiarities of the Hamdan Opinions*, 66 MD. L. REV. 772, 774-75 (2007) (quoting *Hamdan*, 548 U.S. at 636 (Kennedy, J., concurring in part)).

241. Devins, *supra* note 112, at 1588; *see also* GOLDSMITH, *supra* note 91, at 137 ("The 'strong force' that Addington had anticipated [that might counteract executive power] had finally arrived. Now only Congress could help the administration out of its predicament.").

242. *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986).

243. *See, e.g.*, Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397 (2005).

244. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

245. *See also* Elhauge, *infra* note 263 (arguing that a similar goal explains many contemporary canons of statutory construction).

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

The judicial role has centered on the second-order question of whether the right institutional processes have been used . . . rather than on what the content of the underlying rights ought to be. This approach has historically rejected or resisted most claims of executive unilateralism, [upholding government action] only after a judgment of Congress, as well as the executive, has endorsed the action.²⁴⁷

Issacharoff and Pildes call this “bilateral institutional endorsement,” and they persuasively read more than a century’s worth of wartime decisions through this lens, including the *Hamdi* and *Padilla* decisions. This democratic “process-based” view may act as “a special kind of check” on wartime political excess.²⁴⁸ By promoting the participation of all branches in wartime decisions, the process ultimately balances civil liberties and national security.

The democracy-promotion model presented in this Comment also explains something Issacharoff and Pildes leave unaddressed: the conditions necessary for congressional intervention. Issacharoff and Pildes suggest it is enough that the Court acts to “keep open” the possibility of congressional intervention. The democracy-promotion model illuminates a more robust role for the Court, through which it grants Congress the institutional and political leverage it needs to respond.

Issacharoff and Pildes also assume congressional silence in the face of executive action constitutes assent. Instead, PPT shows it may simply be an expression of institutional paralysis owing to the gridlock interval.

The idea of encouraging democratic action fits well with another theory, that of Professor Sunstein’s “minimalism.”²⁴⁹ Minimalism prizes narrow and lightly theorized judicial decisions that encourage dialogue and leave the political process open. In the context of national security, this means the Court should—and does—avoid both “National Security Maximalism” and “Liberty Maximalism.”²⁵⁰ Instead, the Court should focus on upholding only a very basic core of demands: clear congressional authorization must exist for intrusions on liberty interests, those intrusions must be accompanied by a minimum amount of process, and the Court should scrupulously issue only very narrow decisions to avoid overstepping its bounds.²⁵¹

The democracy-promotion model can be read as keeping with Sunstein’s minimalism, especially insofar as the actual substance of *Rasul*, *Hamdi*, and *Hamdan* has been quite modest. As stated above, these decisions rested on

247. *Id.* at 2.

248. *Id.* at 44.

249. Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47.

250. *Id.* at 49–50 (“National Security Maximalists understand the Constitution to call for a highly deferential role for the judiciary, above all on the ground that when national security is threatened, the president must be permitted to do what needs to be done to protect the country. If he cannot provide that protection, who will? By contrast, Liberty Maximalists insist that in times of war, at least as much as in times of peace, federal judges must protect constitutional liberty.”).

251. *Id.*

statutory, not constitutional grounds. They invited a congressional response, and they acknowledged the need to preserve a strong executive. They left many of the substantive details of judicial review unwritten. They ordered no one released, ordered no tribunal to shut down, ordered no military officer to act.²⁵² These are the hallmarks of minimalism. Even *Boumediene* preserves the option for a congressional response to substitute a new national security court for pure civilian habeas review.

The democracy-promotion model also coincides with what Professors Fallon and Meltzer call the “Common Law Model” of habeas adjudication.²⁵³ The idea is that, aware of its institutional powers, the Court has been “muddling through” its habeas decisions—searching for both the proper policy and a way to get there on the most painless legal grounds. Thus, it prefers a statutory solution to a constitutional ruling. But, along the way, it has shown a “characteristic approach of interpreting statutory and constitutional provisions as permitting gradual, policy-driven, common law–like adaptation.”²⁵⁴ By challenging executive authority, but doing so in as minimal a way as possible—a way that permits and invites congressional correction—the Court in *Rasul*, *Hamdi*, and *Hamdan* encouraged consensus and participatory lawmaking.²⁵⁵ *Boumediene* may yet function similarly.

Taking a slightly different tack, Professor Pushaw calls this the “pragmatic approach” to wartime issues.²⁵⁶ In the pragmatic approach, the Court weighs not only the crisis and the civil liberties at stake, but also the chance that the other branches will reject its ruling. In particular, a politically powerful president with the backing of Congress gets more deference; a president with little popular support receives less. The democracy-promotion model has room for this insight: the less popular support a president enjoys, the

252. Devins, *supra* note 112, at 1566 (“[T]here was little risk of executive non-acquiescence [to the terrorism rulings]. In ruling against the administration, the Court did not compel an overhaul of administration policies. While signaling that the Court would play some role in checking the executive and that government must give enemy combatants an opportunity to challenge their detention, the decisions did not place hard limits on the executive.”); see also Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1127 (2005) (“It is simply untenable to read *Rasul* as a call for *federal courts*—or indeed, any court—to determine whether the detainees were correctly classified as combatants because that is not the purpose of habeas corpus.”).

253. Fallon & Meltzer, *supra* note 77, at 2041–42.

254. *Id.* at 2033.

255. See *id.* at 2041 (“In the case of statutory interpretation, courts play the role of junior partners to Congress by fleshing out legislative enactments and sometimes presuming that Congress would not have wanted to run up against possible constitutional prohibitions. Courts following this approach, as we understand it, may also refuse to interpret statutes as trenching on traditionally recognized but not constitutionally absolute rights unless Congress makes its intent to do so unmistakably clear. Nevertheless, when Congress wants the last word, it can have it by enacting a more specific statute—provided, of course, that the question is solely one of statutory interpretation.”).

256. Robert Pushaw, *The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1042 (2007).

more his or her grip on the gridlock interval is undemocratic, and the more necessary judicial intervention becomes. After 9/11, President Bush's popular support steadily evaporated.

Finally, Professor Allen reads the Court's decisions as a form of "channeling," whereby the Court responds to a "Time of Constitutional Change" by insisting that there be countervailing "centers of political authority."²⁵⁷ The goal of the Court is to preserve "structural equilibrium," whereby no particular political actor grows too powerful. This equilibrium is accomplished not by direct intervention, but by promoting checks and balances. *Hamdan* was thus a "judicially modest decision" because the Court could have "removed [the matter] from political debate" with a constitutional ruling, but instead "channeled debate over the structure of military commissions into the political process."²⁵⁸ *Boumediene* may function similarly by prompting calls for the legislative creation of a national security court to balance civil liberties and national security needs.

In the end, these scholars' descriptive theories are remarkably similar. Whether this is thought of as Issacharoff and Pildes' "bilateral institutional process approach," Sunstein's "minimalism," Pushaw's "pragmatism," Fallon and Meltzer's "Common Law Model," or Allen's "channeling," the underlying idea is the same: the Court acts cautiously in wartime, going only so far as is necessary to promote democratic participation by the other branches.

The models developed in this paper illustrate why such cautious intervention is nonetheless crucial: without the Court acting first, Congress often cannot act at all. The Court's wartime role in this scheme is thus not merely to *encourage*, but to *liberate*.

This phenomenon also undermines another of the basic assumptions of PPT, that the Court is driven to enact a single, discrete policy preference. Instead, the Court may also have a second-order preference for the mechanism of policy formation—a concern not just about *what*, but about *who* and *how*.²⁵⁹ To be sure, PPT already recognizes that a variety of interests beyond ideology may determine judges' preferences, including their preferred legal rules,²⁶⁰

257. Allen, *supra* note 85, at 871, 886, 895–97.

258. *Id.* at 918–19, 921 ("The Court channeled debate into the constitutionally established political process, avoided aggrandizement of the judicial branch, and respected the need for effective government. Post-*Hamdan* experience suggests that the Court was successful in its efforts. In late 2006, Congress passed and the president signed into law the Military Commissions Act of 2006. This Act cures the separation of powers issues vetted in *Hamdan* through explicit legislative action in place of unilateral executive fiat.").

259. See generally Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1583 (2001) (collecting examples of the Court's use of "process-centered rules [to initiate] a dialogue with and among nonjudicial actors, often deferring to decisions of political branches on how to resolve constitutional issues, so long as those decisions bear the earmarks of deliberation and care").

260. See Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511 (1998); Pablo Spiller

fidelity to the enacting Congress,²⁶¹ and norms of institutional deference to agencies, lower courts, the president, and others.²⁶² Yet these models still operate on “the assumption of sophisticated utility maximization, however that utility is defined,”²⁶³ and on a one-dimensional policy space. If this assumption is to remain—at least with respect to wartime decision-making—the utility function for the Court may need to operate across a two-dimensional space. The first dimension would represent the Court’s policy preferences; the second would represent its preferences for a particular path and process of policymaking.²⁶⁴

On the other hand, the democracy-promotion model must also contend with the best evidence against it: *Boumediene*. Unlike *Rasul* and *Hamdan*, *Boumediene* did not rest on an easily reversed statutory interpretation; it ruled that detainees had a constitutional right to habeas, and thus threw out the MCA’s jurisdiction-stripping provision and narrowed the policy space in which Congress could act. As Justice Roberts argued in dissent, “Congress[’s] attempt to ‘determine—through democratic means—how best’ to balance the security of the American people with the detainees’ liberty interests . . . has been unceremoniously brushed aside.”²⁶⁵ Justice Scalia added that when the justices in the plurality in *Hamdan* instructed the president to return to Congress to seek authority for the military commissions, it “turns out they were just kidding.”²⁶⁶

How, then, can the Court be “promoting democracy” by overtly undoing an Act of Congress less than two years old?

One possibility is that the Court recognized that with the Democratic takeover of Congress in the 2006 elections, the MCA lost its already tenuous

& Emerson Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT’L REV. L. & ECON. 503 (1996).

261. John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992).

262. See, e.g., Cross & Nelson, *supra* note 66, at 1478–81; Epstein, *supra* note 13, at 601–11.

263. Jacobi, *supra* note 5, at 265 n.25. An important exception to this is Einer Elhauge, who argues that courts seek to maximize “political satisfaction,” and thus use “preference-eliciting default rules [of statutory construction] that encourage a deliberate legislative decision or more explicit statute, and this ultimately leads to statutory results that overall more accurately reflect political preferences.” Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2168 (2002).

264. For an intriguing example of such a two-dimensional model, see Spiller & Tiller, *supra* note 260, at 509–10. Spiller and Tiller argue that judges have both policy preferences and rule preferences (e.g., preferred rules of statutory interpretation, stare decisis, etc.), and those two types of preferences may conflict in a given case. By strategically inviting Congressional overrides in certain cases, a court may be able to maximize preferences along both dimensions. See also Epstein & Jacobi, *supra* note 170, at 96 (“Despite existing scholarship showing that one dimension can largely explain judicial decisions in the aggregate, it is possible that in any specific case or issue, two or more dimensions can be salient.”).

265. *Boumediene v. Bush*, 128 S. Ct. 2229, 2293 (2008) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006)).

266. *Id.* at 2296 (Scalia, J., dissenting).

support among the congressional majority.²⁶⁷ Indeed, the vote on the Leahy-Specter Amendment showed that at least fifty-six senators favored reversing the MCA's jurisdiction-stripping, but were unable to accomplish their preference because of a Republican filibuster. Furthermore, by the time of *Boumediene*, the Court had more evidence that the president was short-circuiting the D.C. Circuit review process and thereby contravening the legislative intent of the DTA and the MCA.²⁶⁸

The Court in *Boumediene*, therefore, may have been doing the same thing it did in *Rasul* and *Hamdan*: responding to a president dragging policy to extremes by freeing Congress to legislate in the middle.

To be sure, *Boumediene* limits the options open to Congress, because the Court anchored detainee rights in the Constitution. But even this is not as straight-forward as it seems.²⁶⁹ Yes, the Court found that the writ of habeas reaches Guantánamo. However, it left open whether it reaches further overseas. It also left the lower courts to sort through the contours of the right, including the extent of discovery, the use of hearsay, confrontation rights, access to classified information, the burden of proof, and detention standards.²⁷⁰ And, according to some commentators, the decision invites Congress to enact a new detention statute, possibly in conjunction with an Article III “national security court,” that would function as an adequate substitute for habeas.²⁷¹

267. Supreme Court intervention might thus be justified in democratic terms as an invitation to Congress to clarify the law it had just passed, thus promoting more deliberative law-making. See Elhauge, *supra* note 263, at 2184–85 (“Courts often should and do try to elicit statutory overrides . . . to obtain ex post legislative instructions in the face of uncertainty about legislative preferences and to encourage the provision of ex ante legislative clarity in similar future cases.”). *But see* Vermeule, *supra* note 65, at 564 (arguing that the concept of normatively desirable “democracy-forcing default rules” survives only on the false assumption of a unitary court).

268. In a major case testing the D.C. Circuit review process, the administration argued that detainees had no right to present exculpatory evidence to the appellate court and no right to access records outside the scope of what the CSRT below had considered, thus severely limiting the scope of review. *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *reh'g en banc denied*, 514 F.3d 1291 (2008); see also Marty Lederman, *What Might the Court Do in Boumediene? And How Might Congress Respond?*, BALKINIZATION.COM, June 2, 2008, <http://balkin.blogspot.com/2008/06/w-hat-might-court-do-in-boumediene-and.html> (“The Bush Administration’s posture in *Bismullah* revealed that its manifest design under the MCA/DTA process is to drag out the detention process indefinitely, and to strenuously resist any serious review of CSRT decisions.”).

269. Frickey, for example, notes that the constitutional avoidance canon—the use of which the dissent explicitly urged in *Boumediene*, 128 S. Ct. at 2281–82—does not necessarily advance the democratic norm of fidelity to the enacting Congress, and may in fact promote just the opposite. Frickey, *supra* note 243, at 448–49.

270. See Bobby Chesney, *Should Judges or Congress Elaborate the Procedural Details of Habeas Review?*, OPINIONJURIS.ORG, July 29, 2008, <http://opinionjuris.org/2008/07/29/should-judges-or-congress-elaborate-the-procedural-details-of-habeas-review/>.

271. See generally Julian Davis Mortenson, *What Comes Next?*, OPINIONJURIS.ORG, June 13, 2008, <http://opinionjuris.org/2008/06/13/what-comes-next/> (“Nothing in *Boumediene* prevents Congress from devising a comprehensive system of preventive detention Under the majority’s opinion, Congress can create procedures governing review; Congress can funnel the

In PPT terms, the constitutional ruling “reduces in a nontrivial way the dimensionality of the policy space in which the political game is played, but [does not] set a particularly policy.”²⁷² In *Boumediene*, the Court forecloses the right half of the policy space (wherein the president sought no judicial review of detainees), but still leaves Congress and the president room to maneuver on the left—and invites them to do so.

In sum, the miscalculation and democracy-promotion theories offer divergent explanations for the Court’s behavior. Under the miscalculation model, the Court has distinct ideological preferences and tries to achieve them strategically, but often blunders. The final outcome of the game turns on the sequence of play, how well the Court judges the political dynamic, and how determined it is to play the game again and again. The Court is a poor but determined strategist.

The democracy-promotion model holds differently. It suggests that, while the Court has policy preferences, it may be willing to subordinate those preferences in favor of a role as the wartime arbiter between Congress and the president. The Court favors a particular result, but it hopes to nudge the other branches to reach it themselves, with decisions that promote democratic norms and collaboration. The Court is still a strategist—but a more complicated one, balancing ideological and institutional concerns.

In the end, of course, it may be impossible to divine what actually motivated the Court in its Guantánamo decisions—or, given the admitted difficulties in modeling the judiciary as a unitary actor, what motivated Justice Kennedy.²⁷³ PPT theorists are the first to concede that judges “are individual human beings whose particular behavior is not reducible to simple models,” and that, in fact, “legal, ideological, and strategic” factors all conspire to determine the fate of a case.²⁷⁴ If so, are we back to simply asking what Justice

cases to a new court to conduct that review; Congress can define the burdens of proof; and Congress can define the categories of people who are detainable. Indeed . . . the majority essentially invites Congress to do so.”).

272. Spiller & Spitzer, *supra* note 181, at 10; *see also* Epstein, *supra* note 13, at 597–600 (modeling the choice of a statutory or constitutional decision as a trade-off between the benefit of a more-permanent policy and the risk to the Court’s legitimacy of provoking a political attack); Eskridge, *supra* note 28, at 387 (hypothesizing that a constitutional decision may have the strategic benefit of signaling the intensity of the Court’s preferences).

273. *See supra* note 170.

274. Cross & Nelson, *supra* note 66, at 1491–92. And, of course, the attitudinalists deny that strategic thinking is *ever* anything more than a minor influence on judges, who simply vote their sincere ideological preferences. *See* Segal, *supra* note 67. The attitudinal model may be a particularly plausible explanation for the Guantánamo decisions—and it is a common trope on the political right in explaining the cases. *See, e.g.*, John Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 17, 2008, at A23. Focused as it is on PPT, this Comment does not consider this alternative at any length. The miscalculation model assumes, however, that the Court does not *want* to be overturned and tries (but often fails) to modulate its decisions accordingly; the attitudinal model suggests the Court does not particularly care one way or another.

Kennedy had for breakfast?²⁷⁵

On the other hand, positive political theory and the models developed herein at least offer different ways of thinking about the Court, the choices it makes, and the values it seeks to promote. This is important for anyone hoping to predict what will happen next in the habeas game.

Indeed, as President Obama steps in to promote his policy preferences for the first time, he will have to decide for himself whether the Court has been “miscalculating” or “promoting democracy.” The answer will inform his own strategic choices and, hence, the success of his agenda.

CONCLUSION: THE OBAMA ERA BEGINS

During the Bush presidency, the habeas game was marked by a distinct pattern: the president asserted unilateral power to eliminate judicial review, which prompted the Court to intervene, which prompted Congress to act to balance the demands of both. This pattern held in both *Rasul* and *Hamdan*.

The PPT models developed in this Comment help explain why. With his unilateral power, President Bush was able to take advantage of legislative gridlock to move policy to the rightward edge of what Congress would favor. By shifting policy outside the gridlock interval, the Court freed Congress to set policy in the middle.

Boumediene may yet prompt a third round of this game, but the Court and Congress now confront a new president. The inauguration of Barack Obama on January 20, 2009, radically reordered the policy space. Instead of the Court and the president positioned at opposing ends of the policy spectrum, both are now jumbled together on the left. The precise location of their preferences—especially relative to the Democratic filibuster pivot—will determine what happens next.

For example, as discussed in Part III.C, the core holding of *Boumediene* probably falls within the gridlock interval. That is, at least forty-one Democratic senators are likely willing to filibuster any attempt to shift policy to the right (e.g., to limit detainee access to the civilian courts). Given this environment, how might President Obama work to enact his policy preferences? And what are those preferences?

One possibility, of course, is that he simply agrees with *Boumediene*.²⁷⁶ The president may favor allowing Article III courts to sort through the mass of detainee challenges using traditional habeas principles.

275. See RONALD DWORKIN, *LAW'S EMPIRE* 36 (1986) (“Law is only a matter of what the judge had for breakfast.”)

276. See Linda Greenhouse, *Over Guantánamo, Justices Come Under Election-Year Spotlight*, N.Y. TIMES, June 14, 2008, at A10 (quoting Obama praising the decision as “an important step toward re-establishing our credibility as a nation committed to the rule of law”).

Figure 10 illustrates this possibility, with the president's preference set at $p1$, the status quo established by *Boumediene*. Under this set of preferences, both President Obama's veto and the Democratic filibuster protect any attempt to shift policy to the right, toward less judicial review. *Boumediene* would remain the framework for the foreseeable future. Obama's executive order closing Guantánamo may also herald this approach, although it expressly considers that "other disposition[s]" besides transfer, release, or prosecution in Article III courts may be necessary for some detainees.²⁷⁷

On the other hand, what if President Obama concludes that the civil-courts system established in *Boumediene* is imperfect? It is possible that, now that he bears the burden of defending the country from terrorism (and wielding executive authority of his own), President Obama will seek to circumscribe Article III review and return to policy that is friendlier to the national security interests of the military and the administration.

Indeed, even if President Obama initially favored allowing full civilian-court habeas review, those cases might lead to a raft of procedural and security problems that prove unworkable, forcing Obama to rethink his preferences.²⁷⁸

Thus, if President Obama wished to shift policy away from the civilian habeas-review model instantiated by *Boumediene*—a preference represented by $p2$ in Figure 10—what would be his options?²⁷⁹

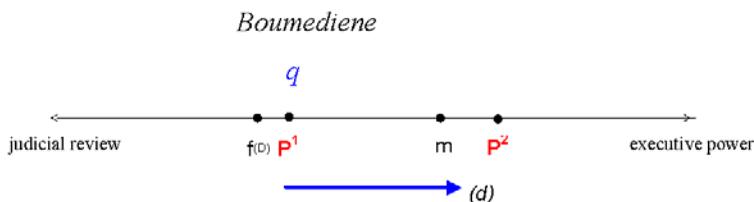


Figure 10. A proposed Obama policy space

Obama could seek a new detention statute from Congress, one that made use of an Article III "national security court" to provide the substantive review *Boumediene* demands, but that is also tailored to military and intelligence-

277. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009).

278. See Lyle Denniston, *Sharp Dispute Over Shape of Detainee Cases*, SCOTUSBLOG.COM, July 26, 2008, <http://www.scotusblog.com/wp/sharp-dispute-over-shape-of-detainee-cases> (reviewing disputes over discovery, hearsay, confrontation rights, burdens of proof, and triggers for evidentiary hearings that have accompanied the first post-*Boumediene* hearings in federal court); see also Gregory S. McNeal, *Beyond Guantanamo: Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29, 45–46 (2008) (detailing problems with security clearances, secured facilities, protection of classified information, and intelligence-gathering demands that civilian courts must confront).

279. To simplify matters, the Figure sets Obama's preference at just to the right of the congressional median. The exact location is unimportant to the game, so long as it is to the right of *Boumediene* but within the gridlock interval.

gathering necessities. Many commentators from the left,²⁸⁰ right,²⁸¹ and center²⁸² have urged such legislation.²⁸³ As of this writing, reports suggest Obama is considering such an option.²⁸⁴

However, if Obama pursues congressional authorization for a new national security court, he could run into immediate opposition from the left. Such proposals have already engendered fierce critiques from the academy, interest groups, and other political players.²⁸⁵ President Obama's Deputy Assistant Attorney General for the OLC, Marty Lederman, has expressed skepticism about the need for a new detention statute, for example.²⁸⁶ The Chairman of the Senate Judiciary Committee, Patrick Leahy (D-VT), has suggested that Article III courts operating under traditional rules could suffice to deal with detainees.²⁸⁷ Most importantly, as noted above, the core holding of *Boumediene* appears to fall within the gridlock interval, protected by the Democratic filibuster.

Thus, if Obama sought new legislation, he would have to "unlock" *Boumediene*. He would have to shift the gridlock interval itself by convincing the Democratic filibuster pivot to support a proposed bill altering the *Boumediene* framework. In other words, he would have to persuade Congress to change its preferences.

Depending on the amount of opposition from interest groups and other political players, this could be a tall order, even for a popular new president.

280. Neal Katyal & Jack Goldsmith, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19.

281. Michael B. Mukasey, *Al Qaeda Detainees and Congress's Duty*, WALL ST. J., Nov. 21, 2008, at A23.

282. Benjamin Wittes, *Congress's Guantanamo Burden*, WASH. POST, June 13, 2008, at A23. See generally BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008).

283. For a comprehensive review of the issues that must be confronted in any administrative detention scheme, see Waxman, *supra* note 165.

284. Peter Finn, *Reports on U.S. Detention Policy Will Be Delayed*, WASH. POST, July 21, 2009, at A2; see also Editorial, *Pragmatist-in-Chief*, WASH. POST, Jan. 16, 2009, at A18 ("Mr. Obama said he is undecided about whether some kind of special national security courts might be needed.").

285. See, e.g., Deborah H. Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 CASE W. RES. J. INT'L. L. 577; John C. Coughenour, *The Right Place to Try Terrorism Cases*, WASH. POST, July 27, 2008, at B7; Anthony D. Romero, *Guantanamo: Restore Moral Leadership*, MIAMI HERALD, Jan. 21, 2009, at A25; Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, FOREIGN AFF., May–June 2008, at 2; RICHARD B. ZABEL & JAMES J. BEJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURT (May 2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>; CONSTITUTION PROJECT, A CRITIQUE OF NATIONAL SECURITY COURTS (June 23, 2008), available at <http://constitutionproject.org/article.cfm?messageID=484>.

286. Marty Lederman, *What's the Rush?*, BALKINIZATION.COM, June 13, 2008, <http://balkin.blogspot.com/2008/06/whats-rush.html>.

287. *Oversight of the Justice Department: Hearing of the Senate Judiciary Comm.*, 111th Cong. (2009) (statement of Sen. Leahy, Chair, Senate Judiciary Comm.).

Figure 10 illustrates this dynamic. Furthermore, of course, any new detention statute would have to meet the constitutional baseline established in *Boumediene*, though the decision seems to contemplate such a response.

President Obama has another option, though. As President Bush did before him, Obama could ignore Congress and use his unilateral powers to try to limit civilian-court review, shaping the reach of *Boumediene* on his own. Currently, the lower courts are sorting through hundreds of habeas petitions; the president could circumscribe those cases by invoking the state secrets privilege, shielding potential witnesses stationed abroad, limiting discovery, or simply employing the delaying tactics favored by his predecessor.²⁸⁸

Outside of court, Obama could seek to short-circuit *Boumediene* by transferring Guantánamo prisoners to U.S. custody at foreign air bases or by even employing rendition to transfer them out of U.S. custody entirely—two options that Obama has expressly kept open, according to early accounts.²⁸⁹ In following such a course, Obama would take *advantage* of the gridlock interval to shift policy on his own. Figure 10 represents this dynamic through *d*, Howell's discretionary parameter representing a president's unilateral power.

On the other hand, as with President Bush, such tactics may set the president up for a confrontation with the Court. To be sure, *Boumediene* does not directly forbid some of these tactics—and seems to invite a few of them.²⁹⁰ But note that *Boumediene* also contains a warning against an executive who seeks to manipulate jurisdiction to evade review.²⁹¹ If Obama stretches policy too far, the Court may intervene yet again.²⁹²

Of course, in all likelihood, Obama has yet to determine his preferences. Shortly before his inauguration, he indicated he was still considering options for detaining and trying suspected terrorists.²⁹³ Moreover, his executive order shutting Guantánamo allows a year to close the prison,²⁹⁴ and another order creates a special “task force” to consider detention options—with a report

288. Early in his term, for example, Obama provoked the ire of the political left by invoking the state secrets privilege in a former detainee's civil suit. *See, e.g.*, Dahlia Lithwick, *See No Evil*, SLATE.COM, Feb. 10, 2009, <http://www.slate.com/id/2210915/>.

289. Greg Miller, *Obama Preserves Renditions as Counter-Terrorism Tool*, L.A. TIMES, Feb. 1, 2009, at A1; Eric Schmitt, *Afghan Prison Poses Problem in Overhaul of Detainee Policy*, N.Y. TIMES, Jan. 27, 2009, at A1. *But see* Wazir v. Gates, No. 06-1697 (D.D.C. Apr. 2, 2009) (extending habeas under *Boumediene* to certain prisoners detained at Bagram Airfield in Afghanistan). As of this writing, the fate of this case on appeal is unclear.

290. *See supra* Part II.G.

291. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008) (“The test for determining the scope of [habeas corpus] must not be subject to manipulation by those whose power it is designed to restrain.”).

292. *See* Wazir, *supra* note 289 (illustrating an early clash between Obama and the judiciary).

293. Washington Post Editorial, *supra* note 284.

294. *See* Exec. Order, *supra* note 277.

expected to be delivered to the president by the end of 2009.²⁹⁵ Guantánamo therefore continues to be a fluid situation for the new president.

Eventually, though, Obama will put his own imprint on national security law. Doing so will require thinking strategically about the other branches. The models developed in this Comment explain what questions Obama should ask as he seeks to enact his preferences: What policies will Congress countenance? What preferences drive the Court? What powers should a judicious president wield? Such questions may seem cold and calculating in light of the constitutional values at stake, but positive political theory instructs that, at the end of the day, everyone is a strategist.

295. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009); see Finn, *supra* note 284.

