ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FEDERAL LEGISLATION COMMITTEE

Checks And Balances: Congressional Restriction of Federal Court Jurisdiction

"For the individual, therefore, who stands at the center of every definition of liberty, the struggle for constitutional government is a struggle for good laws indeed, but also for intelligent, independent, and impartial courts."

— Justice Sandra Day O'Connor[1]

The American Constitutional system is based on checks and balances. Throughout our history, competing branches of government have struggled to define their own respective jurisdictions, to prevent encroachments on that power by other branches, and even to seek the expansion of their own authority at the expense of other branches. This struggle is particularly acute today as Congress has attempted, through the enactment of legislation, to divest the courts of their jurisdiction over specific subjects and even over specific cases. This congressional action, often referred to as "court stripping," reflects Congress' disagreement with the way the courts have resolved particular issues, or its desire to keep certain groups of litigants from seeking redress in the federal courts. This legislation may, in some cases, disrupt the delicate and essential system of checks and balances that is central to our nation's democracy.

The extent to which Congress can control the federal courts' jurisdiction has been the subject of a number of prominent legal articles.[2] The scholarly debate over the propriety of court stripping legislation, however, tends to focus on the technical constitutionality of particular legislative measures. Legal scholars have measured legislative enactments against the text of Article III and other constitutional mandates. This focus is overly narrow. It is well established that Congress has the constitutional power to expand the federal courts' jurisdiction in certain circumstances.[3] Likewise, it has the authority to remove jurisdiction from the courts within the

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1. Sandra Day O'Connor, Associate Justice, Retired, Supreme Court of the United States, Remarks at the Georgetown University Law Center & American Law Institute Conference: "Fair and Independent Courts: A Conference on the State of the Judiciary, (Sept. 28, 2006) (rush transcript available at http://www.law.georgetown.edu/news/documents/CoJ092806-oconnor1.pdf (last visited March 24, 2008)).

2. See, e.g., Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. PA. L. REV. 1499 (1990); Paul M. Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 VILL. L. REV. 1030 (1982); Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953).

3. *See Palmore v. United States*, 411 U.S. 389, 401 (1973) ("'The judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'") (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

confines of the U.S. Constitution.[4] For example, Congress expands the federal courts' jurisdiction every time it creates a new federal cause of action, and it limits their jurisdiction every time it increases the amount in controversy requirement for diversity purposes.

The fundamental question, therefore, is not whether Congress can strip the federal courts of their jurisdiction. It is instead when and under what circumstances it is permissible and advisable for Congress to restrict the role of the judiciary on a set of issues or for a set of litigants.

This paper reviews the constitutional framework setting the balance of power between Congress and the federal courts, examines recent legislation proposed or enacted by Congress that restricts the federal courts' jurisdiction, and recommends a set of legal and policy considerations for Congress to consider before enacting legislation that further restricts the courts' jurisdiction.

I. The Constitutional Framework for Considering Court Stripping Legislation

The text of Article III of the United States Constitution, the Equal Protection and Due Process Clauses, and the overall system of checks and balances together constitute the legal framework for considering whether Congress has the authority to restrict federal court jurisdiction.

A. Article III Defines the Scope of Federal Court Jurisdiction and the Authority of Congress to Limit that Power

Article III extends certain powers to Congress to create and define the scope of judicial power, and simultaneously imposes constraints on Congress' power over the federal courts. It contains three paragraphs. Each paragraph contains both explicit and implicit language defining Congress' power over the judicial branch of government.

Article III, Section 1 establishes the federal courts:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office.

This section, known as the "Madisonian Compromise," is generally understood to grant Congress discretion over the establishment of lower federal courts. The use of the word "may" in the first sentence, as opposed to the word "shall," suggests that Congress has discretion over whether "from time to time" it will "ordain and establish" lower federal courts. Presumably, if Congress can create the lower courts when it deems appropriate, it also has the power to decide

4. *Id.*

what powers those lower courts should or should not have.[5] In other words, Congress can create the lower federal courts, vesting in them some portion of the full power that the Constitution potentially authorizes.[6]

Indeed, through the years, from the very first Judiciary Act in 1789, Congress has provided the lower federal courts with less than the entire judicial power available under Article III. Congress has removed jurisdiction from the federal courts in numerous types of cases where the basis for such divestiture — outside the text of Article III, Section 1 — is found nowhere in the Constitution. Complete diversity and amount in controversy requirements are just two such examples.[7]

Article III, Section 2, Clause 1 defines the power and reach of the federal courts:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This clause defines nine categories of cases and controversies to which the "the judicial Power *shall* extend." This paragraph suggests that *some federal court* must possess the "judicial Power" therein created. Otherwise, Congress could simply eviscerate the federal courts' jurisdiction entirely — leaving the "judicial Power" little more than an empty shell. In short, this text operates as a limitation on the broad authority granted to Congress in Article III, Section 1.

Article III, Section 2, Clause 2 sets forth the Supreme Court's original and appellate jurisdiction:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction,

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5. See Lea Brilmayer & Stefan Underhill, Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws, 69 VA. L. REV. 819, 824 (1983).

6. See id.

7. There was also, with one brief exception, no general federal question jurisdiction until 1875, and even then such jurisdiction was subject to an amount in controversy requirement until 1980. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 745 n.* (2004) (Scalia, J., concurring). Diversity jurisdiction is also narrowed by the non-constitutional complete diversity requirement set forth in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

> both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

This paragraph suggests that Congress has the plenary power to make "exceptions" to the Supreme Court's jurisdiction, but not with respect to those cases over which Article III expressly gives the Court original jurisdiction.[8]

The text does not state, however, how far Congress can go in making these "exceptions" to the Supreme Court's appellate jurisdiction. Some constitutional scholars argue that "an exception must be a small subset of a general rule and thus that Congress's power to make exceptions to the appellate jurisdiction is rather limited."[9] Others take this argument even a step further, suggesting that the "exceptions clause" simply permits Congress "to shift some categories of cases from the Court's *appellate* to its *original* jurisdiction," but not to eliminate the Court's jurisdiction entirely.[10]

Many scholars believe that Article III effectively wraps the core functions of the federal courts — considered the "essential functions" — in an extra layer of protection from encroachment. Scholars suggest that there "must be *some* federal judicial forum for the enforcement of federal Constitutional rights — either a lower federal court or the Supreme Court," meaning that "Congress may bar *either* the Supreme Court *or* the lower federal court reexamination of state adjudications of federal constitutional issues, but *not* both."[11] These scholars suggest that, notwithstanding Congress' authority to make exceptions, it cannot take away any of the Supreme Court's "essential" functions.[12] These "essential functions" are, according to legal scholars, inherent in our system of government, and include protecting individual rights and interpreting the Constitution. Hamilton himself "suggested that judges must guard 'the constitution and the rights of individuals' to prevent 'dangerous innovations in the government, and serious oppression of the minor party in the community.'"[13]

In sum, Congress has broad authority to set up the federal courts and extend or withdraw their jurisdiction over cases and controversies with several key exceptions. Congress may not interfere with the essential functions of the court to protect constitutional rights, and may not remove the Supreme Court's original jurisdiction over parties and matters identified in Article III.

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8. Indeed, until 1914, Congress did not give the Supreme Court jurisdiction to review state court decisions upholding federal rights, *see* Pub. L. No. 224, 38 Stat. 790 (current version at 28 U.S.C. § 1257(a) (2000)), and it has never granted the Supreme Court jurisdiction to review state court decisions on the basis of diversity of citizenship.

9. Mark Strasser, Taking Exception to Traditional Exceptions Clause Jurisprudence: On Congress's Power to Limit the Court's Jurisdiction, 2001 UTAH L. REV. 125, 143 (2001).

10. *Id.* at 129 (emphasis added).

11. Gunther, *supra* note 2, at 914-15.

12. Strasser, *supra* note 9, at 136.

13. *Id.* at 137 (citing THE FEDERALIST NO. 78, at 400 (Alexander Hamilton) (Max Beloff ed. 1987)).

B. Constitutional and Historical Bases to Protect Federal Court Jurisdiction

The constitutional structure contains provisions that many scholars argue would be meaningless without the ability to seek redress in federal court. Additionally, scholars suggest that beyond the explicit rights afforded in the Constitution, and the implicit rights identified by the courts, there is a history of the federal courts' involvement in certain matters that must be respected.

First, the Equal Protection Clause of the Fourteenth Amendment could be read to require that Congress have, at a minimum, a rational basis for allowing some litigants to seek redress in federal court and not others. In other words, Congress cannot discriminate against certain types of litigants by taking jurisdiction away from the courts to hear the litigants' claims. Legal scholars have reasoned, in fact, that "Congress cannot single out constitutional issues and exclude them from federal court jurisdiction without a sufficient reason, and hostility to the substantive rights at issue is not a sufficient reason."[14]

Second, the Due Process Clauses of the Fifth and Fourteenth Amendments may also restrict Congress' authority to enact "court stripping" legislation. Some argue that these due process rights, at their most basic level, "assure access to some judicial forum in many circumstances."[15] Others have argued, however, that it is not necessarily the case that litigants must have access to a *federal* forum for due process to be satisfied; a state court forum may suffice.[16]

Third, the structure of the Constitution itself, with the system of checks and balances and the independence of the judiciary, poses a further constraint on the power of Congress vis á vis the federal courts. If Congress may enact a law and then immunize it from judicial review, the ability of the courts to act as a check on congressional power would be fundamentally eviscerated.[17] Further, key to the system of checks and balances created by the Framers is the notion of three *independent* and *co-equal* branches of government. Judicial independence would be seriously compromised if federal judges were to become hesitant either to strike down congressional enactments — even those that clearly run afoul of constitutional protections — or to render politically unpopular rulings compelled by the Constitution, on the ground that such decisions may result in further reductions in federal court jurisdiction.

The Framers of our Constitution envisioned judicial independence as an important restraint on congressional power. As described by one scholar:

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14. Brilmayer & Underhill, note 5, *supra*, at 822.

15. Gunther, note 2, *supra*, at 915.

16. *See id. Compare* Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 164-66 (1982) (state courts may lack a certain amount of judicial independence required of due process because the judges do not have the same independence safeguards provided for federal judges by Article III).

17. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (explaining that it is a "permanent and indispensable feature of our constitutional system" that "the federal judiciary is supreme in the exposition of the law of the Constitution").

> In *The Federalist Nos. 78 and 79*, Hamilton focused on the need to assure judicial independence. Arguing that the judiciary was "the weakest of the three departments of power," possessing neither the powers of the legislature to control the purse nor the enforcement authority of the Executive ("the sword of the community"), Hamilton asserted "that all possible care is requisite to enable it to defend itself against their attacks." He then proceeded to argue that complete independence of the judiciary was necessary, since that department exercised the check of judicial review on the other branches of government, and "the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments."[18]

The judicial "check" envisioned by the Framers would be vitiated if Congress could simply, on a political whim, abolish the courts' jurisdiction as it sees fit.

The legendary "switch in time that saved nine" is a classic example of the dangers posed to the independence of our judiciary when the political branches attempt to influence judicial decisions — even by means that do not run afoul of any express provision of Article III. In 1937, after the conservative Supreme Court had issued a series of decisions striking down New Deal legislation, President Franklin D. Roosevelt introduced and promoted a bill to pack the Court with additional justices who would be sympathetic to the New Deal. Less than two months after the introduction of this "court packing" bill, the Supreme Court decided *West Coast Hotel Co. v. Parrish*, which declined to overturn the Washington State minimum wage law,[19] giving the appearance that conservative Justice Owen J. Roberts had switched his vote to join the "liberal wing" of the Court consisting of Chief Justice Charles Evans Hughes, Justices Louis Brandeis, Benjamin N. Cardozo and Harlan Fiske Stone. This "switch in time" — along with the resignation of conservative Justice Willis Van Devanter — contributed to the ultimate defeat of the court packing bill in Congress, thus saving "the nine" justices of the Supreme Court.

Significantly, only historical practice — not the Constitution's text — established the number of Supreme Court justices, and no provision of the Constitution expressly prohibited Roosevelt's court packing legislation. But the assault on the independence of the judiciary was no less significant.[20] Indeed, legal scholars have suggested that the sanctity of federal court

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18. Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. PA. L. REV. 741, 832 (1984) (footnotes omitted).

19. 300 U.S. 379, 400 (1937).

20. The Senate Judiciary Committee made the following observation in its consideration of the court packing bill:

    > Courts and the judges thereof should be free from a subservient attitude of mind, and this must be true whether a question of constitutional construction or one of popular activity is involved. If the court of last resort is to be made to respond to a prevalent sentiment of a current hour, politically imposed, that Court must ultimately become subservient to the pressure of public opinion of the hour, which might at the moment embrace mob passion abhorrent to a more calm, lasting consideration.

jurisdiction over cases involving individual rights and liberties and other matters is rooted not only in the Constitution, but also in our country's history and tradition.

II. Recent Legislation Restricting Federal Court Jurisdiction

Congress has a long history of enacting legislation dictating the confines of federal court jurisdiction. As early as 1867, Congress repealed the "1867 Act" that formed the basis of a Civil War detention case that was then pending in the Supreme Court. The Supreme Court allowed this congressional assault on its own jurisdiction, holding that the Court could no longer decide the pending case before it.[21] The second major pre-modern piece of court stripping legislation was the Norris-LaGuardia Act — Roosevelt-era labor legislation limiting the lower federal courts' power to issue injunctions in labor dispute cases.[22]

In recent decades, however, congressional court stripping efforts have gained momentum and signal an increasing trend to limit: (1) the independence of the judiciary; (2) the cases that the federal courts can review; and (3) in some instances, the standard of review. Court stripping legislation seems to be propelled by a dissatisfaction on the part of Congress with federal court opinions. In 1996 alone, for example, Congress passed three legislative proposals aimed at curtailing the jurisdiction of the federal courts: the Prison Litigation Reform Act (which limits remedies judges can provide in civil suits over prison conditions); the Antiterrorism and Effective Death Penalty Act (which limits federal court jurisdiction in habeas corpus suits); and the Illegal Immigration Reform and Immigrant Responsibility Act (which limits the role of federal courts in reviewing decisions involving, among other things, deportation).[23] Federal courts have upheld all three acts.[24]

Mary Murphy Schroeder, Chief Judge, Ninth Circuit Court of Appeals, *The Ninth Circuit and Judicial Independence: It Can't Be Politics as Usual*, William H. Pedrick Lecture at the Arizona State University College of Law (Mar. 2, 2005), *in* 37 ARIZ. ST. L.J. 1, 5 (2005) (quoting *Reorganization of the Federal Judiciary*, S. REP. NO. 75-711, at 15 (1937)).

21. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514-515 (1869) ("[W]hen an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed. And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court . . . . no judgment [can] be rendered in a suit after the repeal of the act under which it was brought and prosecuted." (internal quotation marks omitted)).

22. *See Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329-30 (1938) (holding the lower court lacked jurisdiction to issue injunction because it failed to make the requisite findings under the Norris-LaGuardia Act).

23. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended in scattered titles and sections of the U.S.C.); *see also* H.R. 3019, 104th Cong. § 3626 (2d Sess. 1996) (enacted); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (relevant portions codified as amended in 28 U.S.C. §§ 2261-2266 (2000)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in various titles and sections of the U.S.C.).

24. *See Felker v. Turpin*, 518 U.S. 651, 658 (1996) (Antiterrorism and Effective Death Penalty Act); *Garcia v. Att'y Gen. of the United States*, 329 F.3d 1217, 1222-24 (11th Cir. 2003) (Illegal Immigration Reform and Immigrant Responsibility Act); *Napier v. Preslicka*, 314 F.3d 528, 530-34 (11th Cir. 2002) (Prison Litigation Reform Act).

Congress continues to consider and pass legislation that would limit the power and jurisdiction of the Supreme Court and the lower federal courts and, in some cases, abolish well established jurisprudence. The following are recent examples of the significant changes in federal jurisdiction (and the power and role of the courts) that Congress is considering or has adopted into law.

First, Congress has proposed reversing Supreme Court decisions. The Congressional Accountability for Judicial Activism Act of 2005 would grant Congress the power to reverse future Supreme Court rulings concerning the constitutionality of a Congressional Act by a two-thirds vote.[25] This would reverse the centuries old bedrock of our judicial system — articulated by the Supreme Court over two hundred years ago in *Marbury v. Madison*[26] — that "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Second, Congress has sought to divest the federal courts of jurisdiction over constitutional claims. The Pledge Protection Act — which was passed by the full House in 2004 and reintroduced in 2005 — would strip all the federal courts of their jurisdiction to decide constitutional challenges to the "under God" clause of the Pledge of Allegiance.[27] Similarly, the Constitution Restoration Act of 2005 ("2005 Restoration Act") would prohibit the Supreme Court and other federal courts from exercising jurisdiction over any matter in which relief is sought against any government, entity, or officer for the acknowledgement of God as the sovereign source of law, liberty, or government.[28]

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25. Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920, 108th Cong. § 2 (2d Sess. 2004).

26. 5 U.S. (1 Cranch) 137, 177 (1803).

27. Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (2d. Sess. 2005); S. 1046, 109th Cong. (2d. Sess. 2005). The bill was introduced in express response to a high-profile decision of the United States Court of Appeals for the Ninth Circuit, *Newdow v. U. S. Cong.*, 292 F.3d 597, 612 (9th Cir. 2002), where the Court of Appeals held that a school district's requirement that students recite the phrase "under God" in the Pledge of Allegiance violated the Establishment Clause of the First Amendment. When the case reached the Supreme Court, the Court refused to decide the merits—holding that the plaintiff lacked standing. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004). Thus, the Supreme Court left open the possibility that a plaintiff with proper standing could bring a similar action in the future. The Pledge Protection Act is an attempt by Congress to close that door by divesting the federal courts from entertaining future cases on the issue, thereby precluding the federal courts—including the Supreme Court—from reviewing this specific issue within the context of the Establishment Clause of First Amendment.

28. Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. § 101 (1st Sess. 2005); S. 520, 109th Cong. § 101 (1st Sess. 2005). The 2005 Restoration Act also contains a provision intended to negate previous federal court decisions on issues that the Act removes from the scope of federal court jurisdiction. H.R. 1070, 109th Cong. § 301 (1st Sess. 2005); S.520 109th Cong. § 301 (1st Sess. 2005). This bill, if passed, would have literally wiped scores of federal cases off the books and would preclude the courts from ruling on the scope of the First Amendment. For example, the 2005 Restoration Act—if it had been the law in 2004—would have prevented the federal courts from ruling on Alabama's then-Chief Judge Roy Moore's right to display a two-ton monument of the Ten Commandments at his courthouse. If passed today, it would negate any prior decision in that case and in others. The 2005 Restoration Act was introduced by Senator Richard Shelby and Congressman Robert Aderholt, both of Alabama.

Third, Congress has proposed limiting the dicta and decisions that the federal courts may rely on. Section 201 of the 2005 Restoration Act would limit the federal courts' ability to use international materials in interpreting the Constitution.[29] If adopted, this Act would prohibit all courts from relying on any foreign law sources, including foreign laws, international conventions, European court rulings, etc. (other than old English common law sources), in interpreting the Constitution.[30] Federal judges who choose to rely upon foreign sources in their decisions would be subject to discipline.

Fourth, Congress has sought to preclude judicial review of specific issues and particular laws. The Marriage Protection Act — which was passed by the House in 2004 and reintroduced in 2005 — would strip the federal courts of the power to require states to recognize same-sex marriages entered into in other states.[31] The legislation proposes an amendment to the Defense of Marriage Act ("DOMA")[32] to prevent the application of the "full faith and credit" doctrine to state court judgments recognizing same-sex marriages. DOMA essentially says that each state may decide on its own whether to recognize same-sex marriage. Yet, not only would the Marriage Protection Act strip the federal courts of their jurisdiction over DOMA-related questions, it would also divest all federal courts of their jurisdiction to decide on the constitutionality of the Marriage Protection Act itself. Thus, the proposed legislation would not only strip the federal courts of their jurisdiction over a particular subject, but would insulate the court stripping legislation itself from Constitutional scrutiny in the federal courts.

Fifth, Congress has attempted to prevent particular individuals from accessing the federal courts to seek relief. The Detainee Treatment Act of 2005 ("DTA") became law in December 2005.[33] The DTA amended the federal habeas statue, 28 U.S.C. § 2241(e), to limit the courts' ability to enforce that proscription, providing that "no court, justice or judge shall have jurisdiction to hear or consider" applications for habeas corpus or other actions against the United States brought by aliens detained at Guantanamo Bay.[34] The DTA also conferred exclusive jurisdiction in the United States Court of Appeals for the District of Columbia to review final decisions of the Combatant Status Review Tribunals ("CSRT"), which classify detainees as enemy combatants. Consequently, all jurisdiction was withdrawn from the federal district and other appellate courts, allowing detainees to challenge only their "status determination" (*i.e.*, as "enemy combatants") or their conviction of a war crime. The DTA left no route whatsoever for: (a) challenges to the military tribunals themselves (*e.g.*, that their procedures or mere existence violate U.S. law); (b) habeas petitions by detainees not yet classified or tried by the government (*e.g.*, if a detainee is never put before the military tribunal,

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29. *See* H.R. 1070, 109th Cong. § 201 (1st Sess. 2005); S.520 109th Cong. § 201 (1st Sess. 2005).

30. See id.

31. H.R. 724, 110 Cong. (1st Sess. 2007) (proposing amendment to 28 U.S.C. § 1632).

32. 28 U.S.C. § 1738C (2000).

33. Pub. L. No. 109-148, 119 Stat. 2739 (2005).

34. S.1042, Am. 2524, at 3(D), 151 CONG. REC. S.12771-72 (daily ed. Nov. 14, 2005) (enacted) (proposing amendment to 28 U.S.C. § 2241).

he can never reach the D.C. Circuit, thereby allowing the government to unilaterally keep specific individuals out of the courts entirely); or (c) court challenges by detainees who claim mistreatment.

On June 29, 2006, the Supreme Court reviewed the constitutionality of the DTA in *Hamdan v. Rumsfeld*.[35] The Court held that the DTA's habeas stripping provisions did not apply to cases pending at the time the DTA was enacted.[36] It also invalidated the military tribunals, finding that while the President could convene military commissions where justified under the Constitution and laws, the military commissions established to try Hamdan were violative of the Uniform Code of Military Justice, the American common law of war, and all four 1949 Geneva Conventions.[37] As the concurring justices noted, the Court's decision sent the clear message that in enacting the DTA, Congress did not issue the Executive a "blank check" regarding military commissions, but "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."[38]

At the Court's invitation, the President and Congress promptly revisited the issue of military commissions. In response to *Hamdan*, Congress passed and the President signed into law on October 17, 2006, the Military Commissions Act of 2006 ("MCA"),[39] which expressly grants the President authority to prosecute terror suspects by military tribunal.[40] It also amended Section 2241 of the habeas corpus statute to eliminate the federal courts' jurisdiction over any petition or action filed by a detained alien who has been designated or is awaiting designation as an enemy combatant.[41] Congress expressly provided that the MCA "shall apply to all cases without exception, pending on or after the date enactment."[42] In enacting the MCA, Congress made no secret that one of its primary purposes was to overrule *Hamdan* and strip the federal courts of their jurisdiction over pending Guantanamo detainee habeas corpus petitions. Senator Graham acknowledged this motive when he stated: "[t]he only reason we are here is because of the Hamdan decision [which] did not apply to the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now."[43]

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35. 548 U.S. 557, 126 S. Ct. 2749 (2006).

36. *Id*. at 2769.

37. *Id*. at 2775, 2786.

38. *Id.* at 2799 (Breyer, J., concurring).

39. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

40. Edward Babayan, *Legislative Watch*, 14 NO. 1 HUM. RTS. BRIEF 48, 48 (2006).

41. MCA § 7(a).

42. MCA § 7(b).

43. 152 CONG. REC. S10354, 10367 (daily ed. Sept. 28, 2006) (statement of Sen. Graham).

On June 12, 2008, in *Boumediene v. Bush*, the Supreme Court invalidated the habeas stripping provisions of the MCA as an unconstitutional suspension of the writ of habeas corpus.[44] *Boumediene* held that non-citizens detained as enemy combatants at Guantanamo have the right to challenge their detentions under the Suspension Clause and that the procedures established under the DTA for review of CSRT enemy combatant determinations were an inadequate habeas substitute, thereby rendering Section 7 of the MCA unconstitutional.[45] The Court made clear from the onset that its analysis was grounded in separation-of-powers and checks and balances principles, stating: "in our own system, the suspension clause is designed to protect against cyclical abuses" of the writ by the political branches, and "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty."[46]

The Court fashioned a three-factor test to determine whether the constitutional privilege of habeas corpus reached abroad to Guantanamo detainees: (1) "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;" (2) "the nature of the sites where apprehension and then detention took place;" and (3) "the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[47] Applying this test, the

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44. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008). In February 2007, the D.C. Circuit Court of Appeals held that the MCA required dismissal of 63 pending habeas corpus petitions of Guantánamo detainees, reasoning that the Suspension Clause did not deprive Congress of the power to deny habeas corpus to the detainees because, as aliens detained outside the sovereign territory of the United States, those individuals do not have a constitutional right to habeas corpus or, indeed, any other constitutional rights. On April 2, 2007, the U.S. Supreme Court denied certiorari in *Boumediene*, leaving the DTA and MCA in full effect, but the Court subsequently vacated that denial and granted rehearing. *See Boumediene v. Bush*, 476 F.3d 981, 989-94 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), *order vacated & reh'g granted*, 127 S. Ct. 3078 (2007). This development was quite surprising, as the Court rarely grants such motions for reconsideration. In fact, some experts of Supreme Court procedure said they knew of no similar reversal by the court in decades. William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, *available at* **http://www.nytimes.com/2007/06/30/washington/30scotus.html**.

45. *Boumediene*, 128 S. Ct. at 2275. Note, however, a discrepancy exists as to whether *Boumediene* held that MCA § 7 in its entirety was unconstitutional or only as it relates to the ability of detainees to challenge the legality of their detention. Judge Hogan recently held in *Latif v. Gates* that Section of the MCA §7(a)(2) remains valid to strip federal courts' jurisdiction over detainees' claims relating to aspects of detention, transfer, treatment, trial, or conditions of confinement. Hogan reasoned that *Boumediene* stated explicitly: '[W]e need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.' *Latif v. Gates*, No. 04-cv-1254 (D. D.C. Sept. 22, 2008) (ordering denying an emergency motion to compel access to medical records). At this time, the *Latif* decision has not been appealed.

46. *Boumediene*, 128 S. Ct. at 2247 (internal citations and quotations omitted).

47. *Id.* at 2259. In reaching its decision, the Court rejected the Government's sovereignty-based habeas test, noting it would create serious separation-of-powers problems. A review of Guantanamo's history showed that the United States had maintained "plenary control" over the island since the end of the Spanish-American War in 1898. The Government argued habeas did not extend to Guantanamo because "the United States disclaimed sovereignty in the formal sense of the word." Nevertheless, the Court said: "[t]o hold the political branches have the power to switch the Constitution on or off at will …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.'" The Court concluded that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id*. at 2258-59.

Court held that petitioners were entitled to the writ because: (1) the detainees' status was in controversy, and the CSRTs used to classify them fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review," (2) the place of detention was "[i]n every practical sense . . . not abroad" because of the Government's indefinite, exclusive and plenary authority over Guantanamo, and (3) the "Government present[ed] no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."[48]

The Court then analyzed whether the DTA constituted an adequate and effective habeas substitute.[49] It established that for the writ to be effective in this case, the reviewing court must have the power to correct the CSRT's errors, including some ability to assess the sufficiency of the Government's evidence as well as the authority to admit and consider relevant exculpatory evidence not introduced during the CSRT.[50] Since the DTA failed to allow the Court of Appeals to admit and consider previously unavailable exculpatory evidence, the DTA's review of the CSRT was constitutionally inadequate.[51] Therefore, the Court deemed Section 7 of the MCA an unconstitutional suspension of the writ.[52]

III. Evaluating Legislation that Takes Away Federal Court Jurisdiction

Changing the jurisdiction of the federal courts affects the balance of power among the different branches of government. By its very nature, such action should be done through a contemplative process. Congress should, as part of that process, consider a series of questions about any proposal that would limit the federal courts' jurisdiction, discretion or authority, and adopt only those measures that satisfy a strict set of criteria.

First, Congress should determine what kinds of cases or controversies the proposed legislation would affect. If the legislation would affect litigants seeking redress for a violation of a right that is spelled out in the Constitution, then this action would likely interfere with the essential functions of the federal courts and exceed Congress' authority under Article III of the

48. *Id*. at 2260-61.

49. *Id.* at 2262.

50. *Id.* at 2270. The Court found that CSRTs' deficiencies constrained the detainee's ability to rebut the Government's enemy combatant assertion, such as the lack of counsel, limited means to find or present evidence to challenge the Government's case, being unaware of the most critical allegations underlying his detention, and, because of limitless admissibility of hearsay, only a "theoretical" opportunity to confront witnesses against him. However, "even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact … [a]nd given that the consequence of error may be detention of persons for the duration of the hostilities that may last a generation or more, this is a risk too significant to ignore." *Id*. at 2269-2270.

51. *Id.* at 2273-74.

52. *Id.* at 2274.

Constitution.[53] The Pledge Protection Act's effort to eliminate jurisdiction over one type of First Amendment claim is the type of legislation that would seem to run afoul of this principle.[54]

Furthermore, if legislation would affect litigants seeking protection of constitutional rights identified by the courts, then Congress should, at a minimum, ensure that litigants are able to redress the violation in an appropriate forum, preferably a federal court.[55] In *Boumediene*, the Supreme Court found that the MCA denied litigants access to a proper forum to protect against being held in custody by the federal government in violation of their constitutional rights.[56] In order for the MCA to constitutionally avoid the Suspension Clause, Congress had to provide an adequate substitute procedure for habeas corpus.[57] In addition, *Boumediene* instructs that when Congress seeks to enact jurisdiction-stripping legislation, it should include a savings clause or some security mechanism to ensure that the traditional protections are available if the alternative process proved inadequate or ineffective.[58]

When Congress considers legislation that would restrict a group of litigants from seeking redress of a statutorily created right, the threshold is lower, but Congress should still ensure that litigants have a mechanism to enforce the statutory right.[59] Additionally, there should be a rationale for singling out a group of litigants.[60]

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53. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that authority to pronounce constitutional law lies exclusively with the judicial branch of the federal government, which possesses "'the duty to say what the law is'") (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (affirming that the federal judiciary must be "supreme in the exposition of the law of the Constitution"); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1946 (2003) (reviewing Rehnquist Court decisions striking down legislation under Section 5 of the Fourteenth Amendment by which Congress sought to implement its own interpretation of the Constitution); *see also* Strasser, *supra* note 9, at 136.

54. *See* p. 8 and note 27, *supra*.

55. *See Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) (stating that a statutory provision that precludes *all* judicial review of constitutional issues deprives an individual of an independent forum for the adjudication of a claim of constitutional right and would undoubtedly be an infringement of due process (citing MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 27 (1980))).

56. *Boumediene*, 128 S. Ct at 2274.

57. *Boumediene* at 2262. The Court did not offer a comprehensive summary of the requisites for an effective habeas substitute, but it declared certain guarantees uncontroversial, i.e., the "meaningful opportunity" for a prisoner to demonstrate he is being held unlawfully. In addition, it recognized that the considerable deference owed to judgments of a court of record is not appropriate in circumstances of detention by executive order, but an effective writ did not require that "habeas proceedings . . . resemble a criminal trial even when detention is by executive order." *Id.* at 2266, 2269.

58. *Id*. at 2264-65 ("[In] the two leading cases addressing habeas substitutes. . . the statutes at issue had a savings clause, providing that the writ of habeas corpus would be available if the alternative process proved inadequate or ineffective. The Court placed explicit reliance upon these provisions in upholding the statutes against constitutional challenges.") (internal citations omitted)).

59. *See Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) (finding that a complete denial of a judicial forum to adjudicate the rights granted by the Portal-to-Portal Act was a violation of due process and that

Second, to avoid disrupting the system of checks and balances in the Constitution, Congress should consider whether its law would prevent the courts from interpreting federal law or serving as the final arbiter on the constitutionality of a law. The concept that the federal courts — and the Supreme Court in particular — should be the "ultimate interpreter" of constitutional protections is a concept almost as old as the Constitution itself.[61] If federal courts are prohibited from deciding select federal law and constitutional issues, the "certainty and definition that come from nationwide uniformity of decision" will be forfeited.[62] A prohibition on the federal courts' interpretation of federal laws and their constitutionality may result in the interpretive responsibility falling primarily to state courts, with the potential outcome of multiple conflicting constitutional interpretations without a definitive federal resolution.[63] State courts and legislative bodies are arguably in the position to reflect contemporary societal views on federal questions; however, the Constitution's safeguard of checks and balances anticipates dialogue between the legislative and judicial branches, and legislation that strips jurisdiction from the judiciary is "a peculiar way to carry on any sort of dialogue."[64]

Third, Congress should assess whether the proposed law would remove the courts from acting on matters where the courts have historically played a significant role.[65] "At the absolute minimum, the Suspension Clause protects the writ as it existed in 1789" and "[a]t its historical

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"the exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment."); *see also Bartlett*, 816 F.2d at 704 (finding that *due process* places limits on Congress' power and "that these limits are broached when Congress denies *any* forum-federal, state or agency-for the resolution of a federal constitutional claim.").

60. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (stating that access to judicial relief "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.").

61. *See Powell v. McCormack*, 395 U.S. 486, 549 (1969) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

62. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 560 (1962). James Madison in 1832 also commented on the importance of uniformity in the interpretation of federal law, observing that "anarchy & disunion could be prevented" chiefly through the preservation of the federal judiciary's controlling interpretations of federal law. James Madison, *The Writings of James Madison, comprising his Public Papers and his Private Correspondence, including his numerous letters and documents now for the first time printed*, vol. 9 (1819-1836) (Gaillard Hunt ed., New York: G.P. Putnam's Sons 1900) (1910), http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1940&chapter=119370&layout=html (last accessed Mar. 24, 2008).

63. *See* Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 652 (2006) ("If each state's highest judge, while ostensibly bound by the text of the Constitution, interprets the text in a conflicting manner, then Congress, through stripping appellate jurisdiction of our Court, will have eviscerated the Court's ability to resolve the conflict . . . . The conflict then leaves a question mark hanging over what the Constitution means and accordingly obliterates the Constitution's function as supreme law of the land.").

64. Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 103 n.148 (1986) ("Withdrawing jurisdiction seems a peculiar way to carry on any sort of dialogue . . . . Participants in 'dialogue' usually talk rather than choke each other. Dialogue might be better facilitated if Congress directly addressed the judicial doctrines it disagreed with.").

65. *See* note 47, *supra*.

core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[66] The DTA and the MCA were clearly intended by Congress to circumscribe traditional habeas review.[67] However, the Court's holding in *Boumediene* reaffirmed in no uncertain terms that despite the need for the political branches to secure national security, "[s]ecurity subsists, too, in fidelity to freedom's first principles[; chief] among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives."[68]

Finally, Congress should assess how the proposed enactment would effect the development of jurisprudence and the orderly interpretation of laws through the federal court system. Generally, a federal law that is subject to each different state's interpretation would prove unworkable, because there would be no uniformity[69] and a greater risk of forum-shopping for constitutional and federal rights.

If Congress cannot answer each of these questions in a way that protects the system of government designed by Framers of the Constitution, then it should reject a legislative proposal that strips the courts of jurisdiction on a particular matter.

IV. Conclusion

The Framers of our Constitution designed a judiciary that would be independent of political influence, and foresaw the precariousness of a judiciary that was subservient to the power of the political branches. Under our Constitutional structure, the "judicial Power" acts as a check against the influence of politics precisely because — in the words of Alexander Hamilton in Federalist 78 — the judiciary is subject to the ever-present risk of being "overpowered, awed, or influenced by its co-ordinate branches."[70] Hamilton stressed that, as a society, we should scrupulously guard the province of our courts with "all possible care." By adhering to a set of legal and policy considerations when enacting legislation that dictates the federal courts' jurisdiction, Congress will strengthen the our government's entire Constitutional system.

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66. I.N.S. v. St. Cyr, 533 U.S. 289 (2001) (internal citations and quotations omitted); *see also Rasul v. Myers*, Nos. 06-5209 & 06-5222, 2008 U.S. App. LEXIS 509, at *46-48 (D.C. Cir. Jan. 11, 2008) (discussing the impact of Congress's decision to strip the Supreme Court of jurisdiction to hear habeas petitions through the enactment of the DTA and MCA).

67. *Boumediene* at 2265.

68. *Id*. at 2277.

69 *See, e.g., AT&T Commc'ns of the S. Cent. States, Inc. v. Bellsouth Telecomm., Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998) ("it is not appropriate to defer to state agency's interpretations of federal law because fifty state commissions could apply the Telecommunications Act in fifty different ways; there would be no uniformity.")

70. THE FEDERALIST NO. 78, at 400 (Alexander Hamilton) (Max Beloff ed. 1987).

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