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Habeas Corpus and the Exceptions Clause: Exploring Intergenerational Institutional Struggle

By

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I: Introduction

The constitutional history of the United States is filled with disputes over the specific meaning of the text of the 1787 Constitution and certainly the meaning of the words of the Fourteenth Amendment. In 1787, the Framers of the Constitution developed a framework of structures, processes, and powers that has governed the nation since its ratification in 1788 and its start in 1789. However, certain clauses in the Constitution and the unexplained abilities of each of the three branches instigated inter-branch disagreements. The institutional struggles that followed involved opposing interpretations of the text over specific policy goals. Most disputes required more than one law, one executive action, or one judicial decision to resolve an issue. Although the specific fact patterns changed, the struggle over limits of power and interpretations of implied power continued over generations. This paper studied one of these inter-generational, inter-branch conflicts about one specific clause of the Constitution. In each instance, Congress passed a law to respond to internal security threats. Although more than a century separated these two decisions, they demonstrated a continuation of a single struggle over institutional power and appropriate distribution of power between branches of the federal government.

Scholars referred to the clause at issue in both of these conflicts as the Exceptions Clause. Found in Article III, §2, paragraph 2, the clause stated "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as Congress shall make."[1] This sentence, which appeared without qualification or explanation in the Constitution, produced intense debate for the subsequent centuries. On its face, it granted Congress a wide breadth of power over the jurisdiction of the federal judiciary. However, some members of the federal judiciary have

[1] U.S. Const. Art. 3, §. 2.

argued that the statement must be qualified to protect the separation of powers system and the essential function of the United States Supreme Court. The Exceptions Clause became the center of two landmark decisions that occurred generations apart. The first case, *Ex Parte McCardle* (1869), involved a military trial and *habeas corpus* relief sought by a southern newspaper editor during Reconstruction.[2] In 2008, the justices heard a plea for *habeas corpus* relief by detainees in the War on Terror from Guantanamo Bay, Cuba in *Boumediene* v. *Bush*.[3] Although both disputes involved a congressional action to remove the justices' ability to issue writs of *habeas corpus* and the Exceptions Clause, they resulted in different decisions.

Three distinctions proved important between the cases. The different historical contextual understandings of congressional power, the present danger to the United States at that historical moment, and the perceived role of the Supreme Court in the protection of individual liberties became the main factors in the contrasting decisions. This paper demonstrates that changing circumstances produced conflicting outcomes in the interpretation of the Exceptions Clause and the power of the judiciary. Thorough study suggests that the regulatory power by Congress against the Supreme Court depends more on context than on constitutional argument.

II: Literature Review

The complex history of the Exceptions Clause of the 1787 United States Constitution provided a large body of scholarship for review. To understand the different contexts, this analysis is divided into: Section I, a historiography of the repeal of the Habeas Corpus Act of 1867 and Chief Justice Salmon P. Chase's decision for a unanimous Supreme Court in *Ex Parte McCardle* (1869); Section II, a review of literature on the detainees at Guantanamo Bay, Cuba and the decision of *Boumediene* v. *Bush* (2008); and Section III, an analysis of law reviews

[2] 7 Wallace (74 U.S.) 512 (1869).
[3] 553 U.S. 723 (2008).

written about the proper function and use of Exceptions Clause. Together, these sections summarized the existing scholarship around this topic. Therefore, this section demonstrated the historical importance of the Exceptions Clause, the dispute over its use, and how the similar *McCardle* and *Boumediene* cases elicited different results.

Section I

The scholarship about Chase's *McCardle* holding can be separated into two distinct generations. Earlier historians identified the case as an example of unwieldy powers in the hands of the congressional Republicans. These political historians wrote in the early part of the twentieth century, and some of them lived through the periods they examined. The context in which these men lived, studied, and wrote informed their ideas about the *McCardle* episode and the motivations of its actors.

Political historian John W. Burgess wrote his study of the Reconstruction period in 1902. He became a pioneer of serious political science and historical scholarship and brought new methods of research to the United States. His study, *Reconstruction and the Constitution, 1866-1876*, traced the period's impact on the understanding of constitutional principles. When Burgess examined the events before *Ex Parte McCardle*, he criticized the radical Congress for an overreach of power. He questioned the military occupation of southern states in 1868 and called the repeal of the Habeas Corpus Act of 1867 "a very serious stretching of [Reconstruction's] powers by Congress, if not a distinct usurpation."[4] Burgess did not mince words when he described the action as "an abominate subterfuge on the part of Congress and a shameful abuse of its powers."[5] He wrote that Congress removed the appellate jurisdiction from the United

[4] John W. Burgess, *Reconstruction and the Constitution, 1866-1876* (New York: C. Scribner's Sons, 1902), 197.
[5] Ibid.

States Supreme Court surrounding *habeas corpus* "and did so most effectively."[6] However, he did not discuss the opinion of Chief Justice Salmon P. Chase in *McCardle*. Instead, Burgess concluded his study with his judgment of Congress. Burgess' contemporaries commonly abhorred jurisdiction-stripping of the Supreme Court after the United States Civil War.

The famed historian Charles Warren reviewed the *McCardle* episode in his 1926 Pulitzer Prize- winning work *The Supreme Court in United States History*. Like Burgess, he criticized the actions of Congress to shield the Reconstruction Acts from judicial review. Warren described the events through primary sources, including partisan newspapers and congressional floor speeches. However, later historians like Stanley I. Kutler have questioned research in this period for its unequal sympathy to Democrat actors.[7] In his lifetime, Warren worked as a political activist for the Democrat Party, and he served as Assistant Attorney General in President Woodrow Wilson's administration. Therefore, Warren's frame of reference during the struggle over Reconstruction *habeas corpus* may be biased against congressional Republicans. In Warren's examination of the decisions of the justices of the Supreme Court to postpone a decision, he explained the arguments of each side. Republicans in Congress and the media applauded the majority decision to postpone judgment until the legislature had an opportunity to settle the issue.[8] Democrats criticized the Supreme Court for avoiding the questions and its institutional responsibilities.[9] In his examination of the final opinion of the Supreme Court delivered April 12, 1869, Warren focused on the first half of Chase's opinion. He quoted the

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[6] Ibid.
[7] Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1968), 169.
[8] Charles Warren, *The Supreme Court in United States History*, vol. 2 (Boston: Little, Brown, and Co., 1926), 481. *See more* J.G. Randall, *The Civil War and Reconstruction* (Boston: Little, Brown, and Co., 1969), 645. Originally published in 1937, University of Illinois professor of history J. G. Randall supported Warren's view of *McCardle*.
[9] Ibid.

Chief Justice's acceptance of the exception made by Congress and the denial of jurisdiction to McCardle. The focus on that portion of the opinion became the point of departure for another generation of historians.

In 1958, historian John Schmidhauser joined Burgess and Warren's school of *McCardle* interpretation. In his study, Schmidhauser recognized an all-powerful legislative branch that could "abolish state governments, substitute new ones and enforce its action by military occupation virtually secure against Supreme Court interposition."[10] He placed *McCardle* in the context of *Mississippi* v. *Johnson* (1866) and *Georgia* v. *Stanton* (1867), two instances where the Supreme Court denied a constitutional ruling on Reconstruction. These three decisions angered opponents of congressional Reconstruction, and Schmidhauser portrayed the institutional weakness of the Supreme Court in the face of Congress.

In his 1959 opus, *The American Doctrine of Judicial Supremacy*, political scientist and Supreme Court scholar Charles Grove Haines agreed with his contemporary historians. He recognized a Congress which maintained war powers in the territory of the former Confederacy. He called the *McCardle* decision a "sufficient warning that Congress would allow no interference in the program that had been planned."[11] He placed the decision in a context of a slipping judiciary. The third branch lost significant legitimacy during the Civil War, and Haines pointed to the Chase Court's opinion as another sign of a weakened bench.[12] He quoted Chase's opinion, but only focused on the first half, like the other scholars in this school.[13] Later

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[10] John Schmidhauser, *The Supreme Court as Final Arbiter in Federal-State Relations, 1789-1957* (Chapel Hill: University of North Carolina Press, 1958), 82.
[11] Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (New York: Russell & Russell, Inc., 1959), 389.
[12] Ibid.
[13] Ibid., 489-90.

historians focused on Chase's conclusion, which they claimed vindicated the Supreme Court. Haines faulted Chase and his associates for a failure to defend their institution and its abilities.

Although other historians in the twentieth century disagreed with the previous interpretation of *McCardle*, some modern scholars agreed with Brugess' faction. In her examination of newspapers during Reconstruction, media historian Wendy Swanberg agreed with the first generation of scholars. She wrote about the choice to postpone a ruling and let "Congress take the reins."[14] She argued that the partisan newspapers created a narrative about the Supreme Court's intention to invalidate the Reconstruction Acts. These articles frightened congressional Republicans enough to motivate them to remove the appellate jurisdiction of the Supreme Court.[15] Like other scholars before her, Swanberg criticized the usurpation of authority by a Congress controlled by Radical Republicans.

Two chapters in *Institutions of American Democracy: The Judicial Branch*, edited by Kermit L. Hall and Kevin T. McGuire, discussed the *McCardle* case. Political scientist and legal scholars Cass R. Sunstein and Mark Graber perpetuated Burgess' point of view. In response to nervous Republicans and a repeal of jurisdiction, Sustein wrote that "the Court caved in."[16] Furthermore, Graber argued that during Reconstruction "justices do not declare unconstitutional

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[14] Wendy Swanberg, "*Ex Parte McCardle* and the First Amendment during Reconstruction," in *A Press Divided: Newspaper Coverage of the Civil War*, ed. David B. Sachsman (New Brunswick: Transaction Publishers, 2014), 350.
[15] Ibid.
[16] Cass R. Sunstein, "Judges and Democracy," in *Institutions of American Democracy: The Judicial Branch*, ed. Kermit L. Hall and Kevin T. McGuire (Oxford: Oxford University Press, 2005), 42.

laws strongly supported by the national elite."[17] These political scientists echoed the opinions of the first school of historians about the *McCardle* case.

The next generation of historians in *Ex Parte McCardle* read a different meaning from Chase's opinion. In the bibliographical essay of his 1968 book, *Judicial Power and Reconstruction Politics*, historian Stanley I. Kutler wrote that "[i]t is as if a previous generation of historians had left the period standing on its head, and a new group, influenced by a wholly different political and social environment, has set the story straight."[18] Kutler never disputed the facts of the previous historians, but he disagreed with their arguments. He claimed that the problem with their study "has been mainly one of omission. They often failed, for example, to understand or recognize the complex character of political controversies in which there were varied shades of gray, as well as black and white."[19] He disputed the claim of hostile Republicans and a feeble Supreme Court and instead delved into the nuance of the episode.[20]

Kutler argued that the justices of the Supreme Court wrote their opinions with care. He claimed that the high bench still reeled from the negative impact of *Dred Scott* v. *Sanford* (1857) on the Supreme Court's legitimacy.[21] However, Kutler explained that the *McCardle* decision's "limited nature of the repeal," did not suggest weakness, but strength.[22] He noted the final paragraph of Chase's opinion, which reassured the plaintiffs that the repeal of *habeas corpus* jurisdiction extended only to the provisions of the Habeas Corpus Act of 1867, not to the

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[17] Mark Graber, "From Republic to Democracy: The Judiciary and the Political Process," in *Institutions of American Democracy: The Judicial Branch*, ed. Kermit L. Hall and Kevin T. McGuire (Oxford: Oxford University Press, 2005), 405.
[18] Kutler, *Judicial Power and Reconstruction Politics,* 169.
[19] Ibid.
[20] Ibid., 169-70.
[21] Ibid., 84.
[22] Ibid., 101.

Judiciary Act of 1789.[23] To prove this point, Kutler coupled *McCardle* with another case, *Ex Parte Yerger* (1869). In this related decision, the Chase Court affirmed Yerger's plea for a writ of *habeas corpus* under the Judiciary Act of 1789. Kutler concluded that the United States Supreme Court had not been overpowered by the Republicans in Congress, but rather that "Chase's opinion made it emphatically clear that the Court would not tolerate any interference with its proper constitutional functions."[24] Although Warren examined the *Yerger* decision in his book, he missed the hint Chase left in *McCardle* and called it an "unexpected ruling."[25] The emphasis Kutler placed on the final paragraph of Chase's opinion in *McCardle*, along with the Supreme Court's reassertion of institutional authority in *Yerger*, differentiated his line of thought from previous historians.

Celebrated historian of the Civil War and Reconstruction Harold M. Hyman agreed with Kutler and other of his contemporary historians about the Chase Court's decision in *McCardle*.[26] He wrote that Chase was conscious of the mistake of his predecessor, Chief Justice Roger Taney. Hyman argued that the *McCardle* Court avoided a direct confrontation with the executive, but expressed concern about "the decline in separation of powers as a result of Andrew Johnson's southern policy."[27] At a time when the Supreme Court's jurisdiction changed often between civil and military courts in the South, Chase accepted the role of his branch.[28] Therefore, like Kutler, Hyman focused on the last paragraph of the majority opinion in *McCardle*. The Supreme Court refused McCardle's appeal, and the justices accepted Congress' authority to determine

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[23] 7 Wallace (74 U.S.) 506, 515 (1869).
[24] Ibid., 106.
[25] Warren, *The Supreme Court in United States History*, 491.
[26] Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Alfred A. Knopf, 1973), 497.
[27] Ibid.
[28] Ibid., 498.

appellate jurisdiction. However, Hyman emphasized the narrow decision that "McCardle [sic] meant only that quite constitutionally, Congress determined the Court's jurisdiction, which it elected now to partially excise."[29] Hyman understood the limited nature of the jurisdiction-stripping, and recognized other *habeas corpus* avenues to the federal judiciary.

In his contribution to *The Oliver Wendell Holmes Devise*, historian Charles Fairman considered the conflicting institutions in the *McCardle* decision. In the checks and balances scheme of the United States, he wrote that "[i]t has been given to the Supreme Court to mark the limits of all other authorities; it is proper that it be ever mindful of the statutes that limit its own."[30] Fairman defended the Exceptions Clause as a necessary portion of the Constitution to keep the national government in balance. Furthermore, he noted that the majority of the use of the Exceptions Clause provided benefit to the Supreme Court through an alleviation of a burdensome caseload.[31] Fairman explained the contextual pressures upon Congress, and he vindicated their actions in the pursuit of mending the nation. In a factious nation, all three branches of the federal government suffered criticism, and the Supreme Court did not maintain public trust. Like Kutler and Hyman, Fairman pointed to the *Dred Scott* decision as a reason to remain skeptical about the Supreme Court's jurisdiction.[32] He argued that "[s]ubmission to the Court as the true voice of the Constitution presupposes an established confidence in the lofty disinterestedness of its members – something that at the time of *McCardle* the Court did not

[29] Ibid., 505.
[30] Charles Fairman, *History of the Supreme Court of the United States Volume VI: Reconstruction and Reunion, 1864-88* (New York: Macmillan, 1971), 495.
[31] Ibid., 495-96.
[32] Ibid., 507.

enjoy and did not deserve."[33] In this way, Fairman placed the congressional action in a historical context and defended the legislation against the Supreme Court.

Scholars have continued to agree with Kutler and Hyman about the *McCardle* decision. Historian William M. Wiecek accepted Congress' ability "to withdraw this small bit of appellate review authority," in the case.[34] Wiecek viewed the Chase Court's opinion in *Ex Parte Yerger* as vindication. He argued that in regards to the Exceptions Clause, size does matter.[35] The repeal of the Habeas Corpus Act of 1867 did minimal damage to the Supreme Court's overall ability to review *habeas corpus* cases. Wiecek believed this nuance maintained the constitutionality of the repeal, both in spirit and in letter.[36]

Section II

Scholars have only begun to produce historical analysis of the 2008 Supreme Court decision of *Boumediene* v. *Bush*. The recent ruling required significant study into the causes and effects of the majority opinion, and the literature grew. This case proved exceptional when a majority of Supreme Court justices invalidated portions of a law supported by a wartime president and Congress. Scholars divided over the Supreme Court's decision as an effective check on the political branches.

Some scholars have argued that to understand the *habeas corpus* ruling of the Supreme Court, students must look back to the 1215 Magna Carta. The Great Charter between King John and his barons established the rights and protections of the nobility from the sovereign king, and many founding values of the United States grew out of the document. In *Boumediene*, both

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[33] Ibid., 514.
[34] William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life* (Baltimore: Johns Hopkins University Press, 1988), 89.
[35] Ibid.
[36] Ibid., 89, 184.

Associate Justice Anthony Kennedy's majority opinion and Associate Justice Antonin Scalia's dissent referenced the Magna Carta's influence.[37] Political scientist Eric T. Kasper recognized the influence of the Magna Carta in a 2011 article. In the context of *Boumediene,* Kasper argued that *habeas corpus* and other rights found within the Great Charter had grown since the thirteenth century. He believed that the document produced a judicial limitation on executive authority to prevent arbitrary power or imprisonment.[38] Despite the imperfections in the original Magna Carta, centuries of jurists have developed and expanded the meanings into a judicially workable system of rights. In Kasper's view, the safeguards created by the Magna Carta and advanced by its legacy became a powerful check on the executive.[39]

Political scientist Robert Pallitto also looked at *Boumediene* through the lens of the Magna Carta. He argued that the Supreme Court established itself as the protector of individual rights and Anglo-American liberties and not a deferential body to the political branches.[40] The government kept the Guantanamo detainees in an ambiguous legal state with no charges. Therefore, the detainees sought a writ of *habeas corpus* because it was their only avenue to due process.[41] The majority of the justices of the Supreme Court decided that the government had unconstitutionally denied the detainees their *habeas corpus* rights under the Suspension Clause, despite the fact that the Military Commission Act of 2006 (MCA) never formally suspended the writ. Pallitto argued that when the justices extended common law *habeas corpus* rights to the detainees, they did so "on a reading of Anglo-American legal history that gave decisive weight to

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[37] 553 U.S. 740, 845 (2008).
[38] Eric T. Kasper, "The Influence of Magna Carta in Limiting Executive Power in the War on Terror," *Political Science Quarterly* 126 (2011): 574.
[39] Ibid., 577.
[40] Robert Pallitto, "The Legacy of the Magna Carta in Recent Supreme Court Decisions on Detainees' Rights," *PS: Political Science and Politics* 43 (2010): 483.
[41] Ibid.

the importance of individual liberty."[42] The majority of the justices saw the extension of the Magana Carta's principles to be within their struggle against executive overreach.

Harvard Law School professor Gerald L. Neuman submitted an *amicus curiae* brief in the *Boumediene* case and wrote an article about the implications of the holding on *habeas corpus*. Neuman noted that the 2008 decision became the first time the Supreme Court found a violation of the Suspension Clause.[43] Through the Military Commissions Act of 2006, Congress established a process to determine the status of detainees, but the justices of the Supreme Court ruled that process inadequate. The majority argued that the limited judicial review of the D.C. Circuit Court written in the statute illegally suspended the writ of *habeas corpus*. He argued that the Supreme Court used the Suspension Clause as a protection on the individual rights of the detainees and as "an element of the separation of powers."[44] With this decision, the Supreme Court created new precedent, new uses, and new implications of the Suspension Clause.

Baher Azmy, law professor at Seton Hall University and counsel to one of the petitioners in *Boumediene*, defended the institutional role of the Supreme Court in enemy combatant cases. After an examination of the related cases like *Hamdi* v. *Rumsfeld* (2004), *Rasul* v. *Bush* (2004), and *Hamdan* v. *Rumsfeld* (2006) - which he called the "Enemy Combatant Triad" - Azmy reviewed the facts and holdings of *Boumediene*.[45] He argued that the Roberts Court decided correctly the case and upheld the constitutional role of the federal judiciary in the separation of power scheme.[46] Instead of deference to the political branches, Azmy applauded the Supreme

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[42] Ibid., 486.
[43] Gerald L. Neuman, "The Habeas Corpus Suspension Clause after *Boumediene* v. *Bush*," *Columbia Law Review* 110 (2010): 538.
[44] Ibid., 548.
[45] Baher Azmy, "Executive Detention, *Boumediene*, and the New Common Law of Habeas," *Iowa Law Review* 95 (2010): 449.
[46] Ibid., 450.

Court for its stand. However, he also noted this was the "the first time that the Court has invalidated the collaborative judgment of the political branches to develop policy in the context of a military conflict."[47] He wrote that the justices followed the "Common Law Model of adjudication" described by Richard Fallon and Daniel Meltzer, which used a "'creative, discretionary function in adapting constitutional and statutory language.'"[48] Azmy believed the *Boumediene* decision fit together with the Enemy Combatant Triad as a useful check on executive power.

Cornell University Law School professor Michael C. Dorf identified institutional issues that preceded *Boumediene*. He argued that "a largely passive Congress, an extraordinarily assertive President, and a divided but determined Supreme Court led to the MCA."[49] Dorf used the Enemy Combatants Triad as a story of executive overreach and legislative deference. He saw the Supreme Court as the last remaining check on presidential power.[50] However, Dorf also noted the limitations of the Supreme Court's ability to curb executive action. In each of the Triad decisions, Dorf emphasized the narrow holding and the precarious nature of the majority. In the face of a divided judiciary, he wrote that *Hamdan* "will have little impact in the light of the MCA."[51] The approval of congressional majorities lessened the power of the Supreme Court's institutional check.

Political scientist Darren Wheeler took a different approach to the separation of powers scheme. He wrote in 2009 that the Supreme Court proved to not be an effective check on

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[47] Ibid., 460.
[48] Ibid., 453.
[49] Michael C. Dorf, "The Detention and Trial of Enemy Combatants: A Drama in Three Branches," *Political Science Quarterly* 122 (2007): 48.
[50] Ibid., 53.
[51] Ibid., 58.

presidential power, especially regarding the Guantanamo Bay cases.[52] Wheeler observed that "there is evidence to suggest that the Bush administration thought the Court's detainee decisions were both consequential and limiting," but concluded that the president kept significant powers over detainee matters.[53] He supported his thesis with four arguments. First, executive action dwarfed the speed of judicial decisions. The president's ability to work in "'political time'" proved speedier than "'judicial time.'"[54] Next, the narrow questions provided for limited answers unlike the large policy statements of the president.[55] The third argument against a limiting judiciary is the execution of its decisions. Wheeler argued that since the main enforcement mechanism of the Supreme Court is the executive branch, the president may weaken, subvert, or even ignore the ruling. He wrote that "the president attempted to shape the implementation process of the Court's detainee decisions in such a manner as to retain significant control over detainee policy."[56] Therefore, despite the political branches' loss before the Supreme Court, there was no effective check on their power.

Section III

The Exceptions Clause of the 1787 Constitution produced significant discussion among academics and jurists. Theories about the meaning and application of this single sentence nestled within Article III captivated legal minds for generations. Arguments about the ability of Congress to withdraw appellate jurisdiction from the federal judiciary consumed significant ink and created divides among scholars. Scholars developed various tests to rationalize abstract constitutional theory with the legal realism of the actions of the justices.

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[52] Darren A. Wheeler, "Checking Presidential Detention Power in the War on Terror: What Should We Expect form the Judiciary?" *Presidential Studies Quarterly* 39 (2009): 678.
[53] Ibid., 678.
[54] Ibid., 682.
[55] Ibid., 688.
[56] Ibid., 691.

Harvard University professor of law Henry M. Hart Jr. created the most popular school of thought on the Exceptions Clause. In his famous 1953 article "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," Hart established the Essential Role Test.[57] He argued that the Constitution gave Congress the ability to make exceptions and regulations to any appellate jurisdiction of the Supreme Court as long as the overall legitimacy of the judiciary remained intact. Hart proposed an admittedly indeterminate framework. He believed that the Constitution gave significant power to Congress, but that power to make exceptions cannot destroy the body it attempted to regulate. As long as it fit into that broad framework, any statutory exemption would pass the Essential Role Test. When presented with concerns about his scheme, Hart emphasized that state courts were both the primary guarantors of individual rights and outside of the regulatory reach of Congress.[58] The Hart school and the Essential Role Test accumulated many followers who defended and clarified the initial argument.

Legal scholar Leonard G. Ratner became one of the closest disciples of Hart. He rejected the notion that Congress held plenary power over the Supreme Court's appellate jurisdiction, but he found the power significant.[59] When he examined the *McCardle* case, Ratner found the repeal of appellate jurisdiction constitutional and Chase's opinion appropriate. He argued that the episode could be viewed as "acknowledging the existence of congressional power to thwart

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[57] Henry M. Hart Jr., "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," *Harvard Law Review* 66 (1953): 1365. *See more* Martin Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," *Northwestern University Law Review* 77 (1982): 143, 150. Professor Redish focused on the states' rights portion of the Essential Role Test where states are the primary guardian of individual rights.

[58] Ibid., 1401.

[59] Leonard G. Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," *University of Pennsylvania Law Review* 109 (1960): 171.

the Supreme Court's appellate jurisdiction through *ad hoc* legislation."[60] Ratner noted that McCardle could have brought his case before the high court through another avenue. Therefore, the overall power of the Supreme Court was not destroyed, and the repealing act passed the Essential Role Test.

University of California Davis School of Law professor William S. Dodge defended Hart's argument and clarified his predecessor's meaning. Dodge supported a limited use of the Exceptions Clause and the Essential Role Test.[61] He considered the meaning of supremacy for the high court and responded to other theories, including the Distributive Reading Test. Dodge fit the *McCardle* decision into his framework and defended Chief Justice Chase's opinion. He wrote that "a statute like the one at issue in *Ex parte McCardle* would not be unconstitutional, not just because other federal courts (and indeed the Supreme Court through a different route) remained open to hear the case, as Hart argued, but because the Court retains enough total jurisdiction to make it the most important court."[62] He even conceded the potential political problems of Congress' exceptions ability. As long as Congress respected individuals' constitutional rights and maintained the essential role of the Supreme Court, Dodge wrote that the legislature held tremendous power.[63]

Historian William M. Wiecek concurred with the Hart school. He supported the Essential Role Test and believed it to be a strong limitation on Congress' exceptions authority.[64] Wiecek wrote that when Congress removes jurisdiction, it freezes constitutional interpretation into place. He used that argument to explain Congress' seldom expression of that power.

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[60] Ibid., 180.
[61] William S. Dodge, "Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an 'Essential Role,'" *Yale Law Journal* 100 (1991): 1014.
[62] Ibid., 1031-32.
[63] Ibid., 1032.
[64] Wiecek, *Liberty Under Law*, 184.

Determined legislators feared a permanent ruling against their ideology and therefore proved hesitant to limit the Supreme Court.

Another scholar to evaluate the Exceptions Clause and the Essential Role school was the Charles Warren Senior Fellow in American Legal History at Harvard University School of Law, Raoul Berger. In his 1969 book, dedicated to Professor Hart's memory, Berger examined the Framers' intentions of the Exceptions Clause. He argued that the notes from the 1787 Convention suggest a different meaning to the clause. He explained that "[t]he purpose of the 'exceptions' clause, in Madison's words, was 'to provide against inconveniences,' to serve the 'convenience and secure the liberty,' said Maclaine and Marshall, of all people."[65] The use of congressional exceptions authority would only extend to questions of fact, not of law. In fact, Berger argued that "[c]onstitutional issues therefore fell outside of the remedial purposes of the 'exceptions' clause."[66] He recognized the federal judiciary's role in the protection of individual rights and liberties and believed it would be inconsistent of the Framers to allow the legislature to prevent the judiciary from that duty.[67] Berger's arguments do not fit neatly into the Hart school, and his historical analysis produced a new theory of the Exceptions Clause.

One of the first scholars to write about the Exceptions Clause was Associate Justice Joseph Story in his unanimous opinion in *Martin* v. *Hunter's Lessee* (1816).[68] Story considered the scope of the federal judiciary and its jurisdiction. In his reading of Article III of the Constitution, Story divided the appellate jurisdiction of the Supreme Court into two distinct

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[65] Raoul Berger, *Congress v. The Supreme Court* (Cambridge: Harvard University Press, 1969): 288.
[66] Ibid., 289.
[67] Ibid., 294.
[68] 14 U.S. 304. (1816) *See more* Theodore Eisenberg, "Congressional Authority to Restrict Lower Federal Court Jurisdiction," *Yale Law Journal* 83 (1974): 498. William Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953), 610-20.

categories. The first group consisted of the first three mentions of appellate jurisdiction in the Constitution, which included: (1) "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their authority," (2) "all Cases affecting Ambassadors, or other public Ministers or Consuls," and (3) "all Cases of admiralty and maritime Jurisdiction."[69] Story argued that the inclusion of the word "all" before each of these groups - a word absent in the second category - made these cases constitutionally more important.[70] Because of the national significance of these types of cases, Story argued that "[t]he original or appellate jurisdiction ought not therefore to be restrained."[71] The same protection did not apply to the second category of cases and controversies. Story wrote that the ability of the Supreme Court to hear cases of those groups under its appellate jurisdiction was susceptible to the limitations of Congress.[72] Story's reading of the Exceptions Clause became a starting point for many subsequent legal scholars.

Yale University law professor and former clerk to Appeal Judge Stephen Breyer, Akhil Reed Amar, combined the writings of Hart and Story into a third school. In his 1985 article, Amar established his Distributive Reading Test to understand the Exceptions Clause.[73] Amar adopted Story's two tiers of Article III cases. The first category of cases, which used the word "all," Amar termed the "Mandatory Cases."[74] These questions garnered more importance in Amar's view; therefore, they required that some federal court must have the ability to resolve

[69] U.S. Const. Art. 3, §. 2.
[70] 14 U.S. 334.
[71] Ibid., 335.
[72] Ibid., 338.
[73] Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," *Boston University Law Review* 65 (1985): 206.
[74] Ibid., 246.

them. The second category, or "permissive categories," proved less important.[75] Amar argued that the Framers did not necessitate a federal court hearing for these cases. When he considered the Exceptions Clause, Amar believed "the congressional power to make exceptions to the Supreme Court's appellate jurisdiction includes the power to restrict the scope of federal jurisdiction by eliminating appeals in some or all of the six permissive categories. State court judges may constitutionally be left with the last word on these cases."[76] However, the mandatory cases could not be decided by state courts. Those questions required a federal court opinion, although Congress held the power to decide which federal court heard the case.[77] Therefore, Congress could create an unreviewable federal court on individual issues. Amar used Convention records and the Judiciary Act of 1789 to defend his tier system. Although he found specific issues with both the Hart and Story schools, the fusion of the two produced a workable framework and the Distributive Reading school of the Exceptions Clause.

In 2007, two former clerks to Associate Justice Antonin Scalia joined together to examine the Exceptions Clause in a new way. They criticized Scalia's dissent in *Hamdan* v. *Rumsfeld*, and postulated a response. Steven G. Calabresi, a law professor at Northwestern University, and Gary Lawson, a law professor at Boston University, argued that the vesting clause of Article III gave all judicial power to the federal judiciary.[78] The authors accepted the tier system put forward by Story and Amar, but they disagreed with previous schools about the Exceptions Clause. Instead, they proposed a different procedure where "Congress makes 'Exceptions' to the Supreme Court's *appellate* jurisdiction when it adds those cases to the Court's *original*

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[75] Ibid., 245.
[76] Ibid., 255.
[77] Ibid.
[78] Steven G. Calabresi and Gary Lawson, "The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia," *Columbia Law Review* 107 (2007): 1003.

jurisdiction."[79] They emphasized that all cases with a federal issue must be under the supervisory control of the Supreme Court, in some fashion. Calabresi and Lawson admitted their theory conflicted with Chief Justice John Marshall's opinion in *Marbury* v. *Madison* (1803) and believed that case wrongly decided.[80] They argued that their structural and textualist reading of the Constitution informed an opinion in which the Exceptions Clause granted no power to Congress.[81] Calabresi and Lawson produced a new school of thought about the jurisdictional limitations of the Supreme Court.

While Calabresi and Lawson take a stand on the periphery of the existing literature, legal scholar Gerald Gunther argued for the other extreme. Gunther dismissed the Essential Role Test as a restraint on the power of Congress not found in the Constitution.[82] He pointed to the *McCardle* decision along with other Supreme Court writings, congressional actions, and the text of the Constitution to dismiss any internal limits on the ability of Congress to withdraw appellate jurisdiction.[83] Instead, Gunther defended a broad and discretionary jurisdiction-stripping power of Congress. He even dismissed the motivations and intentions of legislators as important points of the argument.[84] When he added his opinion to the conversation, Gunther created a school of support for congressional power that is nearly plenary over the appellate jurisdiction of the federal judiciary.

Another theory about the Exceptions Clause came from Tara Leigh Grove, law professor at William and Mary School of Law. She argued that scholars have misused their ink in

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[79] Ibid., 1037.
[80] Ibid.
[81] Ibid., 1039.
[82] Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate," *Stanford Law Review* 36 (1984): 908.
[83] Ibid.
[84] Ibid., 920.

examination of the regulation of Supreme Court appellate jurisdiction. Instead, Grove believed the main use of the clause has been "to facilitate, not to undermine, the Supreme Court's constitutional role."[85] Instead of a threat to the judiciary's ability to function, Congress used the Exceptions Clause to lighten the burden on the justices, particularly with the 1891 introduction of the writs of certiorari. The legislature utilized the clause to change the jurisdictional requirements of the Supreme Court to allow the justices to choose their own docket. Grove looked away from assumptions of antagonism between branches and examined the times the when the Supreme Court and the political branches stood together.[86] Like Fairman, she wrote that opponents of certain Supreme Court decisions appreciate the uniformity and stability of a judgment.[87] However, Grove noted admitted "that Congress has the raw power to strip the Court's appellate jurisdiction over certain classes of claims."[88] She cited the *McCardle* episode as an exception to her theory of coordinating branches.[89] In an examination of the Military Commissions Act of 2006, Grove accepted the exception of appellate jurisdiction as it conformed to the Essential Function Test.[90] She wrote that the *McCardle* and *Boumediene* episodes do not disprove her theory because of their limited scope.[91]

Legislators' use of the Exceptions Clause and its interpretation by federal judges has sparked dispute since the ratification of the Constitution. In the *McCardle* and *Boumediene* decisions, the proper function the regulatory power of Congress occupied a prominent part of the controversy. Therefore, the clause is an important aspect in the institutional struggle between the

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[85] Tara Leigh Grove, "The Exceptions Clause as a Structural Safeguard," *Columbia Law Review* 113 (2013): 929.
[86] Ibid., 933.
[87] Ibid., 931.
[88] Ibid., 946.
[89] Ibid., 990.
[90] Ibid., 993.
[91] Ibid., 994.

political branches and the federal courts. This study examined two complex uses of the Exceptions Clause, and those cases prompted more controversy for the future.

III: The Exceptions Clause in The Founding Generation

A good method to gain an understating of the Exceptions Clause is to examine its original intention. A national judiciary was a novel idea during the 1787 Federal Constitutional Convention in Philadelphia, and the delegates debated the topic. Then, delegates at state ratifying conventions repeated many of the same arguments about the federal courts. In the state of New York, three defenders of the potential Constitution published *The Federalist*, a series of essays which explained the scheme of government in general and the judiciary in particular.[92] These three sources provided understanding of the theories of the judiciary and the Exceptions Clause. After the ratification of the Constitution, the First Congress enacted the Judiciary Act of 1789 that further shaped the federal court system. That legislation provided an idea of a judiciary in practice. Together, these primary documents allowed modern scholars a glimpse into the ideas and arguments of the Founding generation. Therefore, these documents constitute the place to start the understanding of power granted by the Exceptions Clause. Through that understanding, it became clear that the Founding era intended the legislature to have the broad ability to strip the federal courts of appellate jurisdiction for convenience, distance, or any other reason the legislature, the representatives of the people, saw fit.

The Philadelphia Convention hosted a wide range of debates on the Constitution. James Madison compiled detailed notes on the Convention's proceedings, and scholars analyzed these

[92] Alexander Hamilton, "Federalist No. 80," eds. George W. Carey and James McClellan, *The Federalist* (Indianapolis: Liberty Fund, 2001), 416.

notes for the arguments on each side of the debates.[93] On August 27, 1787, the delegates addressed the article on the judiciary. Serious disputes arose over the original and appellate jurisdiction of the federal courts, especially in regards to state court jurisdictions. Some delegates believed a strong national judiciary would replace the powers and responsibilities of the state courts. If federal courts possessed the ability and funding to hear claims under state laws, these delegates feared the state courts would become redundant. To some members, those federal courts would infringe on the rights of the states. Therefore, to assuage these apprehensions, many of the initial proposals gave the legislature authority to direct the actions of the judiciary. For example, Madison noted one motion, which stated, "'[i]n all other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct.'"[94] Under this provision, much of the jurisdiction of the federal courts would be subject to the prior instruction of Congress. However, this proposal guaranteed that the federal courts were not an independent department, but rather would be subservient to the legislature. The delegates defeated this proposal by a wide margin. Next, a unanimous vote removed another proposed grant of power to Congress: "[t]he Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time."[95] This sentence was present in an initial draft, but the delegates removed it to separate the judiciary from under the direct control of the legislature. Together, these two actions displayed the sense of the Convention in favor of an independent judiciary. Through significant debate, the federal judiciary arose as a separate branch of the national government. However, the

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[93] Max Ferrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven: Yale University Press, 1966), 1: 1
[94] Ferrand, *The Records of the Federal Convention of 1787*, 2: 431.
[95] Ibid., 2: 187, 431.

Exceptions Clause still granted power to Congress to check the federal judiciary. The delegates did not spend significant debate on that clause at this convention. Therefore, further explanation came during the ratifying conventions in each state.

While the Federal Convention met in secret from May to September 1787, each state then held its own open ratification convention to discuss and review the new form of central government. Therefore, these state conventions often provided scholars with a more complete idea of the arguments presented on each side of the question. At the Virginia Ratification Convention, the Federalists defended their document against their Anti-Federalist opponents. As president of that convention, Edmund Pendleton spoke in favor of the Constitution's judicial proposal. When he considered appellate jurisdiction, Pendleton acknowledged that "it is proper and necessary, in all free governments, to allow appeals, under certain restrictions, in order to prevent injustice."[96] As he noted the benefits of an appeals structure as a feature of republican self-government, he also recognized the necessity of potential exceptions to the process. As his speeches continued, Pendleton explained his ideas about the Exceptions Clause. He spoke about his concerns about portions of Article III in response to the objections raised by the Constitution's opponents. One of these features of appellate jurisdiction Pendleton questioned was the clause, "'both as to law and fact.'"[97] He recognized and may have even sympathized with the Anti-Federalist's concerns about this function of the appeals process, but Pendleton did not reject the entire Article because of this clause. Instead, he pointed his colleagues to the end of the paragraph and said, "[w]e find them followed by words which remove a great deal of

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[96] Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention as Philadelphia, in 1787: Together with the Journal of the Federal Convention, Luther Martin's Letters, Yate's Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and other Illustrations of the Constitutions*, 5 vols. (Philadelphia: J. B. Lippincott Co., 1941), 3: 518.
[97] Ibid., 3: 519.

doubt – 'with such exceptions, and under such regulations, as Congress shall make;' so that Congress may make such regulations as they may think conducive to the public convenience."[98] At this point in the convention, Pendleton took solace in the presence and function of the Exceptions Clause. Although he questioned parts of Article III, Pendleton supported the Constitution because of the legislative powers under the Exceptions Clause. The concern about the appellate jurisdiction over law and fact stemmed from English common law origins where peer juries decided facts and cases in a trial court. Appellate courts considered questions of the law, its applicability, and its constitutionality. However, English common law courts used the facts established at the trial level. An alternate system, inspired from French civil law, never required a jury to decide the facts of a case. Delegates at the ratification convention feared the implications of a trial without a jury, and they questioned the appellate structure of the Constitution. In this proposed system, appellate federal courts possessed the ability to review both law and fact. Therefore, opponents of the Constitution feared that an appeal of the facts denied the common law right of a jury trial.

In response to those fears, Pendleton explained the proper function of a jury. At the trial level, the defendant would still have his common law right to a peer jury. According to Pendleton, an appellate court would, "consider the fact and law together, and decide accordingly."[99] While the trial court made decisions about facts including testimony and evidence, a higher court would review those decisions. If they decided against the factual judgment of a lower court, Pendleton assured that the appellate court would remand the case back to a new jury trial.[100] In his speech to defend the common law right to a jury trial,

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[98] Ibid.
[99] Ibid.
[100] Ibid., 3: 520.

Pendleton also displayed the inherent inconveniences within that type of judicial system. With multiple courts reviewing laws and facts, only to have cases remanded for a new trial, Pendleton explained that the process could place a large burden of time and money on all parties involved in a legal dispute. Additionally, Congress would only authorize a small number of federal trial or appellate courts in the United States at first. A travel burden would be put on individuals just to appear in the necessary courts for a trial. Therefore, he argued that in certain circumstances Congress should have the ability to limit the jurisdiction of the federal courts. Pendleton noted that exceptions could be made and "appeals may be limited to a certain sum."[101] He meant that the legislature could remove certain classes of cases or the review of facts from appellate jurisdiction of federal courts. He said "[y]ou cannot prevent appeals without great inconveniences; but Congress can prevent that dreadful oppression which would enable many men to have a trial in federal court, which is ruinous."[102] Pendleton thought it would benefit the parties if their elected representatives saved them from an arduous journey to a federal court over a small sum of money when a state court could settle the dispute.

Other Federalists at the Virginia Ratifying Convention agreed with Pendleton's assessment of the Exceptions Clause. James Madison and John Marshall each spoke in defense of the federal judiciary and it appellate powers. Both of these men addressed the issue of fact and law before the federal appeals courts. In order to preserve jury trials, Madison said that "I contend that, by the word *regulations*, it is in the power of Congress to prevent it, or prescribe such a mode as will secure the privilege of jury trial. They may make a regulation to prevent such appeals entirely; or they may remand the fact, or send it to an inferior contiguous court, to

[101] Ibid.
[102] Ibid.

be tried; or otherwise preserve that ancient and important trial."[103] Madison suggested that through congressional action to protect the jury trial, it may remove appeals completely from the federal judicial system. The Federalists sought to avoid unnecessary inconvenience in the judiciary, and the Exceptions Clause granted authority to the legislature to ensure it. In that hypothetical, Madison argued that Congress could decide which court, either trial or appellate, to be the final word on a case. To avoid inconvenience was one way the Federalists suggested use of the clause, but their examples were not complete. In his speech, John Marshall supported expansive power even more. He said "Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people."[104] Although he expected exceptions to be narrowly tailored to specific cases, Marshall argued that in certain circumstances society must trust the jury's decision without an appeal if the legislature believed that outcome to be in the best interest of the liberty of the people. In the twentieth century, Berger read these debates to disallow congressional authority over the exceptions to constitutional issues, but his conclusion appeared at odds with the speeches of the delegates.[105] Marshall explained that Congress' regulatory power extended to both fact and law to whatever scope the legislature thought beneficial to the people's interest. Therefore, congressional authority with the Exceptions Clause, under Marshall's reasoning, must extend to constitutional issues as well. The Virginia Federalists defended the Constitution and its Exceptions Clause. Their debates focused on the removal of appellate jurisdiction based on the facts of a case, but also allowed the legislature significant discretion over its use in constitutional questions.

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[103] Ibid., 3: 534.
[104] Ibid., 3: 560.
[105] Berger, *Congress v. The Supreme Court*, 289.

Alexander Hamilton explained this dispute in *The Federalist* Numbers 80, 81, and 82. Along with Madison and John Jay, Hamilton wrote a series of essays in the newspapers of the state of New York to defend the Constitution and respond to its critics. In one of his essays on the judiciary, Hamilton addressed the question of appellate jurisdiction over law and fact. Although he defended the appellate jurisdiction of the federal courts over questions of fact, he rejected the idea that it would put an end to the jury trial.[106] Instead, Hamilton explained how infrequent exceptions to this policy by the legislature "will enable the government to modify it [appellate jurisdiction] in such a manner as will best answer the ends of public justice and security."[107] However, Hamilton noted these regulations as rare occurrences to avoid major inconveniences or disruptions of the judicial system. In most cases from both state and lower federal courts, he supported "an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts."[108] Hamilton defended the Exceptions Clause in his essays with similar arguments as Pendleton, Madison, and Marshall did in Virginia. To assuage fears of the expansive appellate jurisdiction of the federal judiciary, these men pointed to the Exceptions Clause as an authority of the popular legislature to defend the common law rights of society. The way Hamilton wrote about this clause was similar to the Elastic Clause, found earlier in the Constitution. He argued that "[i]f some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected, that the national legislature will have ample authority to make

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[106] Alexander Hamilton, "Federalist No. 81," eds. George W. Carey and James McClellan, *The Federalist* (Indianapolis: Liberty Fund, 2001), 425.
[107] Ibid.
[108] Alexander Hamilton, "Federalist No. 82," eds. George W. Carey and James McClellan, *The Federalist* (Indianapolis: Liberty Fund, 2001), 428.

such *exceptions*, and to prescribe such regulations, as will be calculated to obviate or remove the inconveniences."[109] The Framers of the Constitution understood the unforeseen possibilities that may arise under their structure of government. Therefore, to make the scheme endure for the future, they included open-ended grants of authority, like the Exceptions and Elastic Clauses, into the document to allow the government to address unforeseen situations. These clauses endowed the legislature with the sweeping ability to solve inconveniences or problems from within the constitutional structure.

Another observation in Hamilton's essays related to Justice Story and Amar's identification of the use of the word "all" in the Constitution. Story and Amar thought the inclusion of the word in Article III before the first three classes of cases elevated them to a higher status. The authors relegated other controversies before the judiciary to a permissive status. However, their theory of diction could be questioned through Hamilton's use of the word "all." In his essay, Hamilton used the word far more times than the Constitution and for different purposes. For example, among the first controversies that Story and Amar put in the permissive category were "to Controversies to which the United States shall be a Party" and "to Controversies between two or more States"[110] However, in his listing of "the judicial authority of the Union," Hamilton wrote, "3d, to *all* those in which the United States are a party; 4th, to *all* those which involve PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves."[111] Throughout his paper, Hamilton used the word "all" without particular discretion as to the status

[109] Hamilton, "Federalist No. 80," 416.
[110] Amar, "A Neo-Federalist View of Article III," 242. *Martin* v. *Hunter's Lessee* 14 U.S. 334 (1816). U.S. Const. Art. 3, §. 2.
[111] Hamilton, "Federalist No. 80," 411. Emphasis added.

of the cases. The essay did not prohibit Story and Amar's tier system among federal cases and controversies, but it showed that Hamilton did not use the word "all" to signify its existence.

After the ratification of the United States Constitution, its supporters received the opportunity to put their rhetoric and philosophy into action. To implement judicial policy, the First Congress passed and President George Washington signed the Judiciary Act of 1789, which established inferior federal benches, determined the nature of the Supreme Court, and addressed the jurisdiction of federal courts. Although this Act constituted positive law, many scholars held it in a regard similar to the Constitution. Many of the members of the First Congress were Federalists who supported ratification and understood the intent of the document. Amar wrote that scholars held it in too high of esteem, but that the Act is an important primary source into the Federalists' idea of the judiciary.[112] However, Amar's view is in the minority among historians. In this piece of legislation, the First Congress established strict monetary limits of federal jurisdiction. Although the statute never attributed its constitutional authority to the Exceptions Clause, it regulated which cases could be decided by state and federal courts and which types of cases qualified for a federal appeal based on dollar figures. For example, Section 11 of the Act required a $500 minimum sum for the case to be heard by a federal circuit court in original jurisdiction.[113] The lower limit set by Congress kept disputes in state courts as often as possible. Amar identified Sections Nine, 11, and 12 as modifications to appellate jurisdiction under the Exceptions Clause.[114] The statute made each of those regulations based on the amount of money disputed in the case. However, Congress also made exceptions based on other factors. In fact, the Judiciary Act clarified the use of writs of *habeas corpus* by the courts of the United States. It

[112] Amar, "A Neo-Federalist View of Article III," 259.
[113] 1 Stat. 73, § 11.
[114] Amar, "A Neo-Federalist View of Article III," 260.

gave the federal judiciary a wide breadth of power to issue writs, but included an exception: "*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."[115] Notably, even in the First Congress, the federal legislature regulated the ability of the federal courts to provide writs of *habeas corpus* in certain circumstances. These regulations became precursors to the statues at issue in *Ex Parte McCardle* and *Boumediene* v. *Bush*.

Between 1787 and 1789, Federalists throughout the United States debated and employed the Exceptions Clause of the Constitution. While they focused upon its use to keep appellate courts from a re-examination of facts to thwart the jury trial, some like Hamilton showed that the clause could be used in many situations to further the public good. Those theories became real in the Judiciary Act of 1789 when Congress restricted the jurisdiction of the federal courts to hear certain cases. The evidence suggested that the Framers of the Constitution wrote the Exceptions Clause to carry significant power over the federal judiciary to avoid inconveniences and protect the common law rights of citizens.

IV: Reconstruction and the Regulation of *Habeas Corpus*

After the United States Civil War, the healing of the nation became the primary issue before federal legislators. Through statute, military action, and presidential enforcement, the federal government orchestrated a massive Reconstruction program to ensure state governments, protect African Americans in their localities, and build a reunion of the country. When the military arrested Mississippi newspaper editor William H. McCardle for the publication of incendiary articles about the Reconstruction Acts, a constitutional crisis ensued. He asked the

[115] 1 Stat. 73, § 14.

local federal court for a writ of *habeas corpus*, but they denied him. When McCardle appealed to the United States Supreme Court, rumors circulated throughout the nation that the justices planned to invalidate congressional Reconstruction. Using the expansive powers of the Exceptions Clause, congressional Republicans removed the appellate jurisdiction of the Supreme Court to hear *habeas corpus* cases under the Habeas Corpus Act of 1867. Chief Justice Salmon P. Chase and the other justices acknowledged the authority of Congress to do so. The episode displayed Congress' broad regulatory power over Supreme Court jurisdiction, even over a fundamental Anglo-American liberty like *habeas corpus*.

During Reconstruction, the national government worked to protect minorities in the South. To aid recently freed slaves and to reward those African Americans who fought for the Union in the Civil War, the national government created an avenue from state courts into the federal judiciary through the writ of *habeas corpus*. The Reconstruction Congress feared that state courts in the South denied fair trials to African Americans soldiers accused of crimes or white officers who carried out federal laws against the states. On December 19, 1865, Congressman Samuel Shellabarger of Ohio directed the House Judiciary Committee to produce legislation "to enable the courts of the United States to enforce the freedom of the wives and children of soldiers [. . .] and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery."[116] However, this legislation proved inadequate to protect the liberties of African Americans and national officers in the South. Therefore, Congress decided that new legislation was needed and passed the Habeas Corpus Act of 1867. This law extended the appellate jurisdiction of federal courts to allow appeals "[f]rom the final decision of any judge, justice, or court, inferior to the circuit court [. . .] and from the judgment

[116] *Cong. Globe*, 39th Cong., 1st Sess. 87 (1865).

of said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders, as well for the custody and appearance of the person alleged to be restrained of his or her liberty."[117] In short, the extension of *habeas corpus* jurisdiction made it easier for a plaintiff to enter the federal court system. When he spoke on the bill, Senator Reverdy Johnson of Maryland claimed, "[i]t does nothing more than give the circuit court to ascertain whether there is a cause for the arrest or not."[118] Although Johnson minimized the potential impact of the measure, it granted significant authority to the United States government to ensure fairness in state and lower federal courts. In this era, the national government inserted itself into the affairs of state governments with the motive to uphold fundamental constitutional liberties and protections. Kutler looked at the all the Reconstruction Acts and wrote "[t]he 1867 program was the ultimate expression of Republican policy."[119] Together the laws took effect in the South, and they created numerous opponents there. As public opinion in the North and the South turned away from Reconstruction, the Habeas Corpus Act of 1867 moved into national view with the arrest of McCardle.

After his service as an officer in the Confederate Army, McCardle worked as a newspaper editor in Vicksburg, Mississippi. On November 8, 1867, military officers arrested McCardle for the publication of insurrectional articles in *The Vicksburg Times* in violation of the Reconstruction Acts, and a military commission assembled for his trial.[120] Before his trial in

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[117] 14 Stat. 385, Chapter 28.
[118] *Cong. Globe*, 39th Cong. 1st Sess. 729 (1867).
[119] Stanley I. Kutler, "*Ex Parte McCardle*: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered," *American Historical Review* 72 (1967): 837.
[120] Fairman, *History of the Supreme Court of the United States*, 437. *See more* Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States*, (New York: Oxford University Press, 1992): 534-35. That work provided a concise summary of the causes and arguments of *Ex Parte McCardle*. The *New York Times* republished one of the articles in question. "Reconstruction: A Test Case in the United States Supreme Court – The Opposition to

military court, McCardle petitioned to the United States Circuit Court for a writ of *habeas corpus*. He argued that under the judicial doctrine established just the prior year in *Ex Parte Milligan*, he could not be tried by the military commission. The *Milligan* decision stated that a military commission could not try citizens where civilian courts were open.[121] McCardle argued that as long as the federal courts remained open, a military trial infringed on his constitutional rights.[122] Despite the precedent, the circuit court denied McCardle's request for *habeas corpus* and ordered him to remain under the military's control.[123] With the decision of the circuit court judge, McCardle became eligible for an appeal to the United States Supreme Court under the Habeas Corpus Act of 1867, which his lawyers filed for him filed on December 23, 1867. He used the law, which was produced by the Republican Congress to protect Northern interests in the South, to argue against the constitutionality of the Reconstruction Acts.

Although the intention of the law may have been different, McCardle's appeal followed the guidelines of the 1867 act. The Supreme Court scheduled a date to hear McCardle's plea for *habeas corpus*. Distinguished lawyers Jeremiah Black and David Dudley Field represented McCardle and pressed for a speedy hearing. President Andrew Johnson's Attorney General, Henry Stanbery, refused to argue the case in federal court because he believed the Reconstruction Acts were unconstitutional.[124] Instead, the Department of War hired Senator Lyman Trumbull of Illinois and Matthew Carpenter of Wisconsin to represent the government. Together, they tried to slow or dismiss the judgment.[125] Fairman wrote that as a prominent

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the Laws in Mississippi – An Irate Editor on the Officers and Operations of the Freedman's Bureau," *New York Times* (New York: NY), Jan. 14, 1868.
[121] 71 U.S. (4 Wall.) 2 (1866).
[122] Fairman, *History of the Supreme Court of the United States*, 452.
[123] Kutler, "*Ex Parte McCardle*: Judicial Impotency?" 839.
[124] Hyman, *A More Perfect Union*, 504.
[125] Kutler, *Judicial Power and Reconstruction Politics*, 102.

Senate Republican, Trumbull's actions to delay the case "reflect how critical the matter appeared to the leaders in Congress."[126] They feared the repercussions of the *McCardle* decision on the entire Reconstruction program. The Supreme Court scheduled arguments for March 2, 3, 4, and 9, and each side received six hours to speak. In the time between McCardle's appeal and oral arguments, newspapers around the nation promulgated rumors about potential outcomes of the case. More than any other factor, the press escalated the issue of one Mississippi editor's freedom into a national battle over the constitutionality of the Reconstruction Acts. At that time, newspapers wrote with a sharply partisan point of view, and Swanberg claimed that the "[*McCardle*] case was fairly well understood at the time both by politicians and the public, thanks to the careful attention and descriptions of partisan newspapers."[127] Papers like the *Springfield Republican* printed rumors that the Supreme Court planned to strike down the entire program by a five to three vote.[128] The *Chicago Tribune* published an article and predicted that, "[i]t is generally believed among Conservative members of the bar that reconstruction will receive a check in the Supreme Court."[129] These articles appeared in papers across the nation almost three months before the beginning of oral arguments at the Supreme Court, and nearly a year before the justices announced a decision. However, the publication of rumors incited panic in congressional Republicans and supporters of the Reconstruction Acts. The invalidation of the program would deal a significant blow to Radicals' policies and electoral prospects. Even after the oral arguments, congressional Republicans responded to, what Kutler called "talk circulating in the community – and inspired in great part by Democratic politicians and newspapers."[130] The

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[126] Fairman, *History of the Supreme Court of the United States*, 451.
[127] Swanberg, "*Ex Parte McCardle* and the First Amendment during Reconstruction," 337.
[128] *Springfield Republican* (Springfield, MA), Jan. 10, 1868.
[129] *Chicago Tribune* (Chicago, IL), Jan. 17, 1868.
[130] Kutler, "*Ex Parte McCardle*: Judicial Impotency?" 842.

uncertain climate scared the congressional majorities enough for them to take drastic steps to halt the Supreme Court in its tracks.

The Supreme Court heard arguments in the *McCardle* case in early March, 1868, but then made an unusual decision. After the national media attention and the rumors about the outcome of the case, congressional Republicans considered different legislatives tactics to hinder the justices' decision. Because of the legislative movements in early March 1868 and the potential effect a decision would have on the Reconstruction Acts, the majority of the justices of the Supreme Court decided to postpone their judgment. In a letter written in April 1868, Chief Justice Chase explained their decision that, "[i]n the McCardle [sic] case I agreed with all the Judges except two (Grier and Field), who have made public their dissent, that it would not become the Supreme Court to *hasten* their decision of an appeal for the purpose of getting ahead of the legislation of Congress."[131] According to the Chief Justice, his institution must respect the legislative process and allow Congress to propose a solution before a judicial decision. In fact, Chase quoted the Exceptions Clause and acknowledged the power of Congress "to except such cases as that of McCardle from its appellate jurisdiction."[132] The justices' postponement showed prudent constitutional philosophy, but it also displayed a protection of the Supreme Court's legitimacy and reputation in the context of a national popular partisan dispute. The negative consequences of *Dred Scott* v. *Sandford* (1857) hung over the Supreme Court, and Chase avoided partisan conflicts on the bench. Although the justices divided over the institutional deference of the Supreme Court in the postponement of a decision, they all agreed on Congress' exceptions power in the final decision almost a year later.

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[131] Salmon P. Chase, "To John D. Van Buren," in *The Salmon P. Chase Papers: Volume 5 Correspondence, 1865-1873*, ed. John Niven (Kent, OH: Kent State University Press, 1998), 200.
[132] Ibid.

To defend their program against the potential assault from the Supreme Court, congressional Republicans looked to weaken the institution of the judiciary. Members submitted different proposals to adjust the structure and function of the high bench. Some pieces of legislation sought to increase the number of the justices on the Supreme Court, or to require a supermajority to invalidate a law. Some of the ideas gained little traction in Congress, but Republicans were determined to take action. On March 12, 1868 Congressman James F. Wilson from Iowa proposed an amendment to a bill on *habeas corpus*. The original purpose of the bill amended the Judiciary Act of 1789 to extend appellate jurisdiction to cases of revenue and custom house officers.[133] Wilson amended the bill to repeal portions of the Habeas Corpus Act of 1867, in particular, the section McCardle used to appeal to the Supreme Court.[134] Congressman Robert C. Schenck, the primary sponsor of the bill in the House, allowed the amendment, and the chamber agreed to the measure without debate.[135] Two days later, Congressman Benjamin Boyer, a Democrat from Pennsylvania, spoke on the bill. He claimed that it passed "without any objection solely because it was introduced in a manner calculated to deceive and to disarm suspicion of its real design and effect."[136] Boyer complained further that the bill was a clear targeted political maneuver. He noted the progress of the *McCardle* case and accused Wilson's amendment "to operate upon the very case which is now pending before the Supreme Court."[137] When pressed by Republicans about his objections, Boyer questioned the constitutionality of the Reconstruction Acts and the deception of the repeal act. He believed Wilson proposed the repeal "because they fear their acts of legislation have been

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[133] *Cong. Globe*, 40th Cong. 2st Sess. 1859 (1868).
[134] Ibid., 1860. The repealed section is 14 Stat. 385, Chapter 28.
[135] Ibid.
[136] Ibid., 1881.
[137] Ibid., 1882.

unconstitutional; it must be because they are afraid to submit them to the test of judicial inquiry."[138] Schenk responded with his real motive, that "I have lost confidence in the majority of the Supreme Court. [. . .] I believe that they usurp power whenever they dare to undertake to settle questions purely political."[139] In the eyes of congressional Republicans, the Supreme Court was no longer a prudential body they could trust to uphold their view of the Constitution.

Although the debates over the motivations for the repeal of Chapter 28 of the Habeas Corpus Act of 1867 provided a window into the Reconstruction context, the arguments never answered the fundamental question of the constitutionality of appellate jurisdiction-stripping. When the 40th Congress discussed its ability to withdraw the appellate jurisdiction of the Supreme Court even after the justices heard oral arguments, both sides agreed. Boyer acknowledged the constitutionality of Wilson's legislation, even if he opposed the policy in this circumstance.[140] In other words, both opposing partisan factions agreed that the legislature possessed the power to strip the federal courts of appellate jurisdiction in this context and on this issue. After passage in Congress, the bill, "An Act to Amend the Judiciary Act, Passed the 24th of September, 1789," went to President Andrew Johnson for his review.

When Johnson received the bill for his approval or veto, he was in the middle of an impeachment. In the nation's first presidential impeachment trial, House Republicans accused Johnson of the violation of several federal laws and attempts to attack Congress.[141] The accusations of inter-branch struggle went both ways, however. Johnson's Secretary of the Navy

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[138] Ibid.
[139] Ibid., 1883.
[140] Ibid., 1882.
[141] Fairman, *History of the Supreme Court of the United States*, 522. *See more* Michael Les Benedict, *Impeachment and Trial of Andrew Johnson* (New York: W. W. Norton & Co., 1973), 97. Les Benedict discussed the use of the Supreme Court as "the President's weapon," in his conflicts with Congress.

Gideon Welles discussed the *habeas corpus* repeal in his diary. He used harsh terms to deplore the motivations and product of congressional Republicans. He wrote that "[b]y trick, imposition, and breach of courtesy an act was slipped through both houses repealing the laws of 1867 and 1789, the effect of which is to take from the Supreme Court certain powers, and is designed to prevent a decision in the McCardle [sic] case."[142] Although he misrepresented the legislation, which repealed no part of the Judiciary Act of 1789, Welles' notes hinted at the administration's policy on the 1868 Act. In his diary, Johnson's Secretary of the Interior Orville H. Browning wrote that the president asked him to draft a veto to express that policy.[143] In the midst of the partisan impeachment dispute, the embattled Johnson continued to express his disapproval of federal legislation through vetoes. When this repealing legislation reached his desk, he vetoed it.

Along with his veto, Johnson wrote a message to the Senate with his reasoning and suggestions. In the message, Johnson made specific historical and constitutional arguments about what he saw as deficiencies in the legislation. While he agreed with the original section of the bill, he wrote that "[t]he second section, however, takes away the right of appeal to that court in cases which involve the life and liberty of the citizen, and leaves them exposed to the judgement of numerous inferior tribunals."[144] Johnson argued that the repealing legislation deprived citizens of their rights and referenced the *McCardle* case in particular as an example. With his veto, Johnson defended the judiciary and its place within the separation of powers

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[142] Gideon Welles, "March 14, Saturday," in *The Diary of Gideon Welles: Secretary of the Navy Under Lincoln and Johnson Volume III January 1, 1867-June6, 1869*, ed. Howard K. Beale (New York: W.W. Norton & Co., 1960), 314.
[143] Orville Hickman Browning, "Friday March 20, 1868," in *The Diary of Orville Hickman Browning*, 2 vols, ed. James G. Randall (Springfield, IL: Illinois State Historical Library, 1925-1933), 1: 188.
[144] Andrew Johnson, "Veto of Judiciary Act Amendment," in *The Papers of Andrew Johnson: Volume 13, September 1867 – March 1868*, ed. Paul H. Bergeron (Knoxville: University of Tennessee Press, 1996), 693.

system. He wrote, "[i]f, therefore, it should become a law, it will by its retroactive operation wrest from the citizen a remedy which he enjoyed at the time of his appeal."[145] Johnson argued that his veto protected the constitutional liberties of McCardle against an aggressive legislature and the Army. Furthermore, he wrote that the legislation lacked "harmony with the spirit and intention of the Constitution."[146] Despite his words about the virtues of the institution of the Supreme Court in this message, Johnson may have only written what was politically beneficial. Kutler argued that any defense of the Supreme Court from Johnson was "only a matter of mere expediency."[147] During his congressional career, Johnson lamented the federal judiciary and sought to limit the authority of judges and justices. However, when he faced Radical Republicans as President, Kutler argued that Johnson and his party held the Supreme Court as "the Great White Hope," and their best chance to thwart Radical Reconstruction.[148]

The second to last paragraph of Johnson's short message to the Senate contained a historical view of the Supreme Court and a veiled comment on the current political situation in the United States. In his idealistic reading of history, Johnson wrote "[t]hus far during the existence of the Government the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgments and decrees have always been sought and deferred to with confidence and respect."[149] When Johnson extolled the virtues of the justices of the Supreme Court, he made a broad statement unsupported by historical evidence. Just over one decade ago, the majority of the justices of the Supreme Court issued a judgment, which invalidated the legitimacy of Johnson's

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[145] Ibid., 694.
[146] Ibid.
[147] Kutler, *Judicial Power and Reconstruction Politics*, 39.
[148] Ibid., 38.
[149] Johnson, "Veto of Judiciary Act Amendment," 694.

statement. The *Dred Scott* decision forced people across the United States to question the Supreme Court and its ability to deliver justice in its judgments. In 1857, Chief Justice Taney's political decision contributed to the exact kind of dispute between parties that Johnson argued it had helped to end. Johnson's assertion on behalf of the high court contradicted the contextual mindset of that period, which Kutler, Fairman, and Hyman argued remembered *Dred Scott* well.[150] The political Johnson wrote appealing words to impugn the actions of congressional Republicans, but his words misled the reader. In his final justification for his veto, Johnson noted the opportunity for the justices to invalidate the Reconstruction Acts. He acknowledged the Republican's attempt to remove jurisdiction "as an admission of the unconstitutionality of the act on which its judgment may be forbidden or forestalled."[151] During his impeachment battle, Johnson used the veto as an opportunity to land a partisan attack against Republicans. He sought the invalidation of the Reconstruction Acts to remove the military from the South and weaken the power of Congress. Johnson's veto took a political motive, the ending of the Reconstruction Acts, and discussed it in broad and one-sided terms.

After the President's message, Congress had an opportunity to override the veto and legalize the *habeas corpus* repeal. Because of the national attention on the case, the bill received considerably more debate. Democrats in the House and the Senate followed President Johnson's lead in their argument against the legislation.[152] In addition, newspapers of both parties speculated on the passage of the bill. Despite the increased debate, by March 27, 1868 both chambers agreed to the repeal of *habeas corpus* and overrode the presidential veto.[153] The

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[150] Fairman, *History of the Supreme Court of the United States*, 507. Kutler, *Judicial Power and Reconstruction Politics*, 84. Hyman, *A More Perfect Union*, 497.
[151] Johnson, "Veto of Judiciary Act Amendment," 694.
[152] *Cong. Globe*, 40th Cong. 2st Sess. 2115 (1868).
[153] Ibid., 2170.

Senate voted 33 to nine, with 12 senators absent, and the House voted 114 to 34, with 41 members not voting.[154] Under the authority of the Exceptions Clause, the legislature regulated the appellate jurisdiction of the Supreme Court and proclaimed that the justices had no ability to hear certain *habeas corpus* claims. With the passage of the law, the Supreme Court began to reconsider the judgment of the *McCardle* case, completed with the new exceptions.

In the face of the repealing act, the Supreme Court considered the best way to decide the case. On March 30, 1868, the majority of the justices of the Supreme Court decided to postpone their decision in the *McCardle* case again. A newspaper based in Washington D.C., the *National Intelligencer*, described the discussion between the justices and the counsels. When Black informed the Supreme Court of Congress' finalization of the *habeas corpus* repeal, the justices asked each of the counsels to prepare briefs on the new jurisdictional question.[155] The decision to postpone the judgment in *McCardle* was not unanimous, however. Associate Justices Robert Grier and Stephen Field blasted this second postponement. Together, they went a step further than justices commonly did to express dissent, and they published their criticism in newspapers. Grier wrote that the "case was fully argued at the beginning of this month. It is a case that involves the liberty and rights not only of the appellant, but of millions of our fellow citizens."[156] In his criticism of his fellow justices, Grier called for the swift decision in the case as the duty of his institution. Justice Field concurred with Grier's criticism. Outside of the judiciary, Grier and Field found allies who shared their view. Browning disparaged Congress' aggression and the Supreme Court's unwillingness to act. He wrote about "[t]his exhibition of cowardice on the part of the Court, and their readiness to surrender the inalienable rights of the citizen to the

[154] Ibid., 2128, 2170.
[155] *National Intelligencer* (Washington, DC) March 31, 1868.
[156] Ibid., April 6, 1868.

usurpation and tyranny of Congress is among the alarming symptoms of the times."[157] Furthermore, Browning referenced Justice Field and wrote that if the Supreme Court had delivered an opinion in April, 1868, the majority of the justices would have sided with McCardle and "the rights of the citizen would have been sustained by all the Court but Swayne."[158] The Supreme Court's term ended in early April so that the justices could ride their various circuits. Therefore, the justices would not reconvene until the end of 1868. They postponed numerous cases, including *McCardle*, and planned to hear new arguments in the later term. This schedule had the added benefit of delaying the decision until after the presidential election in November, 1868. Since the *McCardle* decision could invalidate Reconstruction, it had the ability to make a major impact on the electorate. The *Springfield Republican* wrote that the Supreme Court "will not meddle with congressional reconstruction till after the presidential election, when nobody will ask its interference."[159] The justices' writings do not list this as a factor in their decision to postpone the case. Chief Justice Chase even wrote in a letter that "[i]t was especially desirable to me to have the case decided; for it is highly probable that I shall meet the question on the Circuit; and I should feel better if I had a decision to guide and support me."[160] Regardless if the justices intentionally postponed the decision to avoid interference in presidential politics, they now had months to consider and prepare their holding in *McCardle*. After the postponements, the inter-branch conflicts, and numerous constitutional arguments, the Supreme Court announced its decision in *Ex Parte McCardle* on April 12, 1869. The extended legal battle concluded with a unanimous opinion, delivered by Chief Justice Chase. Two questions were before the justices.

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[157] Orville Hickman Browning, "Thursday April 9," in *The Diary of Orville Hickman Browning*, 2 vols, ed. James G. Randall (Springfield, IL: Illinois State Historical Library, 1925-1933), 1: 191.
[158] Ibid., 191-92.
[159] *Springfield Republican* (Springfield, MA) April 1, 1868.
[160] Chase, "To John D. Van Buren," 200.

First, did the Supreme Court have the jurisdiction to hear the case? Second, if yes, did McCardle's imprisonment violate his constitutional rights to due process? In a short and direct opinion, Chase addressed only the first question. Because of the act of March, 1868, which removed appellate jurisdiction from the Supreme Court, the justices possessed no jurisdiction to rule on *McCardle*.[161] Although Chase recognized that the Supreme Court's appellate jurisdiction stemmed from the Constitution and not individual pieces of legislation, he wrote that "[i]t is hardly possible to imagine a plainer instance of positive exception."[162] Chase directed his next argument to the division throughout the nation on the impetus behind the repealing act. In clear terms, Chase declared, "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution."[163] The Chief Justice ignored the questions about congressional attempts to protect the Reconstruction Acts and the institutional criticisms of the Supreme Court. Instead, he focused solely on the Exceptions Clause and the ability of Congress to remove jurisdiction. Without jurisdiction, Chase refused to consider the second question. Historians like Burgess and Warren stopped their analysis of the decision at this point halfway through the opinion. With Chase's denial of jurisdiction, they levied claims of a weakened Supreme Court in the face of the Radicals in Congress. However, Chase left a hint to the bench and bar in the last paragraph of his decision to protect the future abilities of the federal judiciary.

In his last word on the *McCardle* decision, Chase considered the judicial writ of *habeas corpus*, in a larger sense than the act of 1867. He responded to the argument of McCardle's counsel "that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But

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[161] 7 Wallace (74 U.S.) 512 (1869).
[162] Ibid., 514.
[163] Ibid.

this is in error. [. . .] [The repealing act of 1868] does not affect the jurisdiction which was previously granted."[164] The unanimous Supreme Court defended its ability to hear *habeas corpus* cases from any authority besides what the 1868 act explicitly repealed. For example, the justices had the ability to hear *habeas corpus* claims under the jurisdiction outlined in the Judiciary Act of 1789. With this final argument, Chase produced a narrow opinion in the *McCardle* case on *habeas corpus*. Other attorneys recognized the hint and appealed *habeas corpus* claims to the Supreme Court under different statutes.

Observers of the *McCardle* decision viewed the power of the Exceptions Clause over the appellate jurisdiction of the Supreme Court. Because of the repealing act of 1868, Congress thwarted a judicial decision that was already in progress. In a letter he wrote after the decision, Chief Justice Chase wrote that "P.S. I may say to you that had the merits of the McCardle [sic] case been decided the court would doubtless have held that his imprisonment for trial before a military commission was illegal."[165] The author of the opinion that kept McCardle in a military prison acknowledged that the editor deserved a writ of *habeas corpus*. Instead of protecting the rights of the individual, the unanimous justices respected the constitutional ability of Congress to except this particular case from the Supreme Court's jurisdiction. Furthermore, when the justices refused to consider the motivations behind jurisdiction-stripping legislation, they allowed Congress to thwart cases on an *ad hoc* basis. The Exceptions Clause granted considerable power to congressional majorities over the federal judiciary in the separation of powers system.

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[164] Ibid., 515.
[165] Salmon P. Chase, "To Robert A. Hill," in *The Salmon P. Chase Papers: Volume 5 Correspondence, 1865-1873*, ed. John Niven (Kent, OH: Kent State University Press, 1998), 301.

After McCarlde's case concluded, the nation was left to wonder about the future of *habeas corpus* before the Supreme Court. However, the hint Chase left in his opinion became relevant in *Ex Parte Yerger* (1869).[166] Edward Yerger killed a military officer in Jackson, Mississippi, and the military arrested him.[167] Before his military trial, Yerger petitioned the civilian courts for a writ of *habeas corpus* under the Judiciary Act of 1789. When the federal circuit court denied Yerger's plea, he appealed to the United States Supreme Court for relief. Chase delivered this opinion as well, and crafted a different statement than the one he wrote in *McCardle*. This time, Chase wrote a longer decision and studied the history of *habeas corpus* from English common law origins, through the Judiciary Act of 1789, and the repealing act of 1868. In clear terms, Chase explained his position, and he differentiated this holding from *McCardle*. He wrote:

> It seems to be a necessary consequence that if the appellate jurisdiction of *habeas corpus* extends to any case, it extends to this. [. . .] It is proper to add that we are not aware of anything in any act of Congress, except the act of 1868, which indicates any intention to withhold appellate jurisdiction in *habeas corpus* cases from this Court or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. We agree that it is given subject to exception and regulation by Congress, but it is too plain for argument that the denial to this Court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ.[168]

Chase extended *habeas corpus* protection to *Yeger* for multiple reasons. First, he argued that the ability of the Supreme Court to issue these writs stemmed from the Constitution and the Judiciary Act of 1789. The repeal act of 1868 never affected these sources of *habeas corpus* authority. Second, Chase again recognized the power of the Exceptions Clause to inhibit the Supreme Court from this decision. He accepted the ability to hear *Yerger* only in the absence of

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[166] 8 Wallace (75 U.S.) 85 (1869).
[167] Fairman, *History of the Supreme Court of the United States*, 564-70.
[168] 8 Wallace (75 U.S.) 102-03 (1869).

other jurisdiction-stripping legislation. In the final argument in this portion of the decision, Chase foreshadowed Hart's doctrine of the Exceptions Clause in the Essential Role Test. The justices heard this case because to reject it would have weakened the Great Writ and the essential function of the Supreme Court. With the *McCardle* decision in recent memory, the Chase Court clarified the Exceptions Clause, reaffirmed the accessibility of the writ of *habeas corpus*, and defended the institutional role of the Supreme Court.

The entire *McCardle* episode provided an example of the proper use of the Exceptions Clause. Congressional Republicans stripped the appellate jurisdiction of the Supreme Court for *habeas corpus* claims under the Habeas Corpus Act of 1867. When Chief Justice Chase wrote his opinion in the case, Democrats misunderstood his meaning and accused the justices of weakness and deference. However, in *Ex Parte Yerger*, Chase declared the broad power his institution maintained to issues the writ of *habeas corpus*. The two cases demonstrate the interaction between the Supreme Court and the Exceptions Clause. *McCarlde* confirmed the ability of Congress to regulate appellate jurisdiction, and *Yerger* made it clear that the Supreme Court never lost its entire institutional authority.

V: Military Commissions and the Exceptions Clause

After the *McCardle* episode, Congress did not use its authorities under the Exceptions Clause often. In fact, the next case study came over a century later, in the early 2000s. The context of the twenty-first century differed from the Reconstruction period, and the branches of the federal government viewed the Constitution and their respective powers in a new manner. In the time between the two cases, the United States saw the rise of the administrative state and the imperial presidency. The power of Congress had diminished as the scope of the executive branch grew. In this context, a radical terror group in the Middle East called al-Qaeda attacked

the United States on September 11, 2001. In response to these attacks, President George W. Bush shifted his administration towards national security. As Commander-in-Chief, Bush used armed forces in the Middle East to thwart further actions against the United States. However, many legal questions arose as real plans began to take shape. Any captured enemy combatants in the War on Terror never represented a state, but rather they fought for a religious ideal. The mastermind behind the September 11 attacks, Osama bin Laden, claimed to fight for the promotion of his strict view of Islam in the Middle East and around the globe. Lawyers and politicians in the United States questioned if international laws like the Geneva Conventions applied to these combatants. This problem of classification developed as the military created a structure of detention and prosecution of enemy combatants. The Uniform Code of Military Justice (UCMJ) maintained a legal structure in the case of other state actors, but the Bush administration held that these protections did not extend to the non-state terrorists. Therefore, the administration developed procedures for the legal detention and trial of these combatants. These proposals included executive orders, amendments to Department of Defense appropriations, and the Military Commissions Act of 2006. After an inter-branch struggle between the political branches and the federal judiciary, Congress returned to its ability under the Exceptions Clause to restrict the appellate jurisdiction of the Supreme Court. Policymakers in the political branches created a legal and practical trial system without the protections of the federal courts. However, in this historical context, the Supreme Court demonstrated less deference to the political branches and their ability under the Exceptions Clause to strip the federal judiciary's appellate jurisdiction. The 2008 decision, *Boumediene* v. *Bush*, displayed a rejection of Congress' power to regulate the high court's jurisdiction in *habeas corpus* disputes.

The *Boumediene* case came late in the struggle over military commissions between the political branches and the Supreme Court, and it involved a review of the Enemy Combatant Triad and the Detainee Treatment Act of 2005. Only days after the September 11 attacks, the Senate and House passed a joint resolution called the Authorization for the Use of Military Force (AUMF).[169] After Bush signed the legislation, it authorized him "to use all necessary and appropriate force" against any individual or entity associated with the attacks.[170] With this congressional grant of power to the executive branch, Bush organized a system of detention and trials for those accused of terrorism and located it in Guantanamo Bay, Cuba. The military detained an American-born man who fought against the United States in Afghanistan, Yaser Hamdi. Hamdi's father filed a suit to the federal court and sought a legal challenge to the designation of his son. In her 2013 book *Out of Order*, Associate Justice Sandra Day O'Connor explained the progress of the enemy combatant cases.[171] She rejected the administration's wartime argument "that the separation of powers required that the courts play a far more limited role in reviewing discretionary judgments of the executive branch."[172] When she authored the majority opinion in *Hamdi* v. *Rumsfeld* (2004), Justice O'Connor affirmed that "the Great Writ of habeas corpus [sic] allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."[173] In that case, the justices preserved the rights of an American citizen against executive detention.

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[169] *Authorization for the Use of Military Force*, Public Law 107- 40, *U.S. Statutes at Large* 115 (2001): 224.
[170] Ibid.
[171] Sandra Day O'Connor, *Out of Order: Stories from the History of the Supreme Court* (New York: Random House, 2013), 17.
[172] Ibid.
[173] 542 U. S. 507 (2004).

In the same year, the justices confirmed the reach of *habeas corpus* relief to the non-citizen detainees at Guantanamo Bay. In the decision *Rasul* v. *Bush* (2004), Associate Justice John Paul Stevens wrote that "[a]liens held at the base [Guantanamo Bay], no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241."[174] Justice Stevens referenced the section of the United States Code that conferred particular *habeas corpus* jurisdiction to the federal courts. In this decision, Stevens declared that the Constitution and the jurisdiction of the federal courts extended to the base where the United States military "exercises 'complete jurisdiction and control,'" like the naval base in Cuba.[175] The extension of federal court jurisdiction became important in subsequent legislation and judicial opinions because it demonstrated a significant limitation to the Bush administration's use of executive power.

In response to the *Hamdi* and *Rasul* decisions, the political branches planned new legislation. Senator John McCain, a Republican from Arizona, proposed an amendment to the Department of Defense appropriations bill, and he called it the Detainee Treatment Act of 2005 (DTA).[176] The legislation organized the Combatant Status Review Tribunals (CSRT's) and created many rules for the military detention and trial of non-state combatants. As an administrative court, the CSRT's possessed the sole ability to declare a detainee as an enemy combatant. The detainee could appeal the decision of that tribunal to the United States Court of Appeals for the District of Columbia Circuit, which the DTA stated had "exclusive jurisdiction to determine the validity of any final decision."[177] In addition to the CSRT's, McCain limited the jurisdiction of the federal judiciary in detainee cases. The DTA amended Section 2241 and

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[174] 542 U. S. 481 (2004).
[175] Ibid., 480.
[176] *National Defense Authorization Act for Fiscal Year 2006*, Public Law 109- 163, *U.S. Statutes at Large* 119 (2006): 3136. The Detainee Treatment Act is Title XIV of the law and begins on 3474.
[177] Ibid., 3477

stated that "no court, justice, or judge shall have jurisdiction to hear or consider" a plea for the writ of *habeas corpus* or any other legal action against the United States from a Guantanamo Bay detainee."[178] Without a specific reference to the constitutional authority, that section asserted Congress' power under the Exceptions Clause to restrict the jurisdiction of federal courts. Of all the controversial proposals within the DTA, the jurisdiction-stripping section raised the biggest constitutional question. The legislation suggested that an administrative court under the supervision of a federal appeals court provided a constitutional substitute for the traditional writ of *habeas corpus*.

After the passage of the DTA, the Supreme Court prepared to rule on the case *Hamdan* v. *Rumsfeld* (2006). That case involved Osama bin Laden's driver, Salim Ahmed Hamdan, who the United States government kept in detention at Guantanamo Bay. His lawyers asked the Supreme Court for a writ of *habeas corpus*. The Bush administration's lawyers pointed to the DTA as a statutory prohibition against the issuance of the writ. However, the justices heard the case, and in the majority opinion, Justice Stevens rejected the government's argument. He ruled that since the *Hamdan* case began prior to the passage of the DTA, the law's provisions never applied to this case.[179] Therefore, the justices refused to consider Congress' use of the Exceptions Clause to strip jurisdiction. Instead, Justice Stevens wrote that Hamdan's detention came from the Bush administration's understanding of the AUMF without specific congressional authorization.[180] Furthermore, the majority found that the trial process established by the government violated the UCMJ's standards for courts-martial.[181] Since the executive commissions lacked explicit congressional authorization, the Supreme Court justices gave little deference to President Bush.

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[178] Ibid., 3478.
[179] 548 U. S. 579-80 (2006).
[180] O'Connor, *Out of Order*, 17.
[181] 548 U. S. 557 (2006).

In the complex case, the majority of the justices struck down significant portions of the established military commissions. In addition to the majority decision, several questions could only be answered with a plurality of the justices. Those portions of *Hamdan* suggested a number of unfinished disputes that the justices would face again.

After the judicial defeats in the Enemy Combatant Triad, President Bush demanded a stronger remedy. His administration gleaned the suggestions of the justices and crafted new legislation with prominent congressional Republicans. The new measure authorized the military to detain and try suspected enemy combatants, and it expanded the stripping of judicial jurisdiction. To demonstrate that national defense was a top legislative priority, President Bush made an unusual trip to Capitol Hill to meet with lawmakers. The Senate Majority Whip, Mitch McConnell of Kentucky, introduced the compromise bill, which became the S. 3930 Military Commissions Act of 2006 (MCA). That legislation developed a new system of tribunals to determine the status of enemy combatants and responded to the criticisms of the justices of the Supreme Court. In addition, the bill stripped the *habeas corpus* jurisdiction from the Supreme Court again, but to a greater extent. The bill amended 28 U.S.C. § 2241 to state that

a. (e)(1) 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.
b. (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[182]

[182] *Military Commissions Act of 2006,* Public Law 109- 366, *U.S. Statutes at Large* 120 (2006): 2636.

The legislation also denied the appeal of any alien detained since September 11, 2001.[183] That portion of the statute responded to Justice Steven's opinion in *Hamdan,* and it sought to keep detainee cases of *habeas corpus* off of the Supreme Court's docket. Like the DTA, the MCA allowed the detainees a limited appeal after the military commission. The bill granted "the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission."[184] Under the MCA, detainees could appeal only matters of law, not fact. The legislation limited the Court of Appeal's jurisdiction to a consideration of the extent to which the commissions adhered to the MCA and "to the extent applicable, the Constitution and the laws of the United States."[185] The legislation also allowed the Supreme Court to review the Court of Appeals decision. Although the MCA laid out the process of judicial review, it created a limited one. In theory, a detainee could appeal the determination of his status to the high bench, but he could not ask the justices for a writ of *habeas corpus*. With the power of the Exceptions Clause, the MCA created what legislators believed to be an adequate and reasonable substitute to the *habeas corpus*.

Since the MCA resulted of a combination of prior detainee bills, it passed both chambers without committee hearings and with little floor debate. Related bills received hearings in committees, however. In the Senate, the Judiciary Committee met on August 2, 2006 to discuss the prosecution of terrorists.[186] Republican Chairman Arlen Specter of Pennsylvania called and questioned the Judge Advocate Generals (JAGs) of the Army, the Navy, the Air Force, and the Marine Corps along with the Acting Assistant Attorney General on the legal reach of the United

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[183] Ibid.
[184] Ibid., 2622.
[185] Ibid.
[186] U. S. Congress, Senate, Committee on the Judiciary, *The Authority to Prosecute Terrorists Under the War Crime Provisions of Title 18,* 109th Cong. 2nd sess., 2006, 1.

States Constitution and its relation to international statues like Common Article 3 of the Geneva Conventions. Specter asked the witnesses for their legal opinion about justiciable offenses. In reference to the inter-branch struggle between the political branches and the Supreme Court, Specter said, "[s]o let us try to work it out so we do not take the risk of having it stricken again."[187] Senator Specter desired a workable system that adhered to Bush's policy objectives. However, he also wanted a law the Supreme Court found constitutional. Much discussion occurred over the role of federal courts and military commissions between members of the committee, and when asked, the JAGs each said that the best way to prosecute suspected terrorists was through a military commission rather than a federal court.[188]

S. 3930 never received a committee vote because other lawmakers combined other reports to produce the compromise bill. Instead, after being introduced by Senator McConnell, the clerk read the measure on the Senate floor and laid it for consideration. A major opposition amendment came from Specter. He made the amendment's intentions clear, and stated, "[m]y amendment would retain the constitutional right of *habeas corpus* for people detained at Guantanamo."[189] Specter spoke of the fundamental rights guaranteed by the United States Constitution and his belief that those rights extended to the detainees at Guantanamo Bay. He referenced the Suspension Clause of the Constitution, which limits the government's ability to deny *habeas corpus* rights.[190] He argued the jurisdiction-stripping of *habeas corpus* without a formal suspension violated the Constitution. Specter deferred to the judiciary, and he trusted their constitutional judgement. Although his proposed amendment failed in the Senate, Specter's

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[187] Ibid., 12.
[188] Ibid., 15.
[189] Senator Arlen Specter, speaking on S. 3930, 109th Cong., 2nd sess., *Congressional Record* 152 (September 27, 2006): S10243.
[190] U.S. Const. Art. 1, §. 9, cl. 2.

arguments proved similar to those made in the Supreme Court's *Boumediene* decision. The Senate and the House passed the MCA on partisan grounds with little dispute, and the legislation proceeded to President Bush' desk for his approval.[191]

Before President Bush signed the Military Commission Act of 2006 into law, he hosted a signing ceremony at the White House and made a public statement in support of the legislation. In his address, Bush explained his full support the bill and said "[i]t is a rare occasion when a President can sign a bill he knows will save American lives; I have that privilege this morning."[192] Bush made an argument for his support of the MCA based on the policy. His remarks did not focus on the institutional struggle between the political branches and the Supreme Court over jurisdiction and *habeas corpus*. Instead, he contended that the new law would "allow us to prosecute captured terrorists for war crimes through a full and fair trial."[193] Bush maintained the goal of the legislation and praised the broad grant of power to the executive branch. However, he acknowledged the complex legislative and judicial history to the trial of military detainees. Bush looked back to the executive commissions struck down in the *Hamdan* decision and said, "the legality of the system I established was challenged in the court, and the Supreme Court ruled that the military commissions needed to be explicitly authorized by the United States Congress. [. . .] With the Military Commission Act, the legislative and executive branches have agreed on a system that meets our national security needs."[194] In an attempt to comply with the justices' opinion, President Bush and the Republican Congress authorized the

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[191] *Military Commission Act of 2006*, S. 3930, 109th Cong., 2nd sess., *Congressional Record* 152 (September 28, 2006): S10420, H7951.
[192] George W. Bush, "Remarks on Signing the Military Commissions Act of 2006," in *Public Papers of the Presidents of the United States: George W. Bush, 2006, Book II-Presidential Documents: July 1-December 31, 2006,* (Washington, DC: Government Printing Office, 2010), 1857.
[193] Ibid.
[194] Ibid., 1859.

Military Commission Act of 2006. Bush did not mention the Exceptions Clause or the removal of appellate jurisdiction, but argued about the legality of the established tribunals. He sought to demonstrate the unity between the political branches in the war on terror and against the Supreme Court.

As the commissions established under the MCA began to take shape, the lower federal courts shifted their interpretation of detainee's rights. These judges outside of the DC Circuit Court of Appeals read the MCA and determined they lacked jurisdiction. Justice O'Connor, who retired from the Supreme Court in early 2006, wrote that "[a]s a result of the MCA, lower-court habeas corpus [sic] challenges filed by prisoners at Guantanamo questioning their detainment were dismissed for lack of jurisdiction."[195] On its face, the political branches achieved the desired effect of the new law. Since 2002, the United States government had detained Lakhdar Boumediene and other Bosnian citizens at Guantanamo Bay. These detainees or their representatives filed repeatedly in the federal courts for some type of relief. However, the MCA blocked their path. When the detainees' lawyers argued before the D.C. Circuit Court of Appeals, the majority of the judges read the law to strip any jurisdiction in regards to *habeas corpus*.[196] Those judges upheld the effectiveness of the MCA to all cases back to 2001 and the removal of jurisdiction. After the loss at the Court of Appeals, the detainees' advocates filed for a writ of certiorari from the United States Supreme Court.

At first, the justices refused to grant the writ to the detainees. Without the grant of certiorari, the case ended at the appellate level. However, Justice Stevens explained in an oral history that "there was some development to which our attention was called in the rehearing petition that made us feel very seriously that the procedures were more defective than we might

[195] O'Connor, *Out of Order*, 18.
[196] 553 U.S. 724 (2008).

otherwise have thought."[197] With new interest in the case, Stevens said that he and Associate Justice Anthony Kennedy changed their votes. With the additional two justices, the detainees' had enough votes for the grant of a writ of certiorari, and the justices schedule the case *Boumediene* v. *Bush* (2008) to be argued before the Supreme Court.

Oral arguments before the Supreme Court took place on December 5, 2007 and showcased the Clinton administration's Solicitor General Seth P. Waxman for Boumediene against the Bush administration's Solicitor General Paul D. Clement for the federal government. With distinguished counsel on each side, the case broadcasted its political, legal, and constitutional importance. During oral arguments, the petitioner, respondent, and justices discussed many aspects of the case and its effects on the global community. However, this study focused on the questions of *habeas corpus* and the federal judiciary's ability to hear these cases despite the statute. Waxman centered his argument on the Suspension Clause of the Constitution, and the assertion that without an adequate substitute for a federal court ordered *habeas corpus*, which neither the MCA nor the DTA provided, the detainees had their rights removed illegally.[198] The inherent flaws of the CSRT's and the appeals process could not be constitutionally justified. Waxman urged the justices to apply the Suspension Clause to *Boumediene* and rule that Congress removed the privilege of the writ of *habeas corpus* without cause. He believed that the DTA and MCA substitutes were inadequate protections against unlawful detention by the executive branch. In a characterization of Waxman's argument, which counsel agreed to be accurate, Associate Justice Antonin Scalia said, "[y]our assertion here is

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[197] John Paul Stevens, interview by Mary Marshall Clark and Myron Farber, *The Rule of Law Oral History Project: The Reminiscences of John Paul Stevens*, Colombia University, August 29 and November 7, 2012, 1:15.

[198] *Boumediene* v. *Bush*, Supreme Court case 06-1195, Petitioner's original oral argument, transcript page 5, lines 1-5.

that there is a common law constitutional right of *habeas corpus* that does not depend upon any statute."[199] Regardless of the actions of Congress, Waxman believed that the alien detainees at Guantanamo Bay deserved *habeas corpus* protections. A common law *habeas corpus* right suggested that the Supreme Court retained the ability to issue the writs even with the regulation from Congress. In effect, that argument diminished the power of the Exceptions Clause and Congress' ability to strip any *habeas corpus* jurisdiction from the federal judiciary at any level.

Clement for the respondent asserted the constitutionality of the statutes. He believed that the procedures established by the DTA and MCA guaranteed the required rights of the detainees while at the same time the legislation protected national security. To address the Suspension Clause question, Clement reviewed the *habeas corpus* guarantees throughout history that fulfilled constitutional tests. He argued that the systems organized by the DTA and the MCA would have been viewed in 1789 or even in 1941 "as a remarkable -- remarkable liberalization of the writ as it had then been understood."[200] With that idea, Clement asked the justices to accept the procedures of the DTA and MCA as adequate substitutes for the traditional writ of *habeas corpus*. That substitute restricted the justices from a decision on the merits of the trial procedures. In fact, Clement asked the justices to direct the D.C. Circuit Court of Appeals to hear appeals from the CRST as the statute directed, but not to hear any *habeas corpus* claims.[201] Clement's argument gave the justices little ability to produce a ruling, but that was the nature of the statute. The federal government advocated for adherence to the statute and the limited role of the Supreme Court in the detainee questions. In order to balance the guidelines the justices established in the Enemy Combatant Triad and the national security interests of the nation,

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[199] Ibid., page 10, lines 6-8.
[200] *Boumediene* v. *Bush*, Supreme Court case 06-1195, Respondents' original oral argument, transcript page 59, lines 2-3.
[201] Ibid., page 63, line 22-25 and page 64, line 1-13.

Clement suggested that "the proceeding that would unfold would not be the plenary *habeas* that is envisioned by Petitioners but would be a much more narrowly circumscribed *habeas*."[202] Although he never mentioned the Exceptions Clause by name, Clement argued for a system with a limitation upon how far the federal courts could interpose themselves into the military trial process. The end of oral arguments brought no clear victor in the case, and both sides waited until the next year for the justices to announce their opinions.

On June 12, 2008, the justices announced their decision in *Boumediene* v. *Bush*. In a five to four decision, the majority of the justices sided with the Petitioner and struck down portions of the MCA.[203] Justice Kennedy authored the majority decision that centered on the Suspension Clause. He argued that the DTA and MCA procedures "are not an adequate and effective substitute for habeas corpus [sic]. Therefore § 7 of the Military Commissions Act of 2006 (MCA), 28 U. S. C. § 2241(e), operates as an unconstitutional suspension of the writ."[204] The majority produced a landmark decision that turned back the unified force of the political branches and overcame the employment of the Exceptions Clause. Azmy wrote that *Boumediene* became the first decision to deny collaboration between a wartime president and Congress.[205] The majority opinion addressed the exceptions portion of the MCA. Kennedy wrote "[a]s a threshold matter, we must decide whether MCA § 7 denies the federal courts jurisdiction to hear habeas corpus [sic] actions pending at the time of its enactment. We hold the statute does deny that jurisdiction, so that, if the statute is valid, petitioners' cases must be dismissed."[206] The majority presented a delicate policy in response to the stripped jurisdiction. Kennedy

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[202] Ibid., page 70, line 16-19.
[203] 553 U.S. 723 (2008).
[204] Ibid., 733.
[205] Azmy, "Executive Detention, *Boumediene*, and the New Common Law of Habeas," 460.
[206] 553 U.S. 736 (2008).

acknowledged the justices' inability to hear challenges to the procedure, but he would only refuse to hear the case if the statute proved constitutional. He even rejected one of the Petitioner's arguments about the removal of jurisdiction. Kennedy wrote, "Petitioners argue, nevertheless, that MCA § 7(b) is not a sufficiently clear statement of congressional intent to strip the federal courts of jurisdiction in pending cases. See *Ex parte Yerger*, 8 Wall. 85, 102–103 (1869). We disagree."[207] Therefore, the majority argued for Congress' regulatory power over appellate jurisdiction, but only at a later stage in the process. In addition, Kennedy cited Chief Justice Chase's 1869 explanation of the Exceptions Clause in *Yerger*.[208] Furthermore, Kennedy recognized the Bush administration's attempt to follow the justices' guidelines from previous decisions. The political branches produced the MCA as a response to *Hamdan*, especially with the increased removal of judicial jurisdiction.[209] The justices of the majority understood the political branches' intent behind the legislation. The justices also recognized the significant progress made in each attempt of detainee commissions. However, the majority judged that the MCA violated the Suspension Clause and invalidated portions of it.

As part of his examination of the inter-branch conflict, Justice Kennedy also discussed the motivations of the legislature that produced the MCA. In fact, he questioned whether Congress sought to create an adequate substitute to the traditional writ of *habeas corpus*. He wrote "[i]f Congress had envisioned DTA review as coextensive with traditional habeas corpus [sic], it would not have drafted the statute in this manner."[210] Kennedy's implication suggested that Congress intentionally kept available *habeas corpus* remedies from the detainees. He went further and identified that "there has been no effort to preserve habeas corpus [sic] review as an

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[207] Ibid., 737.
[208] See *supra* note 52.
[209] 553 U.S. 738 (2008).
[210] Ibid., 777.

avenue of last resort. No saving clause exists in either the MCA or the DTA. And MCA § 7 eliminates habeas [sic] review for these petitioners."[211] Kennedy impugned the motivations of the legislators who proposed and defended the legislation. He and the other justices of the majority criticized Congress and its attempt to remove the judiciary from the proceedings.

In response to the majority opinion, Chief Justice John R. Roberts entered a dissent, which all the dissenting justices joined. Although he focused on other factors of what he believed to be flaws in the majority's reasoning, Roberts addressed the question of the Exceptions Clause in definitive terms. He wrote that "Congress entrusted that threshold question in the first instance to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do."[212] Chief Justice Roberts asserted the ability of Congress to employ the Exceptions Clause to direct a certain federal court to hear a specific class of cases. The dissenting justices believed that the DTA and MCA processes contained enough oversight from the federal judiciary to meet constitutional requirements. He went further to defend the process as at least an adequate and reasonable substitute of *habeas corpus*. Roberts believed "there is no need to reach the Suspension Clause question. Detainees will have received all the process the Constitution could possibly require, whether that process is called "habeas" [sic] or something else. The question of the writ's reach need not be addressed."[213] The dissenting justices defended the reach of the Exceptions Clause.

The other dissent came from Justice Scalia. The main argument of his dissent derided the majority's decision to give rights to aliens at Guantanamo Bay, a territory where the United

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[211] Ibid.
[212] Ibid., 802.
[213] Ibid., 804.

States maintained no sovereignty.[214] Justice Scalia argued that the Suspension Clause had no application. However, he also discussed the constitutional abilities of the Exceptions Clause. He wrote that, "[o]ur power 'to say what the law is' is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction."[215] In a direct reference to Chief Justice Marshall's philosophy of the Supreme Court, Scalia understood the jurisdictional limitations imposed by Congress. He chided the majority for an overreach of judicial authority against the will of the people's elected representatives. He wrote that "[w]hat drives today's decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of *judicial supremacy*."[216] In the inter-branch struggle over the status of enemy combatants, Justice Scalia argued that the federal judiciary asserted too much of a role. He called for the justices to exercise restraint, in the same way the justices required the political branches to restrain themselves.[217] Justice Scalia critiqued the reach of the federal judiciary into an arena where the political branches had restricted it by statute.

The United States Supreme Court's opinion *Boumediene* v. *Bush* included many complex facets. The jurisdictional question of the federal judiciary occupied a central location and required significant attention. Through statute, the political branches barred judicial intervention in particular detainee *habeas corpus* matters. However, through an expansion of the common-law writ, the majority of the justices concluded that a violation of the Suspension Clause superseded a statutory use of the Exceptions Clause. Justice Scalia expressed the consequences of the growth of judicial intervention despite Congress' limits. He called the justices back into their proper institutional role, but he could only do so from a dissent. The majority's decision

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[214] Ibid., 827.
[215] Ibid., 842.
[216] Ibid. Emphasis added.
[217] Ibid., 833-34.

created precedent for justices' to overlook the Exceptions Clause and the institutional limitations on the judiciary from the political branches.

VI: Conclusion: Contrasting *McCardle* and *Boumediene*

As has been shown, the *McCardle* and *Boumediene* cases presented many similarities. Although the decisions came 139 years apart, both situations involved a restriction of *habeas corpus* rights in the face of an internal security threat. To protect the citizens of the United States, the 40th and 109th Congresses agreed to legislation that limited the appellate jurisdiction of the federal courts to protect a specific public policy goal. The Republicans in 1868 stopped the Supreme Court from ruling on one aspect of their overall Reconstruction agenda. The 2006 Republicans enabled the military to control the trial of enemy combatants. Both of the laws came in the midst of an institutional struggle between Congress and the justices. Despite these similarities, the topic merited further study because of the differences. For example, the *McCardle* decision involved a citizen of the United States within the sovereign territory of the nation, but Boumediene was an alien whom the military arrested and detained outside the borders of the country. Reconstruction Republicans battled President Johnson in addition to the Supreme Court. However, in 2006 President Bush worked with the Republican Congress on the enabling legislation. In these cases, the most consequential difference was the outcome of the Supreme Court decision. In the first decision, the justices expressed deference to Congress, but the justices in the 2008 context invalidated a law. The Roberts Court ruled that the MCA's use of the Exceptions Clause violated their national security and institutional understanding.

When the Chase Supreme Court announced their decision, they responded to both the facts of the case and their historical context. With a present internal security threat against the United States after the Civil War, the justices decided to provide more deference to Congress'

regulation. Although newspapers across the nation decried the repeal of the Habeas Corpus Act of 1867 as a partisan action, Chase and his fellow justices refused to engage in an institutional struggle with Congress. The unanimity of the *McCardle* decision demonstrated that restraint. At that critical post-war period, the justices relied on the Congress and the military to provide protection for the nation. They refused to interrupt that important congressional function. In addition, Chase believed that the Supreme Court did not hold the confidence of the majority of the citizens of the United States after the backlash to the *Dred Scott* decision.[218] Furthermore, Chief Justice Chase's explicit refusal to examine the motivations of Congress displayed his understanding of the present security threats to the United States.[219] Chase weighed the risks to the United States and the Great Writ, and he judged that Congress exercised its exceptions power appropriately for the context and the Constitution. He never mentioned the Suspension Clause or an illegal removal of *habeas corpus* protections. Instead, the justices in 1869 chose to allow Congress to maintain its expanded power in that threatened context.

When the Roberts Supreme Court considered the *Boumediene* case, they lived in a different context from Chase. Although the September 11 attacks remained in the memory of the people, President Bush became a controversial figure as a wartime president in Iraq and Afghanistan. When the justices heard oral arguments in late 2007, the internal security threat did not exist in the same way it did in 2001 or even in 1869. Any danger was far away, which helps to explain the justices' decision. Therefore, the justices gave less deference to the other two branches. In fact, Justice Kennedy's opinion stood in stark contrast to Chase's in methodology, reasoning, and outcome. First, the majority opinion criticized the motivations of Congress. Kennedy did not even give Congress the benefit of the doubt for their good intentions. Instead,

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[218] See *supra* note 31.
[219] 7 Wallace (74 U.S.) 514 (1869).

he rebuked the legislators and the president for the manner in which they crafted the MCA. Kennedy went to the record of debate in the Senate to display direct evidence of the legislators' deliberate decision to remove the federal courts from the detainee trial process.[220] With the power of a majority opinion, Kennedy attacked the institutional strength of the legislature. In unequivocal terms, he asserted the power of his branch and wrote "that when the judicial power to issue habeas corpus [sic] properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."[221] *Habeas corpus* protections are fundamental in the Anglo-American tradition of the rule of law, and Kennedy reprimanded the political branches for their effort to limit it. In not so muted terms, he called the Congress and President Bush naïve for the instigation of this institutional conflict over the applicability of *habeas corpus*. Kennedy refused to allow Congress to regulate the justices' powers to issue the writ except through a formal employment of the Suspension Clause and the declaration of insurrection or invasion. Despite a slim five to four majority, Kennedy penned a strong institutional rebuke to the political branches of the federal government.

The second impetus of Kennedy's opinion was the growth in *habeas corpus* rights since the Judiciary Act of 1789 and the *McCardle* decision. In his oral arguments, Clement explained that jurists in the eighteenth, nineteenth, and even twentieth centuries viewed the MCA's substitution for *habeas corpus* as liberal expansions of the writ.[222] In the majority opinion, Kennedy traced the growth of the understanding and efficacy of the Great Writ. He wrote that "most of the major legislative enactments pertaining to habeas corpus [sic] have acted not to

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[220] 553 U.S. 778 (2008).
[221] Ibid., 787.
[222] See *supra* note 197.

contract the writ's protection but to expand it or to hasten resolution of prisoners' claims."[223] Therefore, the Supreme Court expanded its own role in the protection of individual rights, Anglo-American values, and *habeas corpus*. The institutional growth of the Supreme Court must be matched with a shrinking of Congress' power to employ the Exceptions Clause. If the justices have such a large domain of authority, then more regulations from Congress would violate the Essential Role Test. Justice Scalia mentioned the theory of judicial supremacy, where federal judges believe in their authority as the *final* arbiter of the law. An examination of the idea of judicial supremacy is beyond the scope of this paper, but the *Boumediene* majority believed their judgment and ability to grant *habeas corpus* to be inherently necessary in the separation of power system. Even a broadly crafted statute expanding the appellate rights of detained enemy aliens could not be adequate. Since the majority ruled portions of the MCA unconstitutional, scholars must consider whether Congress can use any *habeas corpus* jurisdiction-stripping measures to limit the judiciary in this context. In an effort to defend one part of the Constitution – the Suspension Clause – the justices made the Exceptions Clause powerless.

A review of the *Boumediene* decision sheds light on the function of the Exceptions Clause. The Essential Role Test, created by Hart and defended by others including Ratner and Dodge, required that any legislation preserved the overall legitimacy of the Supreme Court's jurisdiction. Ratner allowed "the existence of congressional power to thwart the Supreme Court's appellate jurisdiction through *ad hoc* legislation," and he may have approved of the MCA.[224] However, Dodge argued that legislation to regulate appellate jurisdiction cannot infringe upon individual rights, and the MCA's assault upon *habeas corpus* would undoubtedly

[223] 553 U.S. 773 (2008).
[224] Ratner, "Congressional Power over the Appellate Jurisdiction of the Supreme Court," 180.

violate his test.[225] Although the federal judiciary retained the ability to issue writs of *habeas corpus* in other cases, the MCA restricted its essential function. Since the Great Writ was such a fundamental part of the separation of powers system, the regulations from the MCA diminished the function of the Supreme Court and violated the Essential Role Test. In the *McCardle* case, McCardle retained an avenue to the Supreme Court through other *habeas corpus* legislation. However, the Guantanamo Bay detainees lost all of their statutory rights to *habeas corpus* relief under the MCA.

In their responses to different contexts, the Chase Court and the Roberts Court produced different decisions to similar cases. Factors like the fear of present danger and the institutional power of the Supreme Court influenced the majority opinions as much as the actual facts of the cases or any constitutional theory. Whatever understanding of the Exceptions Clause and the amount of deference to the political branches that existed in 1869 simply did not exist and affect Justice Kennedy's opinion. In the current context, it is unlikely that the United States Supreme Court would defer to the political branches on *habeas corpus* disputes. If the desire of Congress is to check the Supreme Court, then legislators must choose a different tool than the Exceptions Clause. After the *Boumediene* decision, they can only limit appellate jurisdiction through judicial appointments or a formal constitutional amendment. In this period of judicial supremacy, the justices will characterize any *habeas corpus* exception as a violation of the Essential Role Test.

[225] Dodge, "Congressional Control of Supreme Court Appellate Jurisdiction," 1032.

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