Federalism & Separation of Powers

A Fundamental Misconception of Separation of Powers: *Boumediene v. Bush*

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Terrorists attacked the United States on September 11, 2001. Congress quickly authorized the President to respond with military force,[1] and the Bush Administration ordered the military detention of alien al Qaeda and Taliban fighters at Guantanamo Bay, Cuba.[2] When the Supreme Court signaled in June 2004 that it would not permit the military to hold these enemy combatants indefinitely,[3] Congress responded with § 7 of the Military Commissions Act (MCA).[4] The MCA deprived the Supreme Court of jurisdiction to hear claims, including habeas corpus petitions, from alien enemy combatants challenging their detention.[5] In *Boumediene v. Bush*,[6] the Supreme Court held that § 7 of the MCA unconstitutionally suspended the writ of habeas corpus and that the detainees thus had access to the federal courts through the writ.[7]

Undoubtedly, civil rights advocates will champion *Boumediene* as a triumph of the Constitution and the rule of law over political will.[8] It is not. It is instead the apex of the Supreme Court's monopoly power over constitutional interpretation. In passing the MCA, Congress challenged the Court's claim to exclusive authority over constitutional meaning. Congress used one of the few tools available under the Constitution to check the Supreme Court's usurpation of political power. The Constitution gives Congress authority to make "Exceptions" and "Regulations" to the Court's appellate jurisdiction,[9] and the MCA stripped the Supreme Court of jurisdiction over any and all cases involving the Guantanamo prisoners' detention.[10] Thus, the Court lacked any colorable claim to jurisdiction over any case involving the Guantanamo Bay detainees, and the political branches' constitutional interpretations of the detainees' due process rights should have been final. Nonetheless, without articulating a statute or constitutional provision purportedly granting it jurisdiction, the Supreme Court granted certiorari in *Boumediene v. Bush* and decided the case on the merits.[11] For the first time in American history, the Court had overturned a congressional act limiting its jurisdiction.[12]

Boumediene raises vexing questions regarding the limits of judicial review and judicial power. *Boumediene* was a 5–4 decision, with two lengthy and scathing dissents.[13] Yet every member of the Court seemed to agree on one crucial principle: Congress's constitutional check on Supreme Court power is not a plenary, unreviewable one. This Article's thesis is that the Court violated basic separation-of-powers principles when it refused to stay its hand in the face of jurisdiction-stripping legislation.[14] Although the Court has long exercised the power to "say what the law is," it consistently recognized, until *Boumediene*, that it *only* has that power when Congress grants the Court jurisdiction to "apply the rule to particular cases."[15] Only then, "of necessity," can the Court "expound and interpret" the law.[16]

I. The Initial Detainee Habeas Cases

On the morning of September 11, 2001, terrorists hijacked four commercial airplanes and aimed them at crucial governmental and financial centers within the United States. Two planes destroyed the Twin Towers of New York's World Trade Center. Another crashed into the Pentagon near Washington, D.C. The fourth plane, which was apparently aimed for either the White House or the Capitol building,[17] crashed in a field in Pennsylvania after civilian passengers attempted to overpower the terrorists. More than 3,000 people died, and thousands more were injured.[18] The attacks were orchestrated by al Qaeda, an international terrorist organization implicated in a series of attacks on the United States and its interests beginning long before September 11, 2001.[19] Those attacks include the World Trade Center bombing of 1993, the attack on U.S. military housing in Saudi Arabia in 1996, the bombing of American embassies in Kenya and Tanzania in 1998, and the bombing of the U.S.S. Cole in Yemen in 2000.[20] The Taliban militia, which is not a recognized arm of Afghanistan's government, but which nonetheless exercises military control over portions of that country, supported al Qaeda's training and activities.[21]

Congress swiftly authorized the President to use military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."[22] The Bush Administration ordered the military detention at Guantanamo Bay, Cuba, of alien al Qaeda and Taliban fighters.[23] As the Supreme Court later acknowledged, detaining enemy fighters for the duration of the conflict was a "fundamental and accepted" principle of the customary laws of war.[24] But the Supreme Court held that the President would have to prove, as a matter of juridical fact, that the detainees had been involved in armed conflict against the United States.[25]

In 2001, Yaser Hamdi—an American citizen—was captured in a combat zone in Afghanistan by the Northern Alliance, a group fighting against the Taliban militia.[26] The U.S. military later detained him as an enemy combatant.[27] Hamdi challenged his military detention, but a majority of the Supreme Court held that enemy combatants could be detained for the duration of the armed conflict.[28] The plurality opinion in *Hamdi v. Rumsfeld*, written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, held that the AUMF authorized the President to hold persons fighting against the United States until the conflict ended.[29] Justice Thomas, who provided a fifth vote, opined that the

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AUMF was unnecessary; the President had inherent authority as Commander in Chief to detain persons, including American citizens, who were deemed enemy combatants.[30]

The plurality asserted that Hamdi was entitled to some type of process to make a factual determination whether he was an enemy combatant.[31] At a constitutional minimum, an American citizen challenging his status as an enemy combatant was entitled to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[32] The plurality acknowledged that this decision maker need not necessarily be an Article III court but rather could be "an appropriately authorized and properly constituted military tribunal."[33] Thereafter, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to make factual determinations whether individuals detained at Guantanamo Bay were enemy combatants.[34]

The Court also considered *Rasul v. Bush*, where a number of noncitizens detained as enemy combatants at Guantanamo Bay sought habeas relief.[35] The Government moved to dismiss the habeas petitions on the grounds that the federal courts lacked authority to hear habeas petitions by noncitizens held at Guantanamo.[36] The *Rasul* majority nevertheless read 28 U.S.C. § 2241,[37] the federal habeas corpus statute, to authorize the Court to exercise jurisdiction over detainees held by the U.S. military in Cuba.[38]

Congress quickly corrected the Court's misinterpretation of 28 U.S.C. § 2241 in the Detainee Treatment Act of 2005 (DTA),[39] which forbade all federal courts from exercising habeas jurisdiction over any detainee of Guantanamo Bay military prison.[40] The DTA vested in the United States Court of Appeals for the D.C. Circuit exclusive jurisdiction to review a determination by a CSRT that an alien is "properly detained as an enemy combatant."[41] The DTA authorized the D.C. Circuit to determine whether the CSRT's findings were "consistent with the standards and procedures specified by the Secretary of Defense" and whether those standards and procedures were "consistent with the Constitution and laws of the United States."[42]

The Supreme Court was not willing to accept Congress's constriction of its role in reviewing the legality of the detainees' incarceration. Giving the statute a tortured reading, the Court held that the DTA's jurisdiction-stripping provisions applied prospectively only, so the Court would continue to entertain the hundreds of pending habeas petitions filed by Guantanamo detainees.[43] Congress responded with the Military Commissions Act of 2006 (MCA), which even more clearly stripped the federal courts of jurisdiction over pending habeas petitions.[44] The MCA reconfirmed the D.C. Circuit's jurisdiction to review the CSRTs' determinations regarding enemy combatant status.[45]

In passing the MCA and stripping the Court of jurisdiction over the detainee's cases, Congress and the President stood firm in their conviction that the Supreme Court had no constitutional claim to judicial review over military detentions in connection with the War on Terror. Then, in *Boumediene v. Bush*, the Court held that § 7 of the Military Commissions Act violated the Suspension Clause[46] by denying the federal courts jurisdiction to adjudicate habeas corpus petitions from military detainees at Guantanamo Bay.[47] For the first time in history, the Court refused to stand aside when Congress exercised its Exceptions and Regulations power to check the Court's overreaching its legitimate sphere of authority.

II. The Boumediene Decision

A. The Majority Opinion

Justice Kennedy, writing for the majority of the Court, began by candidly acknowledging that "the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us."[48] Without pausing to articulate a statutory or constitutional provision that purportedly provided the jurisdiction to do so, the majority opinion then proceeded to analyze whether noncitizens detained outside the territory of the United States have a constitutional right to habeas corpus.[49] The *Boumediene* majority apparently assumed that the Suspension Clause created self-executing habeas jurisdiction in the Supreme Court in any case where the writ would have run in 1789—*apparently* because the Court did not expressly so state, and *assumed* because the Court did not address this proposition's obvious tension with foundational cases.[50]

In the majority's view, if the writ of habeas corpus ran to aliens in foreign nations during the pre-constitutional period, then Article I, Section Nine would prevent Congress from making exceptions and regulations to its habeas jurisdiction over the Guantanamo detainees; therefore, the majority opinion focused heavily on the extraterritorial reach of the writ of habeas corpus in the British empire before 1789.[51] Justice Kennedy found historical inconsistencies regarding whether the writ was available to foreign nationals or available in foreign lands.[52] The writ was unavailable to persons in Scotland, which lay within the King's territories, but the writ was available in Ireland, despite its status as an independent sovereign.[53] After a ten-page historical narrative, Justice Kennedy could draw "no certain conclusions" about whether a pre-1789 common law court would have granted a writ of habeas corpus brought by an enemy combatant detained outside the United States or would have refused to grant the writ for lack of jurisdiction.[54] For Justice Kennedy, the historical record did prove, however, that de jure sovereignty had not been the "touchstone" for habeas corpus jurisdiction.[55]

The Kennedy opinion's exploration of the pre-constitutional history of habeas corpus contrasts sharply with the scant attention given the political question doctrine.[56] The only potential political question, in the Court's view, was whether Cuba or the United States held sovereign power at Guantanamo Bay.[57] The Court did not quibble with the obvious fact that Guantanamo Bay lies within Cuba's sovereign territory.[58] However, the Court said the political question doctrine did not forbid the Court from determining whether the United States held what Justice Kennedy called "*de facto* sovereignty"—that is, practical control—over Guantanamo.[59] "Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction."[60] In three paragraphs, the majority opinion had rejected the notion that the political

branches might be vested with unreviewable constitutional authority to determine whether the writ was available to the Guantanamo detainees.[61] For Justice Kennedy, the premise that the political branches, and not the Court, could determine whether to allow habeas jurisdiction would be "contrary to fundamental separation-of-powers principles."[62] Congress had the power to make laws, but it was the Court's province "'to say what the law is.'"[63]

Kennedy's opinion then reviewed a series of cases addressing, in his view, the geographic reach of the Constitution.[64] It focused on three decisions: The *Insular Cases*,[65] *Reid v. Covert*,[66] and *Johnson v. Eisentrager*.[67] In each case, Justice Kennedy wrote, the extent to which the petitioners were afforded constitutional rights did not turn solely on whether the geographic territory was formally part of the United States.[68] Instead, extraterritorial effect depended upon the "'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impractical and anomalous.'"[69]

The *Insular Cases*, decided following the Spanish-American War, addressed whether the Constitution applied of its own force in the newly acquired Philippine Islands or whether the Constitution would apply only if Congress passed enabling legislation.[70] Although the Court held that the Constitution automatically applied in new territories, it noted that practical difficulties would result from full-scale importation of all constitutional requirements.[71] It would disrupt the existing, well-functioning legal culture, one that should be kept intact since the U.S. intended that the Philippine Islands would return to independence.[72] Thus, only "fundamental" constitutional protections would apply there.[73]

Justice Kennedy saw the same case-by-case, totality-of-the-circumstances analysis at work in *Reid*.[74] Civilian wives of military personnel had been tried by court martial for murders committed in England and Japan.[75] The Court held, however, that these American civilians were constitutionally entitled to trial by jury.[76] While Justice Kennedy conceded that their American citizenship was a "key factor" in the *Reid* Court's conclusion that they were entitled to jury trials, practical considerations also played a part.[77]

Finally, Justice Kennedy addressed *Johnson v. Eisentrager*.[78] The *Eisentrager* Court had refused to grant a writ of habeas corpus and had noted that the prisoners, who were German nationals held in occupied Germany to serve sentences in an American military prison, "'at no relevant time were within any territory over which the United States is sovereign.'"[79] Justice Kennedy wrote that "because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility."[80] Instead, Justice Kennedy contended, the *Eisentrager* opinion also focused on the practical difficulties involved in transporting prisoners and "damag[ing] the prestige of military commanders at a sensitive time."[81]

The Kennedy opinion interpreted the writ's history and the Court's precedents in light of "fundamental separation-of-powers principles,"[82] which, in the majority's view, demanded that the Guantanamo Bay detainees have access to habeas corpus review.[83] If the Court's habeas power depended upon formal state sovereignty, then "it would be possible for the political branches to govern without legal constraint" in foreign territory.[84] In the Court's view, permitting the political branches to operate without the possibility of habeas review in federal court would mean that "the political branches have the power to switch the Constitution on or off at will."[85]

The majority listed three factors that would determine whether the Suspension Clause vests the Court with power to issue habeas writs to an alien held outside U.S. borders: "(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."[86] Applying the first factor, the Court pointed to *Eisentrager*'s trial by military commission as the ideal level of process for determining whether the Guantanamo detainees were in fact enemy combatants.[87] The prisoners in *Eisenstrager* had received a full trial by military commission for war crimes, with a bill of particulars and detailed factual allegations against them.[88] They were afforded legal counsel and the right to cross-examine witnesses.[89] In comparison, CSRT hearings provided the detainee with a "Personal Representative," rather than legal counsel.[90] The Government's evidence was presumptively valid, and the detainee was permitted to present only "reasonably available" evidence.[91] The CSRT process, Justice Kennedy wrote, fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[92] Regarding the second factor, the Court opined that the military held a higher level of control over the Guantanamo military base than over Landsberg prison in Germany following World War II.[93]

As for the third factor, the "practical obstacles," the majority was "sensitive" to the fact that affording habeas petitions to detainees in federal court costs money and "may divert the attention of military personnel from other pressing tasks."[94] The majority did not, however, find these facts "dispositive."[95] The Executive Branch, in their view, presented "no credible arguments that the military mission at Guantanamo would be compromised" by the federal courts' exercise of habeas corpus jurisdiction.[96]

In the end, the majority held that its habeas jurisdiction could not be constricted through the MCA's jurisdiction-stripping provision.[97] Congress could limit the Court's jurisdiction only through a "formal" suspension of the writ.[98] The Court neither cited authority for the proposition that a suspension of habeas must be "formal" nor did it explain what a "formal" suspension might entail.[99]

B. The Dissenting Opinions

Chief Justice Roberts and Justices Scalia, Thomas, and Alito signed onto two separate dissents.[100] Both dissents were highly critical of the majority's decision, which upended the CSRT review process and provided the detainees with constitutional rights to habeas corpus review of the CSRT decisions in federal court. But the dissenters did not dispute certain fundamental assumptions underlying the majority

opinion. In the Justices' unanimous view, the Supreme Court's role in the constitutional enterprise was to declare the true meaning of the Constitution;[101] it was for the Court, not the political branches, to give an authoritative interpretation of the Suspension Clause's cryptic language and the writ's uncertain history.[102] Moreover, Congress was apparently powerless to strip the Court of jurisdiction to make those determinations, despite Congress's unqualified constitutional authority to limit the Court's jurisdiction.[103] Every Justice on the *Boumediene* Court held the opinion that Congress's enumerated power to make exceptions to the Court's jurisdiction was limited, not plenary. As Justice Scalia's dissent phrased it, "[a]s a court of law operating under a written Constitution, our role is to determine whether there is a conflict between [the Suspension] Clause and the Military Commissions Act."[104] The dissenters, like the majority, did not explain where the Court acquired jurisdiction to entertain that question even after the MCA stripped its jurisdiction to hear any case involving the detainees. Did the Court believe that the Suspension Clause provided self-executing habeas corpus jurisdiction to the federal courts? Perhaps the Court believed that the Suspension Clause restricted Congress from ever diminishing the courts' habeas jurisdiction once Congress granted that jurisdiction in the first instance. The dissenting opinions did not explore these questions, and they did not dispute the majority's implicit conclusion that these were not political questions.

The thrust of Justice Roberts's dissent was that the DTA's statutory processes for making enemy combatant determinations satisfied due process.[105] Congress had modeled the combatant-status-determination upon Army Regulation 190-8, which the *Hamdi* plurality presented as a model of the level of procedural protections an enemy combatant would receive from a habeas court.[106] Under the DTA, the Combatant Status Review Tribunals reviewed initial battlefield determinations of combatant status.[107] CSRTs "operate much as habeas courts . . . [t]hey gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention."[108] The *Hamdi* plurality had opined that this first level of review would satisfy constitutional due process standards for American citizens challenging their enemy combatant status.[109] However, Congress went much further than the constitutional minimum and extended the CSRT review process to all detainees, American and alien alike.[110] Congress also provided for an additional layer of review by an Article III court.[111] The DTA authorized the D.C. Circuit to determine not only whether the CSRT's finding in a particular detainee's case "was consistent with the standards and procedures specified by the Secretary of Defense" but also "whether the use of such standards and procedures to make the determination [was] consistent with the Constitution and laws of the United States."[112] The *Boumediene* petitioners had never made use of these statutory remedies.[113]

Justice Scalia wrote separately to emphasize a point he considered "more fundamental still," which was that the writ of habeas corpus had never been available to noncitizens in foreign lands.[114] The Suspension Clause thus did not provide the detainees with habeas rights.[115] Justice Scalia began from the proposition that the Court owes deference to Congress's judgments.[116] Its statutes are entitled to a presumption of constitutionality, and this is especially true in foreign and military affairs.[117] Indeed, Justice Kennedy's majority opinion admitted that, despite his careful examination of pre-constitutional history, he could not come to a certain conclusion regarding whether the writ would have run to aliens outside our borders.[118] For Justice Scalia, this meant that the Court had no basis for striking down the MCA.[119] The Court must defer to Congress's judgment.[120] Justice Scalia nonetheless contended that the majority had incorrectly judged the historical evidence regarding the geographical reach of the writ of habeas corpus.[121] In his view, pre-constitutional and early post-1789 precedents plainly demonstrated that the writ was not available to noncitizens abroad.[122]

III. Separation of Powers After Boumediene

Both the majority and dissenting opinions in *Boumediene* gave remarkably short shrift to two critical issues. The first was the political question doctrine. The second was Congress's power under Article III, Section Two to make exceptions to the Court's appellate jurisdiction.[123] The issues stand in close relationship to one another, since both allocate final constitutional decision-making authority away from the Judicial Branch and place that power within the political branches. Jurisdiction stripping is one of Congress's expressly granted constitutional means for checking the Judicial Branch from abusing sovereign power.[124] The political question doctrine, on the other hand, is a sort of check on the Judicial Branch imposed by the Court itself. It is a judicially crafted doctrine meant to ensure that the Judicial Branch does not usurp legislative or executive power.[125]

The early Court did not view jurisdiction regulation or the political question doctrine as conflicting with the judicial role because the early Court did not view itself as the sole interpreter of the Constitution. That is no longer the case. The modern Court views the political branches' constitutional interpretations as only second-best guesses of "true" constitutional meaning, which the Court may fine-tune or reject as it sees fit. Neither the political question doctrine nor jurisdiction stripping can coexist with the Court's new conception of itself as supreme interpreter of the Constitution.

A. The Political Question Doctrine in Boumediene

The *Boumediene* decision, which spans seventy-seven pages in the Supreme Court Reporter, devotes three paragraphs to the political question doctrine.[126] The only potential political question any member of the Court could identify was an inconsequential one: the Court did "not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay."[127] The majority opinion did not pause for even a moment to consider whether the political branches possessed all constitutional authority to interpret their own and the others' war powers.

Boumediene marks a clear break with precedent. Until September 11, 2001, the Court had consistently taken the position that any constitutional questions arising from the

military detention or prosecution of enemy combatants were political questions to be answered by the political branches alone. The classic political question doctrine posits that the Constitution itself, by virtue of vesting an extraordinary level of discretionary power in one of the political branches, leaves all constitutional questions regarding the limits of that power in that single branch.[128] This doctrine finds its roots in *Marbury v. Madison*, the case that declared the power of judicial review itself, and the two doctrines are inextricably intertwined. Both judicial review and the political question doctrine are judicially crafted instruments for protecting the people's interests by ensuring that sovereign power remains dispersed in accordance with the constitutional plan. In *Marbury*, Chief Justice Marshall made the claim, radical at the time, that the Judicial Branch could issue writs of mandamus to high-order Executive Branch officials.[129] However, the Chief Justice also said that the Court could only order the Executive Branch to perform ministerial duties—those unambiguous legal obligations which left no room for discretion.[130] Where the Executive was vested with discretionary decision-making authority, even deferential judicial review would go too far.[131] It would trespass on a core constitutional function solely dedicated to a coordinate branch, violating separation-of-powers precepts.[132]

The political branches' powers to wage war have historically been viewed as the paradigmatic political question.[133] War powers are the Constitution's clearest "textually demonstrable constitutional commitment" of authority to the political branches.[134] The constitutional text is far more detailed in describing Congress's range of authority over the military than other congressional powers. The sheer number of provisions is striking: Congress has the power to "provide for the common Defence and general Welfare of the United States;"[135] "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;"[136] "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;"[137] "raise and support Armies;"[138] "provide and maintain a Navy;"[139] "make Rules for the Government and Regulation of the land and naval Forces;"[140] "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"[141] and "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."[142]

The Constitution also vests significant war power in the Executive Branch by declaring the President to be the "Commander in Chief of the Army and Navy of the United States."[143] The Constitution makes no attempt to specify how the President shall go about performing this function. It is instead a matter left to the President's discretion, so the Judicial Branch has no "judicially discoverable standards" upon which to judge whether the President exercised that discretion within constitutional bounds.[144] All powers over war were granted to the political branches, without specifying a precise dividing line between them. The Framers blended and overlapped military powers in two separate branches to create an "intentional gray area, or zone of shared powers, requiring the legislative and executive branches to work out the allocation of power and responsibility."[145] This blending of powers created a strong system of checks and balances.[146] Congress and the President might cooperate or might conflict over military policy, but neither had exclusive control over standing armies.[147] Each political branch would stand ready to check any unconstitutional action by the other.[148]

Soon after the September 11th terrorist attacks and consistent with the customary laws of war, the Bush Administration took the position that the military could detain enemy combatants until the cessation of hostilities, and that no formal juridical process was necessary to determine who was an enemy combatant.[149] But the War on Terror was like no other war before it. Its temporal boundaries were uncertain, with the potential to last for decades or beyond. The battlefield had no geographic boundaries. The enemy wore no uniform. Combatants might live in Afghanistan or in Brooklyn. Under these conditions, the potential for erroneously detaining a non-enemy civilian was exponentially higher than in previous wars where military personnel could generally separate civilians from combatants with relative ease.[150]

Given these facts, the Supreme Court broke with the established tradition of non-involvement in military matters and entertained *Hamdi v. Rumsfeld* on a writ of habeas corpus. *Hamdi* acknowledged that the customary laws of war allow the detainment of combatants captured in the course of battle until the conflict ceases.[151] But the plurality was concerned about the possibility that humanitarian aid workers and journalists could be captured, mistaken for enemy combatants, and incarcerated in a war on terror that could last two generations.[152] At the same time, the *Hamdi* plurality recognized the "weighty and sensitive governmental interests" in detaining enemies who have fought against the United States.[153] Further, *Hamdi* acknowledged that the political branches, not the Court, were responsible for wartime decision making: "Without doubt, our Constitution recognizes that core strategic matters of war making belong in the hands of those who are best positioned and most politically accountable for making them."[154] Weighing these competing concerns, *Hamdi* held that an American citizen detained as an enemy combatant had a constitutional right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[155]

Hamdi might thus be viewed as opening a dialogue with the political branches regarding the proper interpretation of constitutional norms.[156] The plurality's tone was diplomatic and collaborative. Although it held that some level of process was owed to the detainees before they could be indefinitely detained, *Hamdi* did not attempt to dictate precisely what that process must entail. The military could choose a process that permitted hearsay and gave a rebuttable presumption in favor of the Government's evidence.[157] *Hamdi* conceded that Article III courts might have no role to play in the detainees' cases.[158]

The Court's tone quickly changed when Congress revoked its jurisdiction to consider additional habeas cases from alien enemy combatants. *Boumediene* apparently considered the MCA's jurisdiction-stripping provisions to be an affront to the Court's place in the constitutional chain of command. The Court proclaimed that the CSRT procedures did not comply with due process, without identifying any particular

shortcomings.[159] *Boumediene* then delegated to the district courts the task of devising new procedures that would meet the detainees' constitutional rights of due process.[160] In response to the Government's concern that vital classified information presented in those habeas proceedings would find its way into enemy hands, *Boumediene* refused to "attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise" in the district courts.[161] Those were questions "within the expertise and competence of the District Court to address in the first instance."[162]

The *Boumediene* Court had lost sight of the limits of the judiciary's institutional capacity. The legitimacy of a judicial decision depends upon an even-handed application of the law. The Court must determine whether the law protects one party's security against his opponent's actions or whether the law instead leaves the opponent at liberty to continue those actions. In an ordinary case, statutory or common law will usually provide a relatively straightforward answer to that legal question. The open-textured language of the Constitution, on the other hand, protects *both* of these values—liberty and security—which often stand in direct opposition to one another. The Constitution secures individual liberties and provides for the common defense and domestic tranquility.[163] The early Court largely left balancing between the two values to the political branches through the complementary principles of deferential judicial review and the political question doctrine. From the 1930s to the 1990s, the Court took an active role in defining and enforcing individual liberties but continued to defer to the political branches' constitutional interpretations in foreign-policy matters in general and wartime policy decisions in particular. Each arrangement was a more acceptable balancing of sovereign power among the coordinate branches. These tacit settlement agreements each achieved a chief aim of the Constitution: to disperse governmental power so as to protect the people's own sovereignty and influence over their government.[164]

However, the modern Court has abandoned the Framers' vision of separation of powers. *Boumediene* exemplifies a new vision of "fundamental separation-of-powers principles,"[165] different not just in degree but in kind from historical understandings of that phrase. The Court is the keeper of the Constitution; the political branches are to concern themselves only with politics—in the most derogatory sense of the term. The Court distrusts the political branches and the political process. Where the early Court considered it beyond the capacity of the judiciary to balance constitutional rights that implicate larger issues of policy vitally affecting the nation, the modern Court views itself as not only capable of balancing competing constitutional rights but also as the *only* branch capable of doing so.

B. The End of Congress's Power to Control the Court's Jurisdiction?

Boumediene began with the Court's acknowledgement that "the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us."[166] The opinion should have ended with that admission. Article III provides that Congress may make "Exceptions" from and "Regulations" to the Court's jurisdiction.[167] The Constitution places no limitations on Congress's discretion.[168] With the exception of a small class of cases within its original jurisdiction,[169] the Supreme Court may adjudicate a case only where Congress has, by statute, granted it jurisdiction to do so.[170] Congress did not grant the federal courts jurisdiction to hear habeas petitions from the Guantanamo detainees but, to the contrary, enacted a series of statutes stripping the Court of habeas jurisdiction in no uncertain terms.[171]

Neither the *Boumediene* majority nor the dissenters mentioned the landmark cases that acknowledged Congress's plenary power and unreviewable discretion to prevent the Court from exercising habeas jurisdiction. In *Ex parte Bollman*, Chief Justice Marshall explained that if Congress chose not to provide the Court with statutory jurisdiction to issue writs of habeas corpus, then "the privilege [of the writ] itself would be lost."[172] *Bollman* thus belied any suggestion that the Suspension Clause vests self-executing habeas jurisdiction in the federal Judiciary.[173] *Boumediene* also failed to acknowledge *Ex parte McCardle*, where Congress stripped the Court of jurisdiction to consider a then-pending habeas petition.[174] "The first question necessarily is that of jurisdiction," said *McCardle*, and once it was determined that Congress had revoked the Court's jurisdiction, it was "useless, if not improper, to enter into any discussion of other questions."[175] The *McCardle* Court was undoubtedly perturbed that Congress had prevented it from exercising influence over the course of Reconstruction, and yet, even a year later in *Ex parte Yerger*, the Court acknowledged that the Constitution had squarely committed to Congress the unreviewable discretion to determine whether the Court should exercise habeas jurisdiction in any case, including cases alleging constitutional violations and deprivations of liberty.[176]

McCardle and *Bollman* were a consequence of the early Court's conception of the Constitution's separation-of-powers structure and the political theory that drove the Framers to settle upon that structure. The Framers divided power among three branches because they knew to a moral certainty that power corrupts. No one branch could be trusted with absolute dominion over constitutional interpretation, or else the Constitution would cease to perform its chief function, which was to protect the people from overweening governmental power. The Constitution delegated various enumerated powers to each branch, but the Constitution did not expressly grant the power of constitutional review to any single institution. The power and duty of constitutional review was instead an implied power, shared by all the coordinate branches. It derived from the Supremacy Clause, which declares the Constitution the supreme law of the land,[177] and from the Constitution's requirement that each branch swear a solemn oath to uphold the Constitution.[178]

Judicial supremacy is directly contrary to the Founding Fathers' intention that "each department should have a will of its own."[179] To prevent "a gradual concentration of the several powers in the same department," the Constitution gave "each department the necessary constitutional means and personal motives to resist encroachments of the others."[180] In *Bollman* and *McCardle*, the Court acknowledged one of the key

constitutional checks on encroachments by the Judicial Branch: the power of Congress given by Article III, Section Two to make exceptions and regulations to the Court's jurisdiction.[181]

These foundational premises—that the Judicial and political branches possess equal authority to interpret the Constitution and that Congress may check the Court's violations of separation-of-powers principles—are no longer acceptable to the modern Court. *Boumediene* seemed to find it intolerable that Congress could remove the Court from the enemy combatant review process. The Court believed itself the only arm of government constituted to act on principle and imagined that Congress and the President were willing to sacrifice the deepest values embodied in the Constitution. The Court believed that rights to due process are something that it respects but that the other political branches violate to satisfy the base preferences of their constituents. In the Court's view, Congress and the President would subjugate the Constitution were it not for strict judicial oversight.

With these as its underlying assumptions, the *Boumediene* Court treated constitutional review as if it were an enumerated and delegated power expressly given to the Judicial Branch and to the Judicial Branch alone. The Court acted as if it viewed itself as the ultimate referee of constitutional-boundary disputes, even where its *own* errors in constitutional interpretation and abuses of constitutional power were at issue. In Congress's independent judgment, the Court had seriously misinterpreted its own constitutional power in declaring its intention to hear habeas claims filed by Guantanamo detainees. Congress used its constitutional Exceptions and Regulations check on the Court to enforce a contrary interpretation.[182] But *Boumediene* deemed Congress and the President unqualified to judge whether the Court had overreached its legitimate sphere of constitutional authority. It would be a "striking anomaly," Justice Kennedy wrote, if "Congress and the President, not this Court, [could] say 'what the law is.'"[183]

Boumediene treated Congress's Exceptions and Regulations power as a narrow and limited one, which could not prevent the Court from exercising its paramount power of judicial review. The writ of habeas corpus was "an indispensible mechanism for monitoring the separation of powers," Justice Kennedy wrote, and the Suspension Clause "must not be subject to manipulation by those whose power it is designed to restrain."[184] Justice Scalia's dissent soundly criticized Justice Kennedy's argument on the grounds that the Court, not Congress, had manipulated the writ's historical reach.[185] But even the dissenters, like the majority, still believed that only the Court could give an authoritative interpretation of the Suspension Clause and further believed that Congress could not prevent the Court from adjudicating that issue. Congress's constitutional Exceptions and Regulations check on the Court is no check at all if the Court has the power to decide whether Congress can use it.[186]

Those who support judicial supremacy do not necessarily contend that the Court is more competent at interpreting the Constitution than the political branches, but instead desire a single interpretation that binds every branch.[187] These commentators feel uncomfortable with the open-endedness of a plurality of voices interpreting the Constitution; they want an authoritative voice.[188] In their article, Larry Alexander and Frederick Schauer argue in favor of judicial supremacy on the grounds that the function of law in general—and the Constitution in particular—is to stabilize society and declare the rights and duties of societal actors consistently and across time.[189] But judicial supremacy would not realize these goals. Even if the Supreme Court were the final authority on constitutional meaning, the Court has altered that meaning time and again by overruling or distinguishing clearly applicable constitutional decisions.[190] Thus, the Court has proved that precedent and stare decisis are insufficient restraints on judicial activism to realize these commentators' desired level of stability.

What is more, there is no reason to believe that the Judicial Branch's constitutional interpretations would likely provide greater stability in the law than the political branches' interpretations. The political branches' readings of constitutional norms have, if anything, remained more consistent over time. Again, military law provides an excellent example, not only because it is directly at issue in *Boumediene* but also because military matters have historically been cordoned off from judicial oversight. The Uniform Code of Military Justice and the Geneva and Hague conventions have provided stable and predictable rules governing armed conflict.[191] They have not lead to the "interpretive anarchy" that Alexander and Schauer fear.[192]

This Article does not advocate putting an end to judicial review.[193] Quite the contrary, judicial review plays an important role in protecting constitutional norms. But the judicial power, like any other power, can be abused. The Constitution was designed to provide other branches the means to resist judicial manipulations of authority. The most flexible and effective constitutional check on the Judiciary is Congress's Article III power to regulate and make exceptions to the jurisdiction of the federal courts.[194] The constitutional system of checks and balances, designed to protect the people from governmental abuse of power, is more essential to the people's liberty interests than is federal habeas jurisdiction. Where Congress is convinced that the Court has attempted to alter the Constitution under the guise of interpreting it, Congress has an oath-sworn duty to uphold the Constitution and resist the abuse. The Constitution gave Congress the means by which to resist the Court's overreaching, by stripping it of jurisdiction.[195] In *Boumediene*, however, the Court refused to defer to Congress's check on its power. The Judicial Branch has claimed total dominion over constitutional interpretation, which is contrary to the Framers' best efforts to divide that awesome power among all the branches.

CONCLUSION

Justice Kennedy ended his *Boumediene* opinion with this thought: "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."[196] His statement was correct. The individual's liberty and the community's security are precious constitutional values, each deeply worthy of protection, and where those values come into conflict, they must be reconciled within the constitutional framework. But Justice Kennedy's statement begs the real

question: *Who* must reconcile them? For the *Boumediene* Court, it was the Court and the Court alone—the Court must "say what the law is"[197]—and Congress's attempt to deprive the Court of jurisdiction to do so was a violation of "fundamental separation-of-powers principles."[198]

Boumediene's understanding of the Court's role is sharply at odds with the Framers' vision—and the early Court's vision—of how the coordinate branches would operate within the constitutional system. The Framers designed the constitutional structure to ensure that no single branch would accumulate too much power. Thus, the Constitution created three perfectly coordinate branches of national government and delegated power, in widely varying amounts, to each. The Constitution did not grant any branch of government the final or exclusive right to declare constitutional meaning. It was instead an implied power, divided and shared among all branches. Because each enjoyed equal stature and rank, no branch could "pretend to an exclusive or superior right of settling the boundaries between their respective powers."[199]

Habeas corpus was indeed an important part of that constitutional framework, as Justice Kennedy said. It does not, however, give the Court license to overturn well-reasoned constitutional interpretations and policy decisions of the coordinate branches. When it became clear that the Court intended to issue habeas writs not to enforce but rather to radically alter settled constitutional understandings, Congress used its delegated and enumerated constitutional check on what it perceived to be the Court's abuses.

The Court's jurisdiction is not self-executing. Congress may grant it, and Congress may take it away. That power is Congress's most effective and flexible check to prevent the Court from overreaching its rightful sphere of influence, and in the MCA, Congress unambiguously stripped the Court's jurisdiction to entertain any claims, including petitions for habeas relief, from the Guantanamo detainees. The Court refused to be deterred. The Court claimed the power to review the constitutionality of Congress's check on the Court's *own* departures from constitutional norms and usurpations of coordinate branches' constitutional powers. The Court claimed irreducible jurisdiction, through the mechanism of habeas corpus review, to proclaim final answers to constitutional questions. The Founding Fathers would find it troubling that *Boumediene* did so in the name of separation of powers.

Endnotes

1 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

2 Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006).

3 *See* Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004) (opining that being detained for over two years in territory controlled by the United States without counsel and without being charged with a crime amounted to unlawful detention).

4 Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C.A. § 2241(e) (Supp. 2009)).

5 *Id.* § 7(a).

6 128 S. Ct. 2229 (2008).

7 *Id.* at 2275–76.

8 Many already have. *See, e.g.*, Ronald Dworkin, *Why It Was a Great Victory*, N.Y. Rev. Books, Aug. 14, 2008, at 18 (praising *Boumediene* as a successful attempt by the Court to prevent the President from escaping his constitutional responsibilities); Jack M. Balkin, *Two Takes: With 'Boumediene,' the Court Reaffirmed a Basic Principle*, U.S. News & World Rep., June 19, 2008, http://www.usnews.com/articles/opinion/2008/06/19/two-takes-with-boumediene-the-court-reaffirmed-a-basic-principle.html (arguing that the *Boumediene* Court saw through the Bush "[A]dministration's ruse").

9 U.S. Const. art. III, § 2, cl. 2.

10 Military Commissions Act of 2006 § 7(a).

11 Boumediene v. Bush, 128 S. Ct. 2229, 2274–75 (2008).

12 *Id.* at 2275.

13 *Id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

14 Others have sharply disagreed. *See* Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 82 S. Cal. L. Rev. 259, 260–61 (2009) (arguing that the Supreme Court took a "functional approach" in *Boumediene* that balanced practical, historical, and political considerations with the Constitution).

15 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

16 *Id.*

17 The 9/11 Commission Report 326 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf (last visited Dec. 20, 2009).

18 Rasul v. Bush, 542 U.S. 466, 470 (2004).

19 *See* The 9/11 Commission Report, *supra* note 17, at 50–63, 231–41 (discussing, among other things, a series of fatwas and other calls to engage Americans in war made by Usama bin Laden and other senior members of al Qaeda and the role of that organization in the 9/11 attacks).

20 *Id.* at 50–73.

21 *Id.* at 63–70.

22 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

23 *See* Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006) (granting authority to the Secretary of Defense to detain and try—subject to certain restrictions—international terrorists and other noncitizens).

24 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

25 *Id.* at 533.

26 *Id.* at 513.

27 *Id.* at 518.

28 *Id.* at 515. On the same day the Court entertained Mr. Hamdi's habeas petition, it also considered the petition of Jose Padilla. Robert H. Freilich, Ryan M. Manies, & Corey J. Mertes, *The Freilich Report 2003–04: The Supreme Court in an Age of Secrecy and Fear*, 36 Urb. Law. 583, 591 (2004). Mr. Padilla was an American citizen captured within the United States who allegedly planned to detonate a radioactive bomb here. Padilla v. Rumsfeld, 352 F.3d 695, 701 (2d Cir. 2003). He was detained as an enemy combatant and held for a time in New York before being transferred to South Carolina. Rumsfeld v. Padilla, 542 U.S. 426, 441 (2004). The issue decided by the Supreme Court in *Rumsfeld v. Padilla* was a narrow one: whether the federal court in New York had jurisdiction over Padilla's habeas petition after his transfer to South Carolina. *Id.* at 443, 447. Five members of the Court held the view that Padilla did have a right to habeas relief, even though New York was not the proper locale in which to press that right. *Id.* at 451.

29 *Id.* at 533.

30 *Id.* at 589–90 (Thomas, J., dissenting).

31 *Id.* at 533 (plurality opinion).

32 *Id.*

33 *Id.* at 538.

34 Memorandum from Paul Wolfowitz, Deputy Sec'y, U.S. Dep't of Def., to the Sec'y of the Navy (Jul. 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

35 Rasul v. Bush, 542 U.S. 466, 470 (2004).

36 *Id.* at 484.

37 28 U.S.C. § 2241 (2006).

38 *Rasul*, 542 U.S. at 484.

39 Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 1, 5, 10, 15, 16, 28, 37, 41, 42, and 50 U.S.C.).

40 *Id.* at § 1005(e)(1). The DTA amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo." 28 U.S.C. § 2241(e)(1) (2006).

41 DTA § 1005(e)(2)(B).

42 *Id.* at § 1005(e)(2)(C).

43 Hamdan v. Rumsfeld, 548 U.S. 557, 577 (2006).

44 Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009):

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or *is awaiting such determination*.

(emphasis added).

45 *Id.*

46 U.S. Const. art. I, § 9, cl. 2.

47 Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

48 *Id.* at 2244.

49 *Id.*

50 See the discussion of *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868), and *Ex parte* Bollman, 8 U.S. (4 Cranch.) 75, 95 (1807), in section III.B.

51 *Id.* at 2244–54.

52 *Id.*

53 *Id.* at 2246–52.

54 *Id.* at 2248.

55 *Id.* at 2253.

56 *Id.* at 2252–53.

57 *Id.*

58 *Id.*

59 *Id.* at 2253.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at 2259 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

64 *Id.* at 2254–60.

65 The *Insular Cases* were a series of cases. Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Huus v. N.Y. & P.R. S.S. Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell 182 U.S. 1 (1901). *See generally* Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 300–12 (discussing generally the facts of and the decisions in the *Insular Cases*).

66 354 U.S. 1 (1957).

67 339 U.S. 763 (1950).

68 Boumediene v. Bush, 128 S. Ct. 2229, 2254–56(2008).

69 *Id.* at 2255–56 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)).

70 *Id.* at 2254.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 2255–56.

75 *Id.* at 2255.

76 *Id.*

77 *Id.* at 2256.

78 *Id.* at 2257.

79 *Id.* at 2257 (quoting Johnson v. Eisentrager, 339 U.S. 763, 778 (1950)).

80 *Id.* at 2257 (citation omitted).

81 *Id.* at 2257 (citing *Eisentrager*, 339 U.S. at 779).

82 *Id.* at 2253.

83 *Id.* at 2262.

84 *Id.* at 2258–59.

85 *Id.* at 2258.

86 *Id.* at 2259.

87 *Id.*

88 *Id.* at 2260.

89 *Id.* at 2260.

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 2261.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 2262.

98 *Id.*

99 The *Boumediene* majority enigmatically opined that "[n]othing in [Hamdan v. Rumsfeld, 548 U.S. 557 (2006)] can be construed as an invitation for Congress to suspend the writ." *Id.* at 2242.

100 *Id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

101 *Id.* at 2304 (Scalia, J., dissenting).

102 *Id.*

103 *See* U.S. Const. art. III, § 2, cl. 2; Lauf v. E. G. Shinner & Co., 303 U.S. 323, 329 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); Sheldon v. Sill, 49 U.S. (8 How.) 411, 448-49 (1850) (concluding that "Congress, having the power to establish the [inferior] courts, must define their respective jurisdictions"); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 314-15 (1816) (emphasizing that Congress has an option, not

an obligation, to create inferior courts).

104 *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting).

105 *Id.* at 2279 (Roberts, C.J., dissenting).

106 *Id.* at 2284 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004)).

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at 2294 (Scalia, J., dissenting).

115 *Id.*

116 *Id.* at 2296.

117 *Id.* at 2296–97.

118 *Id.* at 2251 (majority opinion).

119 *Id.* at 2297 (Scalia, J., dissenting).

120 *Id.*

121 *Id.* at 2298–302.

122 *Id.*

123 U.S. Const. art. III, § 2, cl. 2.

124 *Id.*

125 Rachel Barkow has carefully distinguished between the classical and prudential strands of the political question doctrine. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237 (2002). The classical strand of the political question doctrine is premised upon the idea that the Constitution itself forbids the Judiciary from entertaining certain policy questions. *Id.* at 246–53. The prudential strand of the political question doctrine, on the other hand, is more closely related to abstention doctrines. *Id.* at 253–64. In these situations, the Constitution does not forbid judicial review and Congress has granted statutory jurisdiction over the issues presented, but the Court nonetheless declines to adjudicate the case out of deference to the policy-making decisions of the political branches. *Id.* at 263–73. Barkow's article traces how the Court's failure to articulate clearly whether it was relying upon the classical or prudential strand led to a jurisprudential mess, and as a result, too-heavy reliance on the prudential strand has almost killed the constitutionally based classical strand. *Id*. Barkow advocates a return to the classical strand, in which the Judiciary only refrains from hearing cases where the subject matter presents a textually demonstrable commitment of constitutional decision-making authority to a coordinate branch. *Id.* at 319–35. This article focuses on military power, which is the clearest example of the classical political question doctrine, with a plethora of clear textually demonstrable commitments of authority outside the Judicial Branch. Thus, it is largely unnecessary to distinguish here between the classical and prudential strands of the doctrine.

126 *Boumediene*, 128 S. Ct. at 2253.

127 *Id.* at 2252.

128 *See supra* note 125.

129 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149–50 (1803).

130 *Id.* at 149–50.

131 *Id.* at 166.

132 *Id.* at 166.

133 *Boudemiene* presented a second set of political questions that should have been resolved in Congress alone: questions involving Article III, Section Two, which vests in Congress the unconditional power to control the federal courts' jurisdiction, and the Suspension Clause, which vests in Congress the power to suspend habeas corpus jurisdiction "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. III, § 2, cl. 2; *id.* art. I, § 9, cl. 2. These constitutional provisions vest in Congress two checks on the Court's power. If the Court holds the power of judicial review over another branch's constitutional check on the Court's own abuses, then that check is no check at all.

134 Baker v. Carr, 369 U.S. 186, 217 (1962).

135 U.S. Const. art. I, § 8, cl. 1.

136 *Id.* cl. 10.

137 *Id.* cl. 11.

138 *Id.* cl. 12.

139 *Id.* cl. 13.

140 *Id.* cl. 14.

141 *Id.* cl. 15.

142 *Id.* cl. 16.

143 *Id.* art. II, § 2, cl. 1.

144 Baker v. Carr, 369 U.S. 186, 217 (1962).

145 Geoffrey Corn & Eric T. Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, The President, and Congress*, 44 Hous. L. Rev. 553, 563 (2007).

146 *Id.*

147 *Id.* at 564.

148 *Id.* at 565.

149 Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legis. Affairs, U.S. Dep't of Justice (June 27, 2002), http://www.justice.gov/olc/docs/memodetentionuscitizens06272002.pdf.

150 *See generally* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675 (2004) (discussing one's status under the Geneva Convention as hinging on questions of form and not on one's substantive actions).

151 Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

152 *Id.* at 530–31.

153 *Id.* at 531.

154 *Id.*

155 *Id.* at 533.

156 *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1, 3 (2003) (arguing constitutional structure of separated coequal branches was intended to encourage compromise and dialogue among governmental branches).

157 *Hamdi*, 542 U.S. at 533–34.

158 *See id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.").

159 Boumediene v. Bush, 128 S. Ct. 2229, 2258–61 (2008).

160 *Id.* at 2276.

161 *Id.*

162 *Id.*

163 U.S. Const. amends. I–VIII; *id.* pmbl.

164 *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1435-36 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive power to Say What the Law Is*, 83 Geo. L.J. 217, 245-52 (1994) (arguing that no branch can be the constitutional judge of its own power).

165 *Boumediene*, 128 S. Ct. at 2253.

166 *Id.* at 2244.

167 U.S. Const. art. III, § 1, cl. 2.

168 *See* Palmore v. United States, 411 U.S. 389, 400–01 (1973) (holding

that, per its constitutional power to legislate for the District of Columbia, Congress may establish laws to try local criminal cases before judges who are not accorded life tenure or an indiminishable salary).

169 U.S. Const. art. III, § 2, cl. 2.

170 *Id.*

171 Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009)); Detainee Treatment Act of 2005 § 1005(e)(1), 28 U.S.C. § 2241(e)(1) (2006).

172 *Ex parte* Bollman, 8 U.S. (4 Cranch.) 75, 95 (1807).

173 No party in *Bollman* actually made such a suggestion. Neither prisoner's attorney argued that Article I, Section Nine gave the Supreme Court self-executing habeas jurisdiction. This is consistent with William Duker's leading text on the subject, which explains that the Suspension Clause did not create an individual right to habeas corpus in any person. William F. Duker, A Constitutional History of Habeas Corpus 133–36 (1980). It instead protected *state courts*' habeas jurisdiction from congressional interference because the Framers intended that the state courts would issue writs of habeas corpus to ensure the legality of federal detention. *Id.* The language of Article I, Section Nine, which forbids Congress from *suspending* habeas, presupposes the existence of habeas relief. At the time that language was drafted, state courts had jurisdiction (in varying degrees) to issue writs of habeas corpus. *Id.* at 111–15, 129–30. But there was no federal habeas relief because there were no federal courts. The Articles of Confederation made no provision for federal courts, and the Constitution had not yet been ratified. *Id.* at 131. Even after ratification created the Supreme Court, the Constitution left to Congress the decision whether to create lower federal courts and whether to grant jurisdiction to any federal court. *Id.* at 133–36.

174 *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512 (1868).

175 *Id.*

176 *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 103–06 (1869).

177 U.S. Const. art. VI, cl. 2.

178 *Id.* cl. 3.

179 The Federalist No. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

180 *Id.*

181 *Ex parte* McCardle, 74 U.S. (7 Wall.) 505, 512–14 (1868); 8 U.S. (4 Cranch) 75, 116 (1807).

182 *See* Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009):

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

183 Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

184 *Id.*

185 *Id.* at 2296–98 (Scalia, J., dissenting).

186 What remedy is left if Congress got serious about separation of powers, other than impeachment of Justices? If Congress took that step, would the Court claim the ultimate constitutional power to interpret Article III's provision that federal judges shall "hold their Offices during good Behaviour"? U.S. Const. art. III, § 1.

187 *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1377 (1997) ("The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter's interpretation as authoritative.").

188 *Id.*

189 *Id.* at 1371–77.

190 *Compare* Johnson v. Eisentrager, 339 U.S. 763, 790 (1950). (refusing to extend jurisdiction to German nationals convicted of carrying out military activities in China against the United States) *and Ex Parte* McCardle, 74 U.S. (7 Wall) 505, 515 (1868) (relying on Article III, Section Two to uphold congressional withdrawal of the Court's jurisdiction) *with* Boumediene v. Bush, 128 S. Ct. 2229, 2251–62 (2008) (extending habeas jurisdiction to detainees at Guantanamo Bay, Cuba). *Compare* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (upholding congressional power to regulate access to the polls under the Fourteenth Amendment) *with* City of Boerne v. Flores, 521 U.S. 531–36 (1997). (striking down the Religious Freedom Restoration Act as an unconstitutional use of congressional power).

191 *See generally* Corn and Jensen, *supra* note 148, at 569 (discussing the constraints that the Uniform Code of Military Justice and the Geneva and Hague Conventions have placed on the government).

192 Alexander and Schauer, *supra* note 196, at 1379.

193 But others have. Mark Tushnet and Robert Bork, who stand at opposite ends of the political spectrum, both advocate that judicial review should end. Professor Tushnet has suggested this constitutional amendment: "The provisions of this Constitution shall not be cognizable by any court." Mark Tushnet, Taking the Constitution Away from the Courts 175 (1999). Robert Bork suggests something less extreme. He would permit judicial review and the Court's constitutional interpretation would bind the particular parties who appeared before the Court, but Congress could by majority vote overturn the Court's interpretation of the particular constitutional provision. Robert H. Bork, Slouching Toward Gomorrah 117 (1996). This author remains committed to the premise that the people are best protected where all three branches contribute their various perspectives and institutional strengths to constitutional interpretation. But how to retain judicial review while eliminating judicial supremacy? That is a problem outside the scope of this article.

194 U.S. Const. art. III., § 2, cl. 2.

195 *Id.*

196 Boumediene v. Bush, 128 S. Ct. 2229, 2274–75 (2008).

197 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

198 *Boumediene*, 128 S. Ct. at 2253.

199 The Federalist No. 49 (James Madison), *supra* note 188, at 313.