BOUMEDIENE AND JURISDICTION STRIPPING: IMPERIAL POLITICS MEET THE IMPERIAL COURT

Martin J. Katz∗

INTRODUCTION

In Boumediene v. Bush,1 the Supreme Court struck down a major pillar of President Bush’s war on terror: the indefinite detention of terror suspects in Guantanamo Bay, Cuba. The Court held that even non-citizen prisoners held on foreign soil could challenge their confinement by seeking a writ of habeas corpus in federal court, and that the procedures the government had provided for such challenges were not an adequate substitute for the writ.2

As a habeas corpus case, Boumediene may well be revolutionary.3 However, Boumediene is more than merely a habeas corpus case. This Essay will argue that, at its core, Boumediene should be understood as a case about separation of powers. More specifically, it should be understood as a case about the Court’s vision of judicial review and political branches’ ability to evade judicial review. Hence, this Essay will argue, the principles set out in Boumediene have significant implications for Congress’s ability to restrict or eliminate the jurisdiction of the federal courts – a practice known as jurisdiction-stripping, which has been the subject of an intense, long-running debate among the giants of constitutional law.4

In Boumediene, the Court asserted a forceful view of judicial power that it has hesitated to assert since the Founding. The Court’s newfound willingness to assert this power may be criticized as an exercise in judicial

∗Associate Professor of Law, University of Denver College of Law; Yale Law School, J.D. 1991; Harvard College, A.B. 1987. Thanks to Alan Chen, Richard Fallon, and Scott Moss for their comments on drafts, and to Akhil Amar for his valuable guidance in this area. Any errors are my own. The author served as counsel in the jurisdiction-stripping case, Painter v. Shalala, 97 F.3d 1351 (10th Cir. 1996).
1128 S. Ct. 2229 (June 12, 2008).
2See id., at 2340.
3See id., at 2293-94 (Scalia, J., dissenting) (“Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.”). See also, Glen Sulmasy, The Supreme Court Made a Mistake in 'Boumediene' (U.S. News June 19, 2008) (“The Supreme Court's 5-4 decision in Boumediene v. Bush last week justifiably sent shock waves through the legal community. The majority opinion, authored by the ever wandering Justice Anthony Kennedy, disregarded both centuries of precedent and the military deference doctrine and also intruded on what is clearly the province of the political branches. As a result of this case, Guantánamo Bay detainees now formally have more rights than do prisoners of war under the Geneva Conventions.”)
4See infra note 13.
imperialism. But it also reflects a healthy inclination to counterbalance several recent, unprecedented assertions of power by the political branches.

This Essay will first summarize the long-running debate over jurisdiction stripping, reducing that debate to three major questions. It will then show how the principles articulated in Boumediene suggest answers to those three questions. Next, it will show that the answers suggested by Boumediene are not limited to habeas cases – cases involving detention; rather, Boumediene speaks to jurisdiction-stripping more generally. Finally, the Essay will discuss the extraordinary significance of the fact that the Court has articulated these principles now, after avoiding doing so for centuries. It will conclude that this timing is neither coincidental nor the product of an opportunistic judicial power grab. Rather, Boumediene represents a timely restoration of a healthy balance of power.

I. A Very Brief Primer on Jurisdiction Stripping: Three Questions – Few Answers

Ever since the Supreme Court declared that it had the power to review acts of Congress and the President for constitutionality more than 200 years ago, legal thinkers have wondered whether Congress could control this power by restricting the jurisdiction of the federal courts. The question has tended to come up most visibly in two contexts.

First, in the wake of controversial federal court decisions, opponents have occasionally proposed laws to strip the federal courts of jurisdiction to hear the type of case that had been at issue (presumably with the idea that state courts will ignore or refuse to apply the controversial precedent). For example, after the Supreme Court decided Roe v. Wade, providing constitutional protection for a right to abortion, some legislators proposed

5 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)


7 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 152 (3d ed. 2006). There is, of course, an irony in the use of jurisdiction stripping as a method of dealing with unpopular court decisions: Even if Congress successfully removed jurisdiction from some or all courts, the unpopular decision would remain on the books – the law of the land. However, the point of this type of jurisdiction stripping can be seen either (1) as an attempt to limit the damage done by the unpopular decision by precluding other courts from applying that precedent to new cases, or (2) an invitation to state courts or the political branches to ignore that precedent by removing the possibility that their decisions would be reviewed.
legislation that would strip the federal courts of jurisdiction to hear those cases. Similar legislation has been proposed in response to decisions on school busing, loyalty oaths, school prayer, reapportionment, and the pledge of allegiance. Notably, in this context, while the constitutionality of such legislation has been hotly debated, such legislation has rarely if ever been passed – perhaps as a result of Congressional doubt regarding the constitutionality, or at least the wisdom, of such legislation.

A second context in which jurisdiction stripping has been proposed – and actually passed – is during times of armed conflict. During such times, Congress has occasionally attempted to restrict federal court jurisdiction as a way to maximize the President’s ability to wage war – for example, permitting him to detain those seen as an impediment to the war effort. It was a statute such as this that was at issue in Boumediene. In the Detainee Treatment Act of 2004 and Military Commission Act of 2006, Congress (1) created a non-judicial procedure for determining whether certain individuals are “enemy combatants,” and thus subject to detention, and (2) limited the ability of the federal courts to review such determinations.

Generally, when Congress has passed, or even proposed, jurisdiction-stripping legislation, it has spawned debate over whether such legislation is or would be constitutional. This debate has engaged the minds of many of the country’s finest constitutional scholars.

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10 See Richard Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler’s the Federal Courts and the Federal System 322 (5th ed. 2003) (“At least since the 1930’s, no bill that has been interpreted to withdraw all federal court jurisdiction with respect to a particular substantive area has become law.”) (citation omitted) (hereinafter, “Hart & Wechsler”).

11 See, e.g., Ex Parte McCordle, 74 U.S. (7 Wall.) 506 (1869) (upholding law striking down one basis for Supreme Court jurisdiction); Military Commissions Act, 28 U.S.C.A. § 2241(e) (Supp.2007) (limiting federal court jurisdiction to hear claims by enemy combatants).


13 See Hart & Wechsler, supra note 10, at 322 (“[D]ebates about the constitutionality of legislation withdrawing federal jurisdiction as a signal of substantive disagreement have spawned
It is beyond the scope of this Essay to revisit the debates of these constitutional scholars. My purpose here is not to weigh in on the question of how courts should address jurisdiction stripping statutes (though this Essay does implicate that issue). Rather, my purpose here is to address how the Supreme Court – after centuries of largely avoiding the debate – has now suggested answers to certain fundamental questions in that debate.

Accordingly, this Part will identify the three fundamental questions in this debate: Congress’s ability to (1) strip jurisdiction from the lower federal courts, (2) strip appellate jurisdiction from the U.S. Supreme Court, and (3) do both of these things simultaneously – effectively precluding most or all federal jurisdiction over particular types of cases. 14 This Part will also show how the Court has gone to great lengths to avoid providing definitive answers to these three questions (particularly the third).


14 See Hart & Wechsler, supra note 10, at 330 (listing these issues). Hart & Wechsler also list three additional issues: (4) jurisdiction-stripping statutes that leave state courts available to hear cases (an issue I discuss below), (5) jurisdiction-stripping statutes that leave Article I administrative courts to hear cases (an issue I discuss below), and (6) statutes which apportion jurisdiction among federal courts (an issue that is not implicated by Boumediene, which I therefore do not address). See id. Nor do I address the possibility of Congress attempting to preclude the Supreme Court’s original jurisdiction. There would seem to be no textual basis for such an action and, perhaps for that reason, no one appears to have suggested such a possibility.
A. Stripping Jurisdiction from Lower Federal Courts

The first question in the jurisdiction-stripping debate is whether Congress can restrict the jurisdiction of the lower federal courts (district courts and circuit courts) to hear a particular type of case. This question assumes that only the lower federal courts are closed – that the Supreme Court’s original and appellate jurisdiction remains intact.\(^{15}\)

Proponents of allowing this form of jurisdiction stripping point to the text of Article III, which gives Congress the power to “ordain and establish” lower federal courts.\(^{16}\) The argument is that (1) the Ordain and Establish Clause gave Congress discretion over whether to create lower federal courts, and (2) if Congress could decline to create lower federal courts, then Congress can limit such courts’ jurisdiction.\(^{17}\)

Most commentators today seem to accept the basic idea that the Ordain and Establish Clause permits Congress to restrict or even eliminate the jurisdiction of the lower federal courts.\(^{18}\) Some of these commentators have also suggested that there might be limits on this power. For example, nearly all commentators have suggested that the “ordain and establish” power is limited by Equal Protection principles; that Congress could not preclude jurisdiction only over cases brought by African Americans or Catholics.\(^{19}\)

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\(^{15}\) Much of the commentary regarding stripping lower federal court jurisdiction also assumes the availability of state courts to hear cases, possibly with appellate review by the U.S. Supreme court. See, e.g., Hart & Wechsler, supra note 10, at 342-34; Meltzer, supra note 13, at 1627; Redish, Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager, 77 N.W. L. Rev. 143, 157 (1982); Hart, supra note 13. The importance of this assumption will be discussed below. See supra notes 95-97 and accompanying text.

\(^{16}\) See U.S. Const., Art. III, sec. 1 (vesting judicial power in “one supreme Court, and in suc inferior Courts as the Congress may from time to time ordain and establish”).

\(^{17}\) See Bator, supra note 13, at 1030 (explaining argument). As Professor Bator noted, it is not just the “ordain and establish” clause that supports this argument. It is also the Madisonian Compromise that is reflected in that clause – that is, the idea that Congress would have the power to decide whether or not to create lower federal courts. See id.

\(^{18}\) See, e.g., Bator, supra note 13, at 1030; Charles E. Rice, Congress and the Supreme Court’s Jurisdiction, 27 Vill. L. Rev. 959, 960-62 (1982) (arguing that Congress has discretion to curtail lower court jurisdiction based on the Ordain and Establish Clause). See also Gunther, supra note 13, at 912 (noting the difficulty of refuting the “ordain and establish” argument and also noting that the argument is “widely supported” by commentators). But see Gordon G. Young, A Critical Reassessment of the Case Law Bearing on Congress’s Power to Restrict the Jurisdiction of the Lower Federal Courts, 54 Md. L. Rev. 132, 137 (1995) (arguing that precedents do not support, and may even limit, the traditional view of Congress’s “ordain and establish” power); Eisenberg, supra note 13 (arguing that, in modern times, Congress could not decline to establish lower federal courts).

\(^{19}\) See, e.g., Bator, supra note 13, at 1034; Gunther, supra note 13, at 916-22. See also Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 N.W. U. L. Rev. 1, 6 n.27 (1990) (finding nearly universal agreement as to the invalidity of jurisdictional exclusion of cases brought by members of traditionally suspect classes); see also
Also, as noted above, most of the commentators who believe Congress has the power to limit lower federal court jurisdiction assume that some alternative court would remain open to hear the cases in question – an assumption which is likely incorrect in a case like Boumediene. But beyond these two potential limits, the “traditional view” is that Congress can exercise its “ordain and establish” power to close lower federal courts.

The courts, too, seem largely to accept the “traditional view” – that Congress has the power to restrict lower federal court jurisdiction. The Supreme Court has, on at least five occasions, suggested that Congress can limit lower federal court jurisdiction pursuant to the Ordain and Establish Clause. However, none of these cases appears to have tested the potential limits on the exercise of this power. As I will discuss below, Boumediene suggests such a limit.

Bolling v. Sharpe, 347 U.S. 497 (1954) (Fifth Amendment’s Due Process Clause contains an Equal Protection component, applicable against the federal government).

See supra note 15. In Section I.C, I will address what happens when no other court is left open.

At least one commentator has suggested a third potential limit on the “ordain and establish” power. See, e.g., Tribe, supra note 13, at 142-43 (arguing that it would be problematic for Congress to use its “ordain and establish” power selectively – i.e., to disfavor certain rights – even when other courts might remain available). This idea seems to have gained more traction in discussions about Congressional power to strip all federal jurisdiction. See infra note 38.

See Young, supra note 18, at 137 (referring to expansive view of “ordain and establish” power as the “traditional view”).


Most of those involved jurisdiction-channeling – requiring a certain type of case to be heard in a particular lower federal court – rather than jurisdiction-stripping from all lower federal courts. See, e.g., Yakus v. United States, 321 U.S. 414 (1944) (upholding requirement that appeals in price control cases be filed in designated emergency court of appeals); Lockerty v. Phillips, 319 U.S. 182 (1943) (same). Others of these cases involved a limitation on remedies, rather than a limit on lower courts’ ability to hear cases. See, e.g., Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938) (upholding limit on lower courts’ ability to issue injunctions); Kline v. Burke Construction Co., 260 U.S. 226 (1922) (same). And others involved limits on lower federal courts’ ability to hear state common law claims, as opposed to federal statutory or constitutional claims. See, e.g., Kline v. Burke Construction Co., 260 U.S. 226 (1922) (upholding limit on lower federal courts’ ability to issue injunctions against state courts in common law contract claims); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) (upholding limit on lower federal courts to hear diversity suits where diversity was created by assignment of a contract). So these cases did not test whether there is a limit on Congress’s ability to strip lower federal court jurisdiction where no state court remains available to hear the case. See generally, Young, supra note 18 (questioning whether any of these precedents support a broad Congressional power to strip lower federal court jurisdiction).

See infra Section II.B.2 (arguing that Boumediene limits Congress’s power to close lower federal courts to cases where a competent factfinder remains available); Section II.C.2 (arguing that this principle applies in all constitutional cases that are fact-dependent).
B. Stripping the Supreme Court’s Appellate Jurisdiction

The second question in the jurisdiction-stripping debate is whether Congress can strip the Supreme Court of its appellate jurisdiction. This question assumes that the lower federal courts, as well as the Supreme Court’s original jurisdiction, remain open.26

The idea that Congress can strip the Supreme Court of its appellate jurisdiction flows primarily from the text of Article III, which gives Congress the power to make “Exceptions, and . . . Regulations” to the Supreme Court’s appellate jurisdiction.27 At least some commentators have gone beyond this simple textual argument to suggest a structural purpose underlying this textual provision: that the Framers included this language to provide Congress with a means to check the power of the Supreme Court.28

Most commentators accept the idea that the Exceptions Clause permits Congress to exercise such control over the Supreme Court’s appellate jurisdiction.29 However, some notable commentators have suggested that there might be some limits on this power. For example, Professors Hart and Ratner have suggested that Congress cannot use this power to destroy the “essential functions” of the Supreme Court, which include maintaining the supremacy of and uniformity of federal law.30 Others have suggested that, at least in certain types of cases, Congress cannot use its Exceptions Clause power in a way that would foreclose all avenues to the Supreme Court.31

26 Some commentators in this debate assume that state courts would remain open, as well. See, e.g. Ratner, supra note 13, at 201-02 (explaining need to Supreme Court to keep state courts in check and unify their positions on federal law); Hart, supra note 13 (same). The importance of this assumption will be discussed below. See supra notes 95-97 and accompanying text.

27 U.S. Const., Art. III, sec. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

28 See, e.g., Wechsler supra note 13, at 1005-06.

29 See, e.g., Wechsler supra note 13, at 1005-06; Van Alstyne, supra note 13; Gunther, supra note 13; Bator, supra note 13. A few commentators have rejected the argument, suggesting that the “regulations and exceptions” language was intended to modify the phrase “findings of fact” – that is, that Congress’s power is limited to regulating the Court’s review of findings of fact. See, e.g., RAOUl BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); Merry, Scope of the Supreme Court’s Appellate Jurisdiction: Historical Basis, 47 MINN. L. REV. 53 (1962). But see Hart & Wechsler, supra note 10, at 337 n.11 (“[T]his revisionist view [advanced by Professors Berger and Merry] has attracted little support.”).

30 See Hart, supra note 13 (arguing that Congress must leave intact the “essential functions” of the Court); Ratner, supra note 13, at 201-02 (explaining that “essential functions” include “maintaining the uniformity and supremacy of federal law”). But see Gunther, supra note 13, at 920 (noting that the “essential functions” argument begs the question of what are the Court’s “essential functions” and confuses the familiar with the necessary); Wechsler, supra note 13, at 1005-06 (rejecting “essential functions” argument).

31 See, e.g., Ratner, supra note 13; Sager, supra note 13; Tribe, supra note 13; Richard Fallon, Applying the Suspension Clause to Immigration Cases, 90 COLUM. L. REV. 1068 (1998),
As with the issue of lower court jurisdiction stripping, the Supreme Court has occasionally weighed in on the issue of Supreme Court appellate jurisdiction stripping. The Court has said several times that Congress can use its Exceptions Clause power to restrict the Court’s appellate jurisdiction. However, in repeated dicta, the Court appears to have endorsed one limit on this power: Congress may need to leave open some avenue by which certain types of cases can be litigated in federal court (and possibly the Supreme Court). But the Court never actually struck down a law limiting its appellate jurisdiction on these grounds – until Boumediene.

C. Stripping All Federal Jurisdiction

The third question in the jurisdiction-stripping debate is the most difficult one: Assuming that the first two questions are answered in the affirmative (that Congress can eliminate the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court), under what circumstances, if any, can Congress do both of these things at the same time? In other words, when, if ever, can Congress eliminate all federal jurisdiction (other than the Supreme Court’s narrow original jurisdiction)?

The support for this form of jurisdiction-stripping derives from simply adding two types of power. If Congress can use its “ordain and establish” power to close lower federal courts and its “exception and regulation” power to shut down the Supreme Court’s appellate jurisdiction, the idea is that Congress should be able to do both of these things at once. This form of jurisdiction-stripping may also find support in a checks-and-balances

Although these commentators have spoken of the need to maintain a route to the Supreme Court, it may be that it would be sufficient to leave some federal court open. See infra Section I.C.


33 See, e.g., McCradle, at 515 (noting that jurisdiction-stripping statute may have been more problematic if it had foreclosed all routes to the Court); Felker, at 651 (same). At least one Justice also appears to have provided a nod in dicta to Professor Hart’s “essential function” limit. In a concurrence in Felker, Justice Souter noted that it was an “open” question whether Congress could use its Exceptions Clause power to shut down all avenues to the Court, specifically citing Professor Hart’s articulation of an “essential functions’ limitation on the Exceptions Clause.” See id., at 667 (Souter, J., concurring). But the Court as a whole has never addressed this issue.

34 Most of the commentators in this debate have assumed that, even if Congress closed all federal courts, state courts would remain open. See, e.g., Reddish & Woods, Congressional Power to Control the Jurisdiction of the Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45 (1975) (Congress cannot close all federal courts unless state court is available); Redish, supra note 15, at 155 (argument in favor of Congressional power to strip all federal jurisdiction assumes state courts or some other independent body available to hear cases); Meltzer, supra note 13, at 1627 (same). The implications of this assumption will be discussed below. See supra notes 95-97 and accompanying text.
concept: The argument is that the Framers consciously provided these forms of power to Congress as a way to permit it to control the judiciary.35

Here, the commentators seem to be more split than on the prior two questions. Some have argued that Congress can preclude all federal jurisdiction with few, if any, limits.36 Others have rejected this position, arguing that Congress must vest jurisdiction in some federal court.37

Still others have taken the position that Congress can curtail federal court jurisdiction, but subject to significant limitations. For example, Professors Sager and Tribe have suggested that Congress cannot selectively strip jurisdiction in a manner that disfavors particular rights.38 Professor Amar has suggested that Congress cannot preclude federal courts from hearing matters that fall within the list of “cases” set out in Article III.39

Most important for purposes of this Essay is a limit proposed by Professor Sager, and also by Professors Fallon and Meltzer: Congress cannot preclude federal courts from hearing constitutional claims.40 Varying justifications have been offered for this proposition. For example, some commentators have grounded this limit in the Due Process Clause.41

35 See, e.g., Charles Black, The Presidency and Congress, 32 WASH. & LEE L. REV. 841, 846 (congressional control of federal court jurisdiction “is the rock on which rests the legitimacy of the judicial work in a democracy”). But see Sager, supra note 13, at 38 (noting that this approach “is at odds with the position that Congress cannot use jurisdiction to undermine the decisions of the Supreme Court”).

36 See, e.g., Redish, supra note 15, at 155; Meltzer, supra note 13, at 1627; William R. Casto, The First Congress’s Understanding of Its Authority over the Federal Courts’ Jurisdiction, 26 B.C. L. REV. 1101 (1985). I say “with few, if any, limits” because, as will be discussed below, almost all of these commentators assume that state courts would remain available to hear cases and might feel differently about Congress closing all federal courts if state courts were unavailable. See supra notes 95-97 and accompanying text.

37 See, e.g., J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, 240-47 (1971); Clinton, supra note 13, at 749-50; Eisenberg, supra note 13.

38 See, e.g., Sager, supra note 13, at 70 (Congress cannot exercise its jurisdiction-stripping power in a way that disfavors particular constitutional rights). But see Redish, supra note 15, at 143 (issue-specific jurisdiction stripping is permissible).

39 See, e.g., Amar, supra note 13. But see Meltzer, supra note 13, at 1627 (disagreeing with Professor Amar on this point).

40 See, e.g., Sager, supra note 13, at 66; Richard Fallon & Daniel Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731, 1778-79 (1991). But see Redish, supra note 15, at 155 (disagreeing that Congress must provide federal court to resolve constitutional claims). The possibility a state court could serve this purpose will be discussed below. See supra notes 95-97 and accompanying text.

41 See, e.g., Redish, supra 15, at 158-59 (Due Process clause requires that court be available to hear all claims involving deprivations of life, liberty, or property). But see id., at 155 (that court need not be a federal court; it could be a state court). Notably, the Due Process argument would protect jurisdiction over only a subset of constitutional claims: those involving life, liberty, or property. Unless “liberty” were seen as co-extensive with all constitutional rights, this theory would not require federal jurisdiction over all constitutional claims. See Chemerinsky, supra note 7, at 503 (most, but not all, of the bill of rights have been considered “liberty” interests for purposes of incorporating them against states). A more modest variation on the principle that
Professor Sager bases this proposition on what he terms “the constitutional commitment to a radically independent federal judiciary,” which he finds in Article III’s salary and tenure protections for federal judges. But the most important justification for this limit for purposes of understanding *Boumediene* is the one offered by Professors Fallon and Meltzer: Courts must remain available to adjudicate constitutional claims in order to “keep government generally within the bounds of law.”

The courts have seemed particularly hesitant to decide this third issue (whether Congress can strip all federal courts of jurisdiction) – at least until *Boumediene*. They have adopted and applied a strong avoidance doctrine, under which they have interpreted statutes so as to avoid concluding that Congress has sought to strip federal courts of all jurisdiction (thus avoiding the constitutional question of whether Congress can do so). In fact, in a number of cases, the Supreme Court appears to go to great – some might say extreme – lengths to find that Congress did not intend to preclude all federal jurisdiction. For example, in *INS v. St. Cyr*, the Court addressed a

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42 See e.g., Sager, supra note 13, at 65.
43 See Fallon & Meltzer, supra note 40, at 1778-79. I say that this is the most important argument for our purposes because, as we will see below, it seems to be the argument that animated the *Boumediene* court. See infra Part II.B.1. As Professor Redish has pointed out, this “keeping the government in check” argument is not necessarily limited to constitutional claims; it might apply to non-constitutional claims, as well. See Redish, supra note 15, at 148, 152. Professor Redish’s observation in this regard will be explored further below, in note 92.
45 Although the Supreme Court has not addressed the question, two circuit courts appear to have reached it, though the guidance these opinions provide is not entirely clear. First, in *Battaglia v. General Motors Corp*, the Second Circuit adopted the position that the Due Process Clause precludes stripping all federal jurisdiction in cases that involve the deprivation of property. See 169 F.2d 254, 257 (2d Cir. 1948). It is notable that the Supreme Court never got involved in this case. But, as discussed below in the text, later Supreme Court dicta appears to endorse a variation of *Battaglia’s* holding: the idea that Congress cannot strip all jurisdiction in constitutional cases. Second, in *Eistranger v. Forrestal*, the D.C. Circuit held that the Suspension Clause precludes stripping all federal jurisdiction in a habeas case. See 174 F.2d 961, 966 n.26 (D.C. Cir. 1949). However, this opinion was reversed on the ground that the Suspension Clause did not apply to German nationals held in Germany. See 339 U.S. 763 (1950) (a holding discussed at length and ultimately distinguished in *Boumediene*). So the Supreme Court did not address the issue in that case.
statute that said, “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal . . . ”

Yet the court held that the words “judicial review” did not include habeas corpus; that habeas review remained available. In dissent, Justice Scalia accused the majority of finding “ambiguity in utterly clear” language and “fabricat[ing] a superclear statement, ‘magic words’ requirement . . . unparalleled in any other area of our jurisprudence.”

I will discuss the merits of the Court’s avoidance doctrine below. But whatever one thinks of the merits of the Court’s avoidance doctrine, there are two things that are worth noting about it. First, as a result of that doctrine, the Court has provided little solid guidance on the question of whether Congress can preclude all federal jurisdiction. Second, despite the lack of solid guidance, we do find some guidance in the Court’s explanations for why it has worked to hard to avoid addressing this question. Specifically, the Court’s has suggested some sympathy – in a vague way – for the position that there may be some limits on Congress’s ability to strip all federal jurisdiction in constitutional cases.

The Court has repeatedly explained its inclination to avoid the question of jurisdiction-stripping in the form of a warning – albeit in dicta – to Congress: If Congress really did intend to preclude all jurisdiction over constitutional claims, the Court explains, this “would give rise to substantial constitutional questions.” In other words, the Court seems to be suggesting that, while it believes Congress has substantial control over federal jurisdiction, the Court might draw the line at total federal jurisdiction-stripping in constitutional cases.

So far, this warning has been relatively vague; the Court has not explained the “constitutional questions” that would arise from total federal

One Supreme Court Justice has addressed the issue, albeit in dicta. Justice Story asserted that Congress could not preclude all federal jurisdiction in any case listed in Article III, whether it involved a constitutional claim or non-constitutional claim. See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 328-31 (1816). However, no later Supreme Court opinion appears to adopt – or even repeat – this assertion. (It was cited as an alternative ground by the D.C. Circuit in Estranger. See 174 F.2d at 966 n.26, rev’d 339 U.S. 763. But beyond that, Justice Story’s assertion does not appear to have gained much traction in the courts.

See infra Part III.

46 533 U.S. at 299.
47 See id., at 299-300.
48 See id., at 326-27 (Scalia, J., dissenting).
49 See also, Webster, 486 U.S. at 603 (justifying heightened intent requirement as means of avoiding the “‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim”) (citation omitted); Bowen, 476 U.S. at 681 n.12 (same); Johnson, 415 U.S. at 366-67 (same). The Court has also offered similar dicta outside of the context of its avoidance doctrine. See Zadvydas v. Davis, 533 U.S. 678, 692 (2001) (“This Court has suggested . . . that the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights”) (citing St. Cyr).
jurisdiction-stripping in such cases. And so far, the Court’s endorsement has been limited to dicta. This all changed in Boumediene.

II. Boumediene’s Answers

This Part will show how Boumediene suggests answers to the three big jurisdiction-stripping questions. Section A will explain the Boumediene opinion on its own terms – that is, as a case about the habeas rights of non-citizens held abroad. Section B will show how the Court’s responses to the habeas questions before it suggest answers to the three questions in the jurisdiction-stripping debate. Section C will then show how these answers apply to all jurisdiction stripping cases, not just to habeas cases.

A. Boumediene on its Own Terms

On its face, Boumediene is a case about the habeas corpus rights of non-citizens detained abroad. The case arose in the context of the war on terror. As part of that effort, the Bush Administration has captured and detained a number of individuals, claiming that they are “enemy combatants.” The President has claimed that he has the power to hold such “enemy combatants” for the duration of the war on terror – perhaps indefinitely.51 Several of the detainees have challenged this claim, petitioning the courts for writs of habeas corpus; that is, for an order to release them on the ground that their detentions are illegal.

To deal with the possibility of habeas claims, the Administration has divided the detainees into two groups, depending on their citizenship status and location. This is because the detainees’ rights to seek habeas was thought to depend on these two criteria. U.S. citizens and those detained on U.S. soil are generally thought to have a right to seek habeas.52 But the Administration contended that non-citizens detained abroad did not have that right. Accordingly, the Administration has detained a number of non-citizens in Guantanamo Bay, Cuba, and has claimed that the courts cannot entertain habeas petitions by these detainees.

The initial fight over the habeas rights of non-citizens held in Guantanamo was a statutory fight. In Rasul v. Bush, the Court held that non-citizens detained in Guantanamo Bay had a statutory right to seek

52 While the President seemed to concede that Americans or those held on American soil had a right to habeas, he did not concede that the federal courts should hear their cases. Rather, the President claimed that Constitution gives him exclusive or nearly-exclusive power to decide how to prosecute an armed conflict, and that this executive power overrides or limits citizen-detainees’ right to seek habeas relief from the courts – a claim that the Court rejected in 2004 in Hamdi. See 542 U.S. 507.
habeas relief under the general habeas statute, 28 U.S.C. Section 2241.\textsuperscript{53} Congress responded with the Detainee Treatment Act (DTA), which amended Section 2241 to preclude statutory habeas claims by non-citizens designated as “enemy combatants.”\textsuperscript{54} In \textit{Hamdan v. Rumsfeld}, the Court held that the DTA did not apply retroactively; that non-citizen detainees who had already filed habeas petitions under Section 2241 could continue to pursue those claims.\textsuperscript{55} Once again, Congress responded, this time with the Military Commissions Act (MCA), which made clear that the DTA was intended to be retroactive.\textsuperscript{56} This effectively precluded all avenues of statutory habeas jurisdiction for non-citizens held in Guantanamo.\textsuperscript{57}

In \textit{Boumediene}, a group of non-citizen detainees in Guantanamo Bay claimed a constitutional right to habeas. The detainees claimed that, irrespective of any statute, the Suspension Clause of the Constitution – which precludes Congress from suspending the writ of habeas corpus except in cases of rebellion or invasion\textsuperscript{58} – provides them with a constitutional right to petition a court for a writ of habeas corpus.

The government’s first defense was that the Suspension Clause does not apply to non-citizens held outside of the U.S. in a place like Guantanamo.\textsuperscript{59} Specifically, the government argued (1) that the lease agreement between the U.S. and Cuba regarding the Guantanamo Bay Naval Station makes Cuba sovereign over that location, and (2) that the Suspension Clause does not apply in places where another country maintains sovereignty.\textsuperscript{60} The Court accepted the government’s first contention (that Cuba maintained sovereignty over Guantanamo).\textsuperscript{61} But it rejected the government’s second contention, holding for the first time that the Suspension Clause – and therefore a constitutional right to habeas – applies to certain non-citizens held abroad.\textsuperscript{62} Specifically, it held that the Clause applied in Guantanamo.\textsuperscript{63}

The Court based this holding on two grounds: separation of powers and precedent.\textsuperscript{64} The Court rejected the government’s proposed sovereignty-
based test on separation of powers grounds. The Court noted that the government’s proposed test would essentially permit the government to “switch the Constitution on or off at will” based on the agreements it might enter with host countries. This, the Court held, would violate the concept of separation of powers: “The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.” Rather, the Court held, the scope of the Suspension Clause must be determined by the courts: The courts, not the political branches, are supposed to say “what the law is.”

Then, looking at its precedents, the Court distilled an alternative, three-factor test for determining where Suspension Clause would apply. In applying that test, the Court concluded that Guantanamo was the type of place in which the Suspension Clause applied.

The government also advanced the alternative argument that, even if the Suspension Clause did apply to non-citizens at Guantanamo, the procedures provided by the DTA serve as an adequate substitute for the writ. The DTA provides two stages of review: First, a detainee gets a hearing in front of a Combatant Status Review Tribunal (CSRT), established by the Defense Department. Then, the detainee can challenge the CSRT’s determination in the U.S. Court of Appeals for the District of Columbia.

The Court held that this procedure did not provide an adequate substitute for habeas. It began by noting that “the necessary scope of habeas review [or a proposed substitute for habeas] in part depends upon the rigor of any earlier proceedings.” The Court noted several shortcomings in the earlier CSRT procedures, including the fact that detainees do not have the assistance of counsel, have limited means to find and present evidence that they are not enemy combatants, and may not even be aware of the most critical allegations relied upon by the government. The Court remarked that these shortcomings posed a “considerable risk of error,” and held that “the court that conducts the habeas proceeding [or its substitute] must have

Notably, what the Court does glean from this discussion is the notion that, as a historical matter, the writ has largely been understood as a mechanism for separating powers – a way for courts to check the excesses of the executive. See id., at 2246, 2247.

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65 See id., at 2259.
66 See id.
67 See id.
68 See id., at 2259.
69 See id., at 2262.
70 See id., at 2262.
71 See id., at 2241.
73 See Boumediene, at 2268.
74 See id., at 2269.
the means to correct errors that occurred during the CSRT proceedings.\textsuperscript{75} The Court then noted several limitations that the DTA places upon the D.C. Circuit’s ability to correct such errors, including the court’s inability to consider newly discovered evidence.\textsuperscript{76} As a result of these limitations, the Court held that the DTA did not provide an adequate substitute for habeas.\textsuperscript{77}

Because the Suspension Clause applied, and because Congress had neither sought to suspend the writ nor provided an adequate substitute for the writ, the Court held in favor of the detainees. It ordered the lower courts to hear habeas cases brought by such detainees.\textsuperscript{78}

\textbf{B. Boumediene as a Jurisdiction-Stripping Case}

As discussed above, \textit{Boumediene} was a habeas case, not a jurisdiction-stripping case. However, as this Section will demonstrate, the principles the Court used to decide \textit{Boumediene} effectively provide answers to the three major questions in the jurisdiction-stripping debate.

The Section will begin with the third jurisdiction-stripping question (whether Congress can preclude all federal court jurisdiction), since that is arguably the most important of the questions and because it is the question most directly implicated by \textit{Boumediene}’s principles. I will then address the first two jurisdiction-stripping questions (whether Congress can preclude lower federal court jurisdiction and Supreme Court appellate jurisdiction, respectively). Then, in the following Section, I will demonstrate that these answers are not limited to habeas cases; that they apply to all jurisdiction-stripping cases.

1. Preventing Stripping of All Federal Jurisdiction

Perhaps the most significant development in \textit{Boumediene} is that it effectively answers the question of whether Congress can strip jurisdiction from all federal courts. \textit{Boumediene}’s effectively says that Congress cannot do so, at least in cases involving constitutional questions.

Note that I am not claiming that the \textit{Boumediene} majority necessarily saw itself as deciding this jurisdiction-stripping question. Rather, my point is that the \textit{Boumediene} Court employed three powerful principles to decide whether the Suspension Clause extended to Guantanamo, and that those principles can be applied to – and largely resolve – the question of whether Congress can preclude all federal court jurisdiction.

\textsuperscript{75} See id., at 2270.
\textsuperscript{76} See id., at 2272.
\textsuperscript{77} See id., at 2274.
\textsuperscript{78} See id., at 2279.
Recall that the government had requested a sovereignty-based test to determine the reach of the Suspension Clause. And recall that the Court rejected that proposed test on the ground that the test would violate separation of powers principles. Specifically, *Boumediene*’s separation of powers argument contained three principles.

First, the Court said that the political branches cannot set their own boundaries. The Court could not abide the prospect that “the political branches have the power to switch the Constitution on and off at will.”79 In other words, someone other than those branches must define the limits of those branches’ power.

Second, the Court said that the Court must be the one to define those limits. The problem that the Court had with the prospect of the political branches having the ability to “switch the Constitution on or off” was that such power “would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”80 In other words, the Court said, the courts, not the political branches, must define the Constitution’s limits on the political branches’ power – must say “what the law is.”

Finally, and perhaps most importantly for the jurisdiction-stripping debate, the Court balked at the idea that the political branches could manipulate the courts’ ability to perform this function: “The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to constrain.”81

Although *Boumediene* deployed these three principles to address a controversy over the territorial scope of the Suspension Clause, these three principles have important implications for the jurisdiction-stripping debate.

The first two principles (that the political branches cannot determine their own limits and that the judiciary is responsible for doing so) are powerful arguments for judicial review of the political branches’ acts. In fact, these principles were central to Chief Justice Marshall’s famous justification for judicial review in *Marbury v. Madison* – which *Boumediene* cites prominently.82 If there were no judicial review, Marshall reasoned, then the political branches would effectively have unlimited power – contrary to the Constitution’s design.83 It is essentially an argument that (1) lack of oversight effectively means lack of constraint (the first *Boumediene* principle), and (2) that the courts’ role is to provide that oversight (the second *Boumediene* principle).

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79 See *Boumediene*, 128 S. Ct. at 2259.
80 See id., citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
81 See id.
82 *Boumediene*, 128 S. Ct. at 2259.
83 See Marbury, 5 U.S. (1 Cranch) at 177.
For example, suppose that the President were given the final decision on how much process the Due Process Clause required. He might decide that this clause required no process at all, or no process beyond the “right” to respond during interrogation. He could thereby detain people indefinitely without any hearing. Or suppose that Congress were given the final decision on the meaning of the Equal Protection Clause. Congress could decide that this clause only protected the slaves freed during the Civil War, and thereby pass laws denying modern-day African Americans or Catholics the right to own property. The correctness of these interpretations is not the issue. The issue is who gets to interpret the Constitution. The point of Marshall’s argument, echoed in Boumediene’s first two separation of powers principles, was that someone other than the political branches – specifically, the judiciary – must be the arbiter of the Constitution’s limits on those branches.

While these two principles have traditionally been deployed in support of the power of judicial review, they also have implications for the jurisdiction-stripping debate. The argument is that these principles not only permit judicial review (as Marbury held), they require judicial review, at least in constitutional cases: If Congress could preclude judicial review, it would be able to shed the very constraints that Marbury said were necessary to keep the political branches in check. Thus, the argument goes, courts must remain available to adjudicate constitutional claims in order to “keep government generally within the bounds of law.”

Readers might balk at these two principles, whether applied to judicial review or jurisdiction-stripping. As most first year law students learn in their study of Marbury, despite Chief Justice Marshall’s assertion, it is far from clear that, absent judicial review, the political branches would ignore the Constitution (Boumediene’s first separation of powers principle). Those elected to the political branches take a similar oath to the one judges take to act within the bounds of the Constitution. Whether they would keep themselves in check absent judicial oversight is arguably an open question. Also, it would seem to be an open question whether there are other effective forms of oversight exist besides judicial review (Boumediene’s second

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84 See Hamdi, 542 U.S. at 537 (government argued that it provided process by permitting prisoner to contest his status as an “enemy combatant” during interrogation).

85 Actually, Marbury did not necessarily establish that the courts must get the last word regarding the constitutionality of the political branches’ actions. Read narrowly, that opinion might be understood as standing only for the proposition that the courts get to evaluate constitutionality; not that they get the last word on the issue. See Marbury, 5 U.S. (1 Cranch) at 177. However, in later cases, the Court asserted that it gets the last word on constitutionality. See, e.g., Cooper v. Aaron, 358 U.S. 1 (1958).

86 See Fallon & Meltzer, supra note 40, at 1778-79.

87 See, e.g., U.S. Const., Art. II, Sec. 1, cl. 8.

88 See Chemerinsky, supra note 7, at 44.
separation of powers principle). For example, the electorate might vote a politician out of office for acting outside the bounds of the Constitution. But courts are not necessary to keep the political branches in check.

But my purpose here is not to debate whether these two principles – when made by the *Marbury* Court or the *Boumediene* Court – are correct. My point is that the *Boumediene* Court has adopted these two principles in a context that supports their application to the jurisdiction-stripping debate.

Prior to *Boumediene*, these principles had been applied to establish the power of judicial review. But they had never been deployed by the Court to address the power of Congress to curtail judicial review. Although *Boumediene* was not on its face a jurisdiction-stripping case, the Court applied these principles in a way that had the effect of requiring jurisdiction in a case in which Congress had tried to restrict it. Congress had said that only the D.C. Circuit could hear the case and simultaneously limited the ability of that court to do so. Based on the two *Marbury* principles, the *Boumediene* Court held that Congress could not impose such a limit. *Boumediene*’s use of these two principles to ensure jurisdiction strengthens the argument that these principles preclude complete jurisdiction-stripping in constitutional cases.

But an even stronger argument against jurisdiction-stripping flows from *Boumediene*’s third principle (that the political branches may not manipulate the scope of the Constitution’s limits on their own power). This principle, which the Court had not clearly articulated before, suggests that Congress cannot strip jurisdiction as a means of avoiding judicial review in constitutional cases – that is, as a means of giving the political branches the last word on the constitutionality of their own actions.

To understand this point, consider again the hypotheticals set forth above. In those hypotheticals, the President asserted that the Due Process Clause did not preclude him from detaining people without trial, and Congress asserted that the Equal Protection Clause did not preclude it from preventing African Americans or Catholics from owning property. Exercising the power of judicial review, the courts would almost certainly

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89 *See id.* Note that the *Marbury/Boumediene* argument also begs the question of who is supposed to keep the Court in check. After *Marbury*, one possible answer to this question was that Congress could do so, thought its jurisdiction-stripping power. *Boumediene* appears largely to foreclose this option without providing an alternative means of limiting the courts. Whether this is a good idea is discussed more fully below in Part III.

90 As noted above, the Court did occasionally talk about the “separation of powers” problems that might arise if Congress were to preclude all jurisdiction over constitutional claims *See supra* Section I.C. However, as also noted above, the Court never discussed what those “separation of powers” problems were, and never struck down a jurisdiction-stripping or jurisdiction-restricting law based on these principles – until *Boumediene*. *See id.*

91 While it is far from clear, one might read *United States v. Klein* as standing for the proposition that Congress cannot manipulate federal court jurisdiction in a manner designed to achieve specific outcomes in litigation. *See* 80 U.S. (13 Wall.) 128 (1871).
reach different conclusions about the meaning of these two clauses. But now suppose that Congress passed a law stripping jurisdiction from the courts to hear cases involving the Due Process Clause or the Equal Protection Clause. Effectively, such a law would manipulate the limits on the political branches. It would permit those branches, and not the judiciary, to determine the Constitutions’ limits on their actions – that is, to “say what the law is.” Boumediene’s anti-manipulation principle seems to preclude such a tactic.

Thus, the three separation of powers principles deployed in Boumediene appear to resolve, at least in part, the question of complete jurisdiction stripping. These three principles suggest that Congress cannot preclude all jurisdiction in constitutional cases.92

A proponent of jurisdiction-stripping might object to this claim, arguing that Boumediene was concerned only with the geographic scope of constitutional limits (where the Constitution applies), as opposed to the doctrinal scope of those limits (what the Constitution means). However, this objection does not give sufficient weight to all of the Boumediene Court’s concerns. Although the Court was clearly concerned with whether the Constitution applied in Guantanamo, the reason for this concern was more substantive than geographic. The Court’s point was that the political branches should not be allowed to define their own limits; that if they could, they would effectively be unrestrained. Yet the concern about lack of restraint is not just a geographic concern. It is hard to imagine that the Court would be concerned with an unrestrained exercise of power in

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92 One might wonder whether Boumediene’s requirement for a federal court to remain open applies only in constitutional cases, or whether a court must also be available to hear claims of statutory violations as well. See Hart & Wechsler, supra note 10, at 352 (posing question of whether constitution requires review over “suits alleging that official action has violated statutory, rather than constitutional, rights”); Richard Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 HARV. L. REV. 915, 976-86 (1988) (same). If courts are required to keep the federal government within the bounds of its authority, this requirement would seem to apply to statutory, as well as constitutional authority. See Redish, supra note 15, at 148, 152. And this is a constitutional principle – the type that would arguably trump Congress’s Article III jurisdiction stripping powers. The Constitution requires the federal government to remain within its bounds. When it acts within the power granted by a legitimate statute, it acts within its bounds. When it exceeds such power, it acts outside of those bounds. Given the Boumediene Court’s concern about unlimited government – and the need for courts to prevent unlimited government – it might well be concerned with action that exceeds statutory, as well as constitutional, bounds. (Of course, some statutory claims do not seem to involve the unconstrained exercise of federal power. Specifically, when a statute provides an agency with discretion to act within a certain range, it will be impossible to argue that the agency is acting in an unconstrained fashion as long as it is acting within the range of its discretion. But this is really just a way of saying that, in such a case, there is no statutory violation. That is, in such a case the agency would be acting within its power under the statute, as opposed to in violation of the statute. If the claim was that the agency exceeded the discretion provided by the statute, such a statutory claim would again raise the specter of unconstrained federal action.)
Guantanamo, but not be concerned with such an unrestrained exercise of power in the U.S.93

Alternatively, proponents of jurisdiction-stripping might argue that Boumediene’s principles are limited to habeas cases. I will address this argument below in Section C.1.

It is, however, worth noting a few caveats on the argument I have made. First, there is the question of state courts. My argument is that the three separation of powers principles deployed in Boumediene require the availability of a court to ensure that the political branches remain within their constitutional limits. But do these principles require that this court be a federal court? What about state courts? Can they serve the function of keeping the political branches of the federal government in check?94 In Boumediene, a federal habeas case, a state court could not play this role. Tarble’s Case precludes state courts from granting habeas to federal detainees.95 Thus, in such a case, Congress would need to leave a federal court open to keep the government within the bounds of the Constitution. But what about in cases where state courts remain available? In such cases, can Congress close all federal courts to constitutional claims as long as state courts remain open?96 Boumediene does not answer this question.97

93 A proponent of jurisdiction-stripping might also argue that I have over-stated the implications of its principles, particularly its third, anti-manipulation, principle. Arguably, this principle only prevents jurisdiction-stripping when this practice is used as a means of manipulating or avoiding the Constitution’s limits on the political branches. That is, the principle might arguably permit Congress to preclude jurisdiction, even in constitutional cases, so long as it did so for some reason other than avoiding judicial oversight of its own limits. See supra note 38. However, there are three responses to this argument. First, in most of the more controversial jurisdiction-stripping proposals, Congress’s intent to manipulate has been fairly clear. See supra Part I. Second, even in cases where there seems to be no Congressional intent to evade its own constitutional limits – cases involving laws that might have shielded certain types of administrative actions from constitutional review – the Court has suggested that there might be separation of powers problems. See supra Section I.C. In other words, even prior to Boumediene, the Court did not seem to draw the line at manipulation. Third, and perhaps related, Boumediene’s first two principles – which came straight out of Marbury – apply irrespective of any Congressional intent to manipulate. These two principles would require judicial review in all constitutional cases.

94 It is clear that state courts have the capability of keeping state governments within the bounds of the Constitution. There has been much debate over whether state courts are sufficient to do so. See supra notes 36-40. However, Boumediene also does not speak to that issue.

95 See 80 U.S. (13 Wall.) 397 (1871). Tarble’s Case “has been much criticized.” See Hart & Wechsler, supra note 13, at 356. But it also seems fairly well entrenched as precedent.

96 The Madisonian compromise almost certainly envisioned the possibility that state courts might keep the federal government in check. The whole idea was that Congress might choose not create lower federal courts, instead leaving it to state courts (possibly with appellate review in the U.S. Supreme Court) to resolve constitutional claims. See Redish, supra note 15, at 155. However, subsequent developments appear to make this concept less likely. See, e.g., M’Clung v. Sillman, 19 U.S. (6 Wheat.) 598 (1821) (state courts cannot compel performance by federal officers). But see Sager, supra note 13, at 82 (suggesting that Congress can waive this principle to permit state courts to check the federal government). In any event, the question of whether
Second, there is the question of whether the argument I have proposed suggests that federal courts must hear all constitutional claims. The answer is no. There is no indication whatsoever that the Court is willing to forego its justiciability doctrines, such as standing and the political question doctrine.\textsuperscript{98} The justiciability doctrines have the effect of letting the political branches have the last word on some constitutional questions. Similarly, it is far from clear that \textit{Boumediene} speaks to the doctrine of sovereign immunity, which might shield political branch officers from judicial review. My argument is only that \textit{Boumediene}'s principle regarding the need for a federal court to remain open applies to all justiciable constitutional claims.

2. Lower Federal Courts and Factfinding

We have seen how the three separation of powers principles deployed by \textit{Boumediene} to address the territorial scope of the Suspension Clause suggest a significant limit on Congress’s power to preclude all federal jurisdiction. In this Section, I will show how a fourth principle articulated in \textit{Boumediene} suggests a significant limit on Congress’s power to preclude lower court jurisdiction. Specifically, this principle suggests that, at least some cases, a lower court must be left open for factfinding.

In the context of discussing the requirements of an adequate substitute for habeas, \textit{Boumediene} compared the procedures available under the DTA with those available under the basic habeas statute, 28 U.S.C. Section 2241. In this comparison, \textit{Boumediene} found particularly important the fact that Section 2241 “accommodates the necessity for factfinding that will arise in some cases by allowing the appellate judge or Justice to transfer the case to a district court of competent jurisdiction, whose institutional capacity for factfinding is superior to his or her own.”\textsuperscript{99}

\footnotesize{\textsuperscript{97} It is also arguable that a non-Article III federal court might suffice. See Hart & Wechsler, supra note 13, at 362-418 (discussing role of non-Article III federal courts). However, given the \textit{Boumediene} Court’s insistence on disinterest and independence, see 128 S. Ct. at 2269, it would likely be quite skeptical of an organ of the political branches serving as the only check on the political branches. See also Zadvydas v. Davis, 533 U.S. 678, 692 (2001) (“This Court has suggested . . . that the Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights”) (citing \textit{St. Cyr}).

\textsuperscript{98} See, e.g., Chemerinsky, supra note 7, at 49 et seq. (discussing justiciability doctrines – including standing requirement, ripeness and mootness doctrines, prohibition on advisory opinions, and political question doctrine – as limits on federal jurisdiction); \textit{id.}, at 180 et seq. (discussing sovereign immunity as a limit on federal jurisdiction). See also, Fallon, supra note 13, at 329-39, 366-72 (discussing well-accepted limits on judicial review); Hart & Wechsler, supra note 10, at 347-351 (suggesting that political question doctrine, sovereign immunity, and limits on remedies, may effectively preclude review in certain types of cases).

\textsuperscript{99} See \textit{Boumediene}, 128 S. Ct. at 2266 (emphasis added).}
In other words, the Court said, (1) in some cases, factfinding will be necessary, and (2) where factfinding is necessary, some entity with the institutional capacity for factfinding must remain open. This principle leaves open the question of which cases require factfinding, a question I will address below. But in such cases, *Boumediene* limits lower court jurisdiction stripping in one of two important ways.

First, a strong reading of *Boumediene*’s factfinder requirement might suggest that a lower federal court must be left open for factfinding in such cases. *Boumediene* did specifically refer to “a district court.” Moreover, as our federal courts are currently structured, federal district courts are designed to serve as the trials courts; the courts that are institutionally designed to find facts. This role would seem to make federal district courts the most obvious entities to satisfy *Boumediene*’s factfinder requirement. Thus, one could argue, *Boumediene* stands for the proposition that, at least in certain types of cases, Congress must leave open a particular type of court – a federal district court – to find facts.

However, this is probably an over-reading of *Boumediene*. A second, weaker, reading of *Boumediene* seems more plausible: *Boumediene*’s factfinder requirement precludes Congress from closing down all lower federal courts unless a competent factfinder remains available. But the Court might well accept someone other than a lower federal court as a competent factfinder. For example, in at least some types of cases, a state court may be available as a factfinder. Alternatively, in some cases, *Boumediene*’s requirement of a competent factfinder might be satisfied by a federal agency or a non-Article III court.

This second, weaker, reading would seem to be supported by *Boumediene*’s functionalist approach to the question of competence. In *Boumediene*, the Court did not focus specifically on which entities would be competent to review cases brought by prisoners at Guantanamo. Instead, it focused on the attributes which would qualify an entity to hear such cases:

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100 See infra Section II.C.2.
101 See *Boumediene*, 128 S. Ct. at 2266.
102 In *Boumediene*, there was no possibility that a state court could play any role. Ever since *Tarble’s Case*, it has been clear that a state court cannot hear a habeas case against the federal government; that is, a state court cannot order the federal government to release a prisoner. *See* 80 U.S. (13 Wall.) 397 (1871). However, as I will argue below in Section II.C.2, *Boumediene*’s factfinder requirement is not limited to habeas cases. And the possibility of state courts serving as the requisite factfinders in constitutional cases may be viable in cases that do not involve habeas petitions against the federal government. *See infra* text accompanying notes 94-96.
103 See infra note 97. It also remains possible that the Supreme Court could serve as a factfinder. However, if the lower federal courts were closed, in the vast majority of cases the Supreme Court’s jurisdiction would be limited to appellate jurisdiction, which might serve to limit its legal ability to engage in factfinding. *See* U.S. Const., Art. III (dividing Supreme Court jurisdiction between original and appellate jurisdiction).
The entity must be “disinterested in the outcome and committed to procedures designed to ensure its own independence.” In other words, the factfinder must be (1) disinterested, and (2) independent. This set of qualifications would suggest that the factfinder does not necessarily need to be a lower federal court. It might be a state court or even a federal agency, so long as that state court or federal agency were sufficiently disinterested and independent.

In summary, Boumediene suggests an important limitation on Congress’s widely assumed ability to strip jurisdiction from the lower federal courts: At least in certain types of cases, some entity must be available to perform factfinding. And while it is not clear that this entity must be a lower federal court, it does need to be sufficiently disinterested and independent.

3. The Supreme Court’s Appellate Jurisdiction

The Court in Boumediene does not say anything directly about Congress’s ability to strip the Court’s appellate jurisdiction pursuant to the Exceptions Clause. However, here, Boumediene’s actions arguably speak louder than words, and may be understood as holding that Congress cannot preclude all routes to the Supreme Court’s jurisdiction.

There is little ambiguity about Boumediene’s actions. In this case, Congress unequivocally sought to bar the Court’s appellate jurisdiction. The MCA provides, “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus” in cases such as Boumediene. The Act also provides that, in non-habeas actions, the only federal court with jurisdiction is the U.S. Court of Appeals for the District of Columbia. In other words, Congress made clear that the U.S. Supreme Court had no business hearing habeas cases or any other cases regarding

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104 Boumediene, 128 S. Ct., at 2269 (discussing attributes of criminal courts that seemed to be lacking in military commissions). See also Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (holding that the due process clause requires, “that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”).

105 This principle has implications for the distinction between entities that are primarily political and those that are more insulated from the political process. Specifically, an agency that is more independent from the President might be considered competent to act as a factfinder, while one that was less independent might not. See Morrison v. Olsen, 478 U.S. 714, 726 (1986) (discussing, and applauding, the fact that the independent counsel is independent of the executive branch, despite being part of that branch).

106 Section II.C.3, below, will discuss the types of cases to which this rule applies.


108 See id. § 2241(e)(2) (Supp. 2007), incorporating Detainee Treatment Act §§1005(e)(2) and (3), 10 U.S.C.A. § 801 (granting exclusive jurisdiction for judicial review to D.C. Circuit in non-habeas cases).
Guantanamo detainees designated as enemy combatants. Yet the Supreme Court did not hesitate to take the case. Effectively, it held that Congress could not preclude the Court from taking the case.

Of course, the Court could have heard the Boumediene case solely for the purpose of deciding it did not have jurisdiction. But the Court’s review was not so limited. Rather, the Court took the case and decided it on the merits — despite being highly aware of the jurisdiction-stripping provisions of the MCA. This action suggests that the Court effectively rejected those provisions insofar as they might have precluded its own appellate review.

The Court did not discuss this issue. So we do not know the basis for its action. However, the Court’s action is consistent with strong dicta in cases going back nearly 140 years suggesting that, in exercising its Exceptions Clause power, Congress must leave open some route to Supreme Court review, at least certain cases. For example, in Ex Parte McCardle, the Court upheld an act by Congress that stripped the Court of appellate jurisdiction, but included a paragraph at the end of the opinion pointing out that another statutory route to the Court’s appellate jurisdiction remained available.\footnote{See Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 515 (1869).} The implication was that the outcome might have been different had some alternative route not been left open. And in Felker v. Turpin, the Court reiterated this suggestion in stronger terms. There, in upholding the 1996 Antiterrorism and Effective Death Penalty Act, the Court emphasized that (1) the statute it did not preclude all access to the Supreme Court, and (2) that the availability of such access obviated constitutional issues that might have otherwise plagued the statute.\footnote{See Felker v. Turpin, 518 U.S. 651, 661 (1996).} Justice Souter, along with two other Justices, expressly noted that “if it should later turn out that [other] statutory avenues . . . were closed, the question whether the statute exceeded Congress’s Exceptions Clause power would be open.”\footnote{See id., at 667 (Souter, J., concurring).}

In those cases, the Court essentially warned Congress that precluding all access to the Supreme Court might well be unconstitutional. Thus, in Boumediene, where the Court accepted jurisdiction and decided the case on the merits in the face of a clear desire by Congress to preclude such review, it seems reasonable to suppose that the Court’s action was based on the rationale expressed in its earlier dicta: That Congress cannot exercise its Exceptions Clause power in a way that would close all avenues to the Court.
C. The Universality of Boumediene: It is not Just a Habeas Case

The most obvious objection to the argument I have made is that, whatever answers Boumediene may have provided, such answers might be limited to habeas cases. After all, Boumediene was a habeas case; a case challenging bodily detention. And the ostensible basis for the Court’s decision in Boumediene was the Suspension Clause – which applies only to habeas cases.

If this were true, if Boumediene’s answers to the three jurisdiction-stripping questions discussed above were limited to habeas cases, these answers would still be significant. If that were the case, we would at least have important guidance about the limits of Congress’s jurisdiction-stripping powers in habeas cases. But there is reason to believe that at least some, and perhaps all, of Boumediene’s answers extend well beyond habeas cases. Specifically, the principles underlying those answers appear to apply to all constitutional claims.

1. Stripping of All Federal Jurisdiction: Boumediene Applies to all Constitutional Claims

My claim regarding the significance of Boumediene is strongest with respect to its implications for the third jurisdiction-stripping question: the idea that, in exercising its jurisdiction-stripping powers, Congress must leave in place some federal court to hear constitutional claims. This principle almost certainly extends beyond habeas cases. Rather, it applies to all constitutional claims, irrespective of whether they involve detention. This scope is apparent from three aspects of the Court’s opinion.

First, the Boumediene Court made clear that it saw habeas as a means, not an end. The protection of constitutional rights was the end. The Court stated, “[T]he writ of habeas corpus is an indispensable mechanism for monitoring the separation of powers.” Elsewhere, the Court spoke of the compelling need to adhere to “freedom’s first principles,” and highlighted two such principles: One was “freedom from arbitrary and unlawful

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112 See Boumediene, 128 S. Ct. 2240. See also Hart & Wechsler, supra note 10, at 352 (The “historic office [of habeas] is to test the lawfulness of bodily detentions. . . . In modern practice, habeas corpus is frequently employed as a mode of reviewing criminal convictions obtained in courts. Historically, however, an even more fundamental role was to authorize judicial oversight of detentions imposed extra-judicially by executive officials.

113 See Boumediene, 128 S. Ct. at 2240. See also U.S. Const., Art. I, sec. 9, cl. 2 (Suspension Clause); INS v. St. Cyr, 533 U.S. 289 (2001) (holding that Suspension Clause limits Congress’s power to preclude habeas review).

114 As noted above, there is some question as to whether, in some non-habeas cases, a state court might suffice. See supra text accompanying notes 95-97. However, for purposes of this Section, I will refer to Boumediene’s principle as requiring a federal court in constitutional cases.

115 See Boumediene, 128 S. Ct. at 2259.
restraint” – that is, habeas. The other was “the personal liberty that is secured by adherence to the separation of powers.” In other words, the majority in Boumediene understood the case not just as a habeas case, but also more broadly as a separation of powers case.

In fact, the Court was explicit as to the way it saw the relationship between habeas and the separation of powers it articulated. Immediately after articulating its three separation of powers principles, it noted, “These concerns have particular bearing on the Suspension Clause question . . . .” In other words, the Court expressly saw the need for habeas as an example of – a subset of – its broader concerns about separation of powers.

Second, the three separation of powers principles that served as the foundation for the Boumediene Court’s opinion apply not just to habeas cases; they apply to all constitutional claims. The core principle that animated Boumediene was the Court’s assertion that judicial review is required to keep the political branches within the bounds of the Constitution. The Court’s fear was that, by strategically locating operations in places such as Guantanamo that would arguably permit evasion of judicial review, the political branches could effectively transgress the Constitution as they pleased – that they could “switch the Constitution on or off at will.” Yet this fear cannot be limited to habeas cases, or cases in which someone is in custody. The concern that, absent judicial review, the political branches could transgress the Constitution applies to any of the myriad ways in which the political branches can transgress the constitution even when no one is in custody.

For example, suppose that the government fined people who refused to recite the Pledge of Allegiance, or denied them benefits for burning a flag. And suppose that the government could preclude judicial review of such fines or denials of benefits. There would be no custody, and thus no habeas claims. Yet this would be exactly the type of unlimited power – the same ability to transgress the Constitution with impunity – that the Boumediene Court feared. The principle applies not just to habeas cases; it applies to all constitutional claims.

116 See id., at 2277. The Court also mentioned the importance of separation of powers principle at id., at 2263 (noting that the “gravity of the separation-of-powers issues raised by these cases” was “exceptional”).

117 See id., at 2259.

118 See id.

119 Of course, in cases where someone is in custody, the availability of habeas may serve to address this concern. See St. Cyr, 533 U.S. at 299 (distinguishing between judicial review and habeas and noting that leaving habeas intact avoided constitutional problem). My point is that even in cases where habeas is not required, Boumediene’s separation of powers principle required judicial review.

120 See Daniel Meltzer, Congress, Courts, and Constitutional Remedies, 86 Geo. L.J. 2537, 2573 (1998) (the checking-the-political-branches argument requires judicial review in non-habeas, as well as habeas cases).
Third, the *Boumediene* Court’s selection of authority suggests that its principle applies in non-habeas cases. The claim that judicial review is necessary to keep the political branches within the bounds of the Constitution comes straight out of *Marbury v. Madison*.121 And *Boumediene* clearly relied on that case, citing it directly for the proposition that the Court (as opposed to the political branches) must have the ability “to say what the law is.”122 Yet *Marbury* was not a habeas case. *Marbury* established the right to find that any type of action by the political branches violates the Constitution. That is, *Marbury* applied to all constitutional claims. And *Boumediene*’s conscious embrace of *Marbury* suggests that its reasoning applies to all constitutional claims.

These three arguments strongly suggest that *Boumediene*’s answer to the third jurisdiction-stripping question – that Congress cannot preclude all federal jurisdiction – extends beyond habeas cases. Rather, this principle extends to all constitutional claims.

2. The Need for a Factfinder: *Boumediene* Applies to all Constitutional Claims

*Boumediene*’s suggestion that Congress cannot preclude all lower federal court jurisdiction unless a disinterested and independent factfinder remains available appears similar in scope: This principle appears to apply to all constitutional claims, or at least those constitutional claims that are fact-specific.

One can, of course, argue that this principle is limited to habeas cases. After all, *Boumediene* was a habeas case. And *Boumediene*’s discussion of the need for factfinding occurred in the context of a discussion about habeas substitutes.123

However, the better view is that the principle applies to all constitutional claims. As discussed in the prior Section, *Boumediene* was concerned about protecting constitutional rights more generally – not just in habeas cases or cases involving detention.124 And in many constitutional cases, factfinding is essential. Without adequate factfinding, there can be no adequate constitutional review.

Consider, for example, a simple example of the fact-dependency of constitutional litigation. Suppose that Congress passed a statute precluding any judicial review of facts in free speech cases. And suppose that a speaker gave an anti-government speech. And finally, suppose that the government took the position that the speech was “incitement” (which is

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121 5 U.S. (1 Cranch) 137 (1803).
122 See *Boumediene*, 128 S. Ct. at 2259 (citing *Marbury*).
123 See *Boumediene*, 128 S. Ct. at 2266.
124 See supra Section II.C.1.
unprotected by the first amendment), and therefore sought to impose a large fine on the speaker. If the speaker defended based on first amendment grounds, the case would largely turn on a factual determination: whether the speech was in fact “incitement”; that is, whether it was intended and likely to cause the audience imminently to violate the law. Yet, as a result of the statute precluding review of facts, the court could not engage in meaningful review. It would be bound to accept the government’s factual contention that the speech was “incitement.” Effectively, the government could suppress speech without judicial review.

As discussed above, Boumediene seemed concerned with protecting constitutional rights, irrespective of whether the failure to do so results in detention. It therefore seems likely that the Boumediene Court would require the availability of a factfinder not just in habeas or detention cases, but in all constitutional cases.

3. The Need for Supreme Court Appellate Review: The Unclear Scope of Boumediene

The scope of Boumediene’s implicit holding that Congress cannot foreclose all routes to the Supreme Court’s appellate jurisdiction is less clear. This is in large part because we do not really know the Court’s justification for this holding.

The separation of powers principles that underlie Boumediene’s suggested limits on complete jurisdiction stripping do not apply to the Court’s implicit holding that Congress cannot foreclose all avenues for its appellate review. These separation of powers principles require some judicial review. But they do not necessarily require judicial review by the Supreme Court exercising its appellate jurisdiction. Any federal (or possibly state) court should do. Accordingly, the idea that Congress is required to leave open some route to the Supreme Court’s appellate jurisdiction must be based on some other argument.

Actually, we do not really know what argument might underlie Boumediene’s second principle. As noted above, Boumediene did not discuss its reasoning for accepting the appeal and deciding the case on the merits in light of the MCA’s removal of its appellate jurisdiction. And to the extent that this action was based on dicta from earlier cases, those cases

126 This idea, that factfinding may control the outcome of constitutional claims, was recognized by the Court in Crowell v. Benson, 285 U.S. 22 (1932) (“[W]herever fundamental rights depend, as not infrequently they do depend, upon facts, . . . finality as to facts becomes in effect finality in law.”).
127 See supra Section II.C.1.
128 See supra Section II.B.3.
never discussed their reasoning either.\textsuperscript{129} Without an understanding of the reasoning for the principle, it is difficult to know its scope.

That is not to say that we have no clues as to the possible scope of Boumediene’s second principle. There are three clues, two of which suggest a limited scope (that Boumediene’s implicit holding regarding Supreme Court appellate jurisdiction is limited to habeas cases), and one of which suggests a broader scope.

First, a reference within the Boumediene opinion suggests a limited scope. To understand this reference, it is important to keep in mind that the argument in favor Congress’s ability to strip the Supreme Court of its appellate jurisdiction is based on the fact that Article III gives Congress the power to “regulate” that jurisdiction.\textsuperscript{130} The Boumediene Court referred to this language only once. And that reference was clearly focused on the writ. Specifically, the Court noted that the Suspension Clause serves as “an ‘exception’ to the ‘power given to Congress to regulate courts.’”\textsuperscript{131} This suggests that the Court understood the limit on Congress’s power to strip its appellate jurisdiction as coming from the Suspension clause – the Constitutional enshrinement of the writ.

Second, Boumediene’s lineage in this area lies squarely within the realm of habeas. As noted above, Boumediene effectively made good on a warning that the Court had provided several times before: That, in exercising its Exceptions and Regulations power, Congress must leave open some appellate access to the Supreme Court. Notably, each of those earlier warnings occurred in a habeas case.\textsuperscript{132}

However, a third argument points the other way: to the need to preserve Supreme Court appellate jurisdiction in cases beyond habeas. This argument has to do with the Court’s view of its own necessity. As will be discussed in the following Part, Boumediene represents a fairly bold stroke by the Court.\textsuperscript{133} In that sense, the Supreme Court is clearly taking a leadership role in proclaiming the importance of federal judicial review in the constitutional structure. Given its leadership role, one might wonder if the Supreme Court would really ever allow itself to be sidelined, with final say over constitutional questions in non-habeas cases given by lower federal courts.

But at least for now, Boumediene seems to have: (1) unequivocally answered the question of whether Congress can close all routes to the

\textsuperscript{129} See, e.g., Felker v. Turpin, 518 U.S. 651 (1996); Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 513-14 (1869).

\textsuperscript{130} See U.S. Const., Art. III, sec. 2.

\textsuperscript{131} Boumediene, 128 S. Ct. at 2246.

\textsuperscript{132} See McCardle, 74 U.S. 506; Felker. 518 U.S. 651.

\textsuperscript{133} See infra Part III.
Supreme Court in habeas cases (it cannot), but (2) left open the question of whether it must remain available as a forum in non-habeas cases.

III. Boumediene as an Act of Imperialism

If all Boumediene had done was to provide answers – even partial answers – to the three big questions in the jurisdiction stripping debate, that would be quite significant. But perhaps what is most significant is the Court’s willingness to articulate the principles it did now, when historically it has been extremely hesitant to do so.

As discussed above, the Court has tended to use an avoidance doctrine to avoid squarely facing the question of whether Congress can strip the courts of jurisdiction: Whenever possible (and sometimes even when it seemed impossible), the Court has interpreted statutes to find that they did not preclude all jurisdiction – thus avoiding the question of whether Congress could do so.134

Notably, the Court could have taken a similar approach in Boumediene – at least in a number of respects. The statutes in question actually gave jurisdiction to one federal court (the D.C. Circuit), and also created factfinding bodies (the military commissions).135 Notably, in a dissent by Justice Roberts, at least four of the Justices in Boumediene argued that these statutes could be read to provide these two entities with the power to perform all of functions of that the majority deemed necessary for them to serve as an adequate substitute for habeas.136

While the correctness of the dissent’s statutory reading may be open for debate, that is not the point. The point is that this statutory reading was at least possible. It was plausible enough to have been adopted by four Justices. And it hardly seems less plausible than readings the Court has given to jurisdiction stripping statutes in many of its avoidance cases.137 Such a reading would have allowed the Court to avoid the constitutional question regarding the territorial scope of the Suspension Clause. And while such a reading might have yielded a different result than the one reached in Boumediene (it would not have provided the non-citizen detainees with the right to seek habeas), it would have yielded a similar – arguably indistinguishable – result (a statutory process possessing all of the attributes of habeas that the Court saw as essential).

Yet the Court did not choose this path of avoidance. Instead, the Boumediene Court read the statutes as precluding the type of process that would have provided an adequate habeas substitute, thereby forcing the

134 See supra Section I.C. See also Sager, supra note13 at 20 (“[T]he Court, for its part, has generally tried to avoid or soften confrontations with the national legislature.”).
136 Boumediene, 128 S. Ct. at 2283-85 (Roberts, J., dissenting).
137 See supra Section I.C.
constitutional question regarding the scope of the Suspension Clause. 138 And the Court did not stop there. It went on to answer that constitutional question in the most forceful of ways, not merely striking down the DTA and MTA, but doing so based on broad and powerful separation of powers principles – principles suggesting the need for judicial review to police other branches’ compliance with the Constitution. 139 In these ways, Boumediene was surely a bold decision.

This boldness raises two key questions. First, it raises a descriptive question: Why did the Court chose this case for such a bold act, after resisting the temptation to act in this way in so many earlier cases? Second, it raises a normative question: Was Boumediene justifiably bold, or was it imperious? Should we be happy with Boumediene or frightened by it? While it is beyond the scope of this Essay to attempt to provide definitive answers to either of these questions, I will provide a few thoughts on each.

With respect to the descriptive question of why the Court has acted in this way now, I will offer the observation that perhaps it was provoked. On a micro level, the Court may have been provoked by the sheer amount of time that the detainees have been held by the government (some, nearly six years) with what the Court perceived as no meaningful opportunity to challenge their detentions. 140 But, as noted above, the court could have provided the detainees with process in a less bold manner. 141

More likely, the Court may have been provoked on a macro level. Since the beginning of the war on terror, the President has claimed extraordinary – some might say imperious – powers. 142 In response, one might have expected, perhaps hoped, that the Court would step up and try to stop such exercises of an imperial presidency. 143

138 See id., at 2270–75.
139 See supra Section II.B.1.
140 See Boumediene, 128 U.S. at 2275 (noting that, “In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands.”).
141 See supra text following note 137. See also Boumediene, 128 S. Ct. at 2293 (Roberts, J., dissenting) (suggesting that Court’s ruling might delay rather than expedite detainees’ release).
143 Linda Greenhouse expressed this hope in two articles, one in 2002 and the other in 2004 – before the Supreme Court had acted on any of the “war on terror” cases. See id; Linda
In this respect, one might even comment on the Court’s restraint. The Court certainly had the opportunity to push back against an imperious President in earlier cases like *Hamdi* and *Hamdan*. But notably, in its earlier cases in the war on terror, the Court did not push back directly against the President. Instead, the Court looked to Congress to control any excesses of an imperial presidency. For example, in *Hamdi*, the Court invited Congress to create a set of procedures for military tribunals to determine “enemy combatant” status. And in *Hamdan*, the Court invited the President to ask Congress to pass a law authorizing him to use military commissions to try individuals accused of certain types of wrongdoing.

The idea seemed like a sound one. If the Court could stand back and let Congress act as a check on an imperial President, the problem might be solved — the imbalance redressed — with no need for the Court to seem imperious. The problem is that, in the climate of the war on terror, Congress seemed only too happy to comply with any request from the President.

In fact, Congress might have seemed less an impediment than an enabler of imperious presidential power. After the Court held that the general habeas statute permitted review of aliens at Guantanamo, Congress passed the Detainee Treatment Act (DTA), precluding such review. And after the Court ruled that the DTA was not retroactive (thereby permitting review of claims that were already pending) and that Congress had not authorized trials by military commissions, Congress passed the Military Commissions Act, precluding pending claims and authorizing trial by military commissions. So it may well have appeared to the *Boumediene*


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144 See *Hamdi*, at 538.
145 See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”)
146 See Harold Koh, *The National Security Constitution* [cite] (arguing that the Court should take on the role of promoting discourse between the political branches in foreign/military affairs matters).
147 It is arguable that Congress has been too eager to cede power to the President even in matters that do not involve war. See *Clinton v. New York*, 524 U.S. 417 (1998) (Congress impermissibly tried to give power to the President to veto specific items in spending bill).
151 See 28 U.S.C.A. § 2241(e) (Supp.2007). Although the dissent in *Boumediene* attempts to characterize the MCA as a careful balancing act by Congress, the Act incorporates most of the features of the President’s program that were most problematic, including (1) the Commissions can still hear and consider hearsay evidence, (2) the Commissions can still hear and consider evidence extracted through “extended interrogation techniques,” so long as that evidence was
Court that Congress simply was not up to the task of counter-balancing an imperious executive. Thus, the Court may have decided to take that role upon itself.

As to the normative question of whether this is a good thing, this is even harder to say. But here, too, I will offer a few observations, both prudential and structural.

As a prudential matter, the question is whether the Court should have avoided or engaged the constitutional question. The avoidance doctrine makes some sense. It allows the Court to avoid difficult questions, where the Court risks making decisions it may later regret. Avoidance also allows the Court to take a stance of humility, avoiding grand proclamations of its own power or of Congress’s lack of power. The doctrine avoids the possibility of a constitutional stand-off, in which a political branch might refuse to follow an order of the Court (though this possibility seems less likely in modern times). And the doctrine arguably promotes a certain healthy uncertainty. Perhaps it is a good thing for the judiciary to have to worry about jurisdiction stripping, and for Congress to have to worry about whether it has this power.

Of course, there may also be a time for certainty and backbone, rather than uncertainty and forbearance. As discussed above, the Court may have been responding to a sense that the President was out of control and that Congress was not likely to stand up to him. Perhaps that is a time for action, rather than avoidance.

As a structural matter, the general idea of one branch rising to challenge another branch that seems to be accumulating too much power makes some sense. And it is hardly a new idea. It is part of the Framers’ design. Notably, more than 200 years ago, soon-to-be-Chief Justice John Marshall expressed the idea in connection with the presidential campaign of 1800. In that campaign, he opposed Thomas Jefferson because he feared that obtained prior to the DTA, and (3) suspects may still be barred from learning about, and therefore effectively refuting, evidence against them that has been classified as secret. [cite MCA] The MCA also sought to quash all outstanding habeas petitions. [cite MCA] In other words, the MCA granted most, if not all, of what the President asserted he could do prior to the passage of that statute.


153 Compare Chemerinsky, supra 7, at 46 (noting that at time of Marbury, the President would almost certainly have disregarded an order of the Court with which he disagreed), with id., at 356 (noting President Nixon’s compliance with Court’s order to comply with subpoena). For a detailed discussion of the concept of constitutional crises, see Jack M. Balkin, Constitutional Hardball and Constitutional Crises, 26 QUINNIPIAC L. REV. 579 (2008).

154 See Hart & Wechsler, supra note 10, at 342 (“the existence of congressional power of unspecified scope [may] contribute to the maintenance of a desirable tension between Court and Congress.”).
Jefferson would be too close with Congress. In other words, for Marshall, it was critically important for each branch of the government to operate independently. The idea of one acting as a rubber stamp for another, as often seems to happen in the war on terror, would seem problematic — perhaps problematic enough to warrant the third branch in stepping up to serve as a check to the other two.

On the other hand, there are also some potential negatives to the Court stepping in to check an imperious President and compliant Congress. First, it is not clear where or whether this model — imperiousness spawned by imperiousness — ever ends. If one branch repeatedly asserts greater power in response to other branches’ assertions, all of the branches may eventually end up incredibly powerful. Of course, it is possible that the existence of powerful branches counteracting powerful branches might render the government as a whole impotent, rather than powerful. But it could also result in a federal government that is, as a whole, quite powerful, a problematic prospect for those concerned about federal power generally.

Second, the way in which the Court has asserted its power — by proclaiming principles that limit Congress’s ability to stop its own exercise of power — raises the specter of an out-of-control court. Remember the whole justification for the Court’s assertion of its power: Someone must limit the political branches or they will exercise unlimited power. But who will limit the power of the judiciary? One might argue that we need not fear this “least dangerous branch,” which generally needs the help of another branch to implement its will. But in opinions like Boumediene, the Court hardly looks weak.

On balance, it is difficult to say whether Boumediene is a good decision. My personal inclination at this point is positive. There is no doubt that presidential power — or at least claimed presidential power — has expanded with the war on terror. It is far from clear to me that Congress has the stomach to serve as a meaningful check on that power. At times like this, I draw comfort from the idea of a powerful court serving as a check on executive power. But that may be simply because I do not particularly fear out of control judicial power at this point in history.

Put differently, how one reacts to the prospect of a bold court it may come down to the question of whom one fears most. Those who fear an

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155 See James F. Simon, What Kind of Nation, Ch. 7.
156 See Cary v. Curtis, 44 U.S. (3 How.) 236 (1845) (“To deny [Congress’s power to control jurisdiction] would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.”), quoted in Hart, supra note 13, at 1366-71.
158 See, e.g., Balkin, supra note 153, at 583 (“President Bush pushed hard for an increase in presidential power, greater secrecy, and limited accountability for the Executive, arguing that these changes were necessary to fight the global war on terror.”).
out-of-control executive (and fear that a weak Congress will not have the
backbone or ability to limit the President) will likely cheer the arrival of an
assertive judiciary. On the other hand, those who fear unaccountable and
out-of-touch judges micromanaging the war on terror will likely loathe a
decision such as Boumediene. Pick your evil.

CONCLUSION

Although it was a habeas case, Boumediene has a great deal to say about
jurisdiction stripping. The separation of powers principles deployed in that
case suggest significant limits on Congress’s ability to strip jurisdiction
from the federal courts in ways that are not likely limited to habeas cases.
And perhaps more importantly, the Court’s willingness to answer these
questions and deploy these principles, which it has largely avoided for ages,
may herald the arrival of a Court whose boldness is either (1) is imperious
and frightening, (2) is appropriate to match the imperiousness of the
President, or (3) both. It depends on who you fear most.