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The Article II Safeguards of Federal Jurisdiction

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Tara Leigh Grove*

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ABSTRACT

Jurisdiction stripping has long been treated as a battle between Congress and the federal judiciary. Scholars have thus overlooked the important (and surprising) role that the executive branch has played in these jurisdictional struggles. I seek to fill that void. Drawing on two strands of social science research, I argue that the executive branch has a strong incentive to use its constitutional authority over the enactment and enforcement of federal law to oppose jurisdiction-stripping measures. Notably, this structural argument has considerable historical support. The executive branch has repeatedly opposed jurisdiction-stripping proposals in Congress. That has been true even when the President was otherwise deeply critical of the federal courts’ constitutional jurisprudence (such as during the Franklin Roosevelt and Reagan Administrations). Furthermore, even when jurisdiction-stripping measures do become law, the executive branch controls the enforcement of that law. The Department of Justice has repeatedly used this enforcement authority to urge the courts to interpret jurisdictional restrictions narrowly in order to preserve jurisdiction over constitutional claims. This executive branch practice has important implications for the Obama Justice Department, as it litigates cases brought by current and former detainees in the war on terror. One provision of the Military Commissions Act of 2006 appears to preclude any court from examining a detainee’s challenge to his “conditions of confinement” during his detention. The executive branch could substantially limit the impact of this law by conceding (as it has in prior administrations) that the federal courts retain jurisdiction over constitutional claims.

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I. Introduction

Scholars have long debated the scope of Congress’s power to curb federal jurisdiction. The recurring concern over this issue stems from an apparent tension in Article III: although that provision vests the federal courts with the “judicial Power” to decide issues of federal law, it also gives Congress broad power to regulate federal jurisdiction. Commentators worry that, when federal courts issue controversial opinions (or seek to protect unpopular groups), Congress will respond by taking away their power to decide cases.

Although scholars have expressed concern about a variety of efforts to limit federal jurisdiction, two issues have repeatedly dominated the debate: Congress’s authority to make broad “exceptions” to the Supreme Court’s appellate jurisdiction and to strip all federal jurisdiction over constitutional claims. There seems to be a consensus that such laws would be at odds with “the structure and spirit of the [Constitution].” But many scholars nevertheless conclude that Congress could enact such statutes, if it so chose. In short, a prevailing view is that the Constitution has left the federal judiciary largely at the mercy of Congress.

I argue that scholars have overlooked an important (and surprising) advocate for the federal judiciary in these jurisdictional struggles: the executive branch. The Constitution gives the President considerable authority to block constitutionally questionable legislation. The President can veto problematic legislation or use the threat of a veto to urge Congress to pursue other alternatives. Moreover, under Article II’s Take Care Clause,

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1 U.S. CONST. art. III, § 1.
2 See U.S. CONST. art. III, § 2 (providing that the Supreme Court’s appellate jurisdiction is subject to “such Exceptions, and … such Regulations as the Congress shall make”); infra notes 12-13 and accompanying text.
5 See Peter J. Smith, Textualism and Jurisdiction, 108 COLUM. L. REV. 1883, 1892-94 (2008) (noting that “the traditional view” of Article III is that Congress has plenary power over federal jurisdiction); infra notes 9-17 and accompanying text.
the President is in charge of enforcing federal law in the federal courts—a task that he has largely delegated to the Department of Justice.\(^6\) The executive branch can use this enforcement authority to ensure that laws are applied in a manner that accords with constitutional values.

Drawing on recent social science scholarship, I contend that the executive branch has a strong incentive to use this constitutional authority to oppose efforts to curb federal jurisdiction. First, social scientists have argued that the President often expresses his constitutional philosophy through litigation in the federal courts. Accordingly, the President has some incentive to ensure that the federal courts retain jurisdiction over constitutional claims. These presidential incentives are reinforced by the institutional incentives of the Department of Justice. Relying on theories of path dependence and institutional entrenchment, I argue that the DOJ has a substantial interest in defending the authority of the federal judiciary, because it can thereby maintain its own enforcement power. The DOJ has a particularly overriding interest in protecting the appellate jurisdiction of the Supreme Court, because the Solicitor General is in charge of all federal litigation at that level. By defending the authority of the Supreme Court, the Justice Department can maximize its power and influence over the development of federal law.

In sum, I contend that the executive branch has strong institutional incentives to oppose the very kind of legislation that scholars find most problematic: restrictions on the Supreme Court’s appellate jurisdiction and the federal courts’ authority to adjudicate constitutional claims. The executive branch should be inclined to use its constitutional authority to shield the judiciary from such challenges to the federal judicial power.

This structural argument has considerable historical support. The executive branch has sought to protect federal jurisdiction in two major ways. First, the executive branch has repeatedly opposed bills targeted at the Supreme Court’s appellate review power or at federal jurisdiction over constitutional claims. Notably, that has been true even when the President strongly disagreed with the federal courts’ constitutional jurisprudence. For example, during the New Deal era, the Roosevelt Justice Department opposed efforts to eliminate the Supreme Court’s appellate jurisdiction over constitutional claims. Likewise, the Reagan Justice Department spoke out against proposals to strip federal jurisdiction over cases involving school prayer and abortion. Other DOJ officials have similarly urged Congress to refrain from enacting jurisdiction-stripping proposals, at times expressly invoking the threat of a presidential veto.

Although most jurisdiction-stripping bills have been defeated in the legislative process, some proposals to curb federal jurisdiction have, in

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\(^6\) See U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").
recent decades, captured sufficient political support to gain the assent of both Congress and the President. But the executive branch has an additional constitutional tool to limit the impact of such laws. The DOJ controls the enforcement of most federal laws and can urge the federal judiciary to interpret those laws narrowly in order to preserve federal jurisdiction. Indeed, that is the approach that recent Justice Departments have taken. Both the Clinton and the second Bush Administrations urged the courts to construe broadly-worded jurisdiction-stripping statutes, like the Antiterrorism and Effective Death Penalty Act, so as to preserve jurisdiction over federal constitutional claims.

The federal courts, of course, could disregard these arguments and independently determine their jurisdiction. But, to the extent that the courts are already inclined to interpret jurisdiction-stripping laws narrowly, the DOJ’s arguments provide substantial reassurance that such constructions will have the support of a coequal branch of the federal government. And, in practice, the federal judiciary has proven quite receptive to the executive branch’s efforts to preserve the scope of federal jurisdiction.

I do not, however, want to overstate the extent of these Article II safeguards. First, I should emphasize that my argument is limited to efforts to restrict federal jurisdiction, where the executive branch has an institutional interest in preserving judicial authority. I do not claim that the executive will oppose all court-curbing efforts. Furthermore, the executive branch has not sought to block every jurisdiction-stripping measure; some have been enacted into law with the President’s assent. Finally, the DOJ has not always advocated a narrow construction of jurisdiction-stripping laws (although it has done so increasingly in recent years). But, notwithstanding these exceptions, the executive branch has repeatedly used its constitutional authority to protect the federal judicial power.

This argument has important implications for scholarship in federal courts and constitutional law. First, this analysis provides a missing ingredient in the debate over Congress’s power to restrict federal jurisdiction by emphasizing the substantial role that the executive branch has played in these jurisdictional struggles. Moreover, this analysis offers an important correction to a theory that has gained traction in recent years: that partisan politics has eclipsed the checks and balances created by the Constitution, so that we now live in a world dominated by the “separation of parties, not powers.” As this historical survey demonstrates, the executive branch has repeatedly opposed jurisdiction-stripping proposals in Congress—even when those proposals were championed by members of the President’s own party. Accordingly, in this crucial context, the judiciary has been protected by the separation of powers, not parties.

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Finally, the analysis here has significant implications for the Obama Justice Department as it litigates cases brought by current and former detainees in the war on terror. The Military Commissions Act of 2006 (in a provision that the Supreme Court has not yet construed) appears to preclude any alleged “enemy combatant” from challenging, even on constitutional grounds, his “conditions of confinement” during his detention. The Department of Justice could substantially limit the impact of this legislation by conceding, as it has in prior administrations, that the federal courts retain jurisdiction over federal constitutional claims.

I lay out the argument for these Article II safeguards as follows. In Part II, I discuss prior scholarship on Congress’s power to curb federal jurisdiction. I assert that the executive branch offers an important (and previously overlooked) structural protection for the federal judiciary. In Parts III and IV, I provide historical support for this claim. I contend that the executive branch has repeatedly used its role both in the legislative process and in litigation to protect the scope of federal jurisdiction. Finally, in Part V, I discuss the scope and limitations of these Article II safeguards. I observe in part that the Justice Department may have an even stronger incentive than the President to defend the judiciary, and may take advantage of “agency slack” to protect the scope of federal jurisdiction. I further assert that, even in the context of the war on terror, the executive branch could use its constitutional authority to protect the Article III judicial power.

II. The Theory

Scholars have long puzzled over the scope of Congress’s authority to regulate federal jurisdiction. But two issues have dominated the debate: Congress’s authority to restrict the Supreme Court’s appellate jurisdiction and to strip all federal jurisdiction over constitutional claims. I argue that the structural safeguards of Article II may work particularly well to protect federal jurisdiction in these two contexts.

A. The Search for Limits on Congress’s Power

Many commentators argue that Congress has plenary power over federal jurisdiction. These scholars note that, under Article III, the Supreme

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8 See 28 U.S.C. § 2241(e)(2) (“[N]o court, justice, or judge shall have jurisdiction … [over any] action against the United States or its agents relating to any aspect of the detention … or conditions of confinement” of an alleged enemy combatant); Boumediene v. Bush, 553 U.S. 723, 792 (2008) (declining to “discuss the reach of the writ [of habeas corpus] with respect to claims of unlawful conditions of treatment or confinement”).

9 See CHARLES L. BLACK JR., DECISION ACCORDING TO LAW 18 (1981) (“My own position is … that Congress does have very significant power over the courts’ jurisdiction.”); Raoul Berger, Insulation of Judicial Usurpation: A Comment on Lawrence Sager’s “Court-Stripping” Polemic, 44 OHIO ST. L.J. 611, 614 (1983) (same); John Harrison, The Power of
Court’s appellate jurisdiction is subject to “such Exceptions, and ... such Regulations as the Congress shall make”\(^{10}\) and conclude that this Exceptions Clause gives Congress broad power to remove cases from the Court’s appellate oversight.\(^{11}\) There is even greater consensus on Congress’s authority over the inferior federal courts. Under Article III, the creation of those courts is left to the discretion of Congress.\(^{12}\) Most commentators conclude that Congress may also determine to what extent such courts are needed to enforce federal law.\(^{13}\) In sum, these scholars reach what Martin Redish has described as the “inescapable” conclusion—that Congress’s authority over federal jurisdiction is unconstrained by Article III.\(^{14}\)

But even those who subscribe to this “plenary power” theory argue that Congress should generally refrain from exercising its authority.\(^{15}\) They express particular concern about proposals to restrict the Supreme Court’s appellate review power or the federal courts’ authority to hear constitutional claims. For example, Paul Bator argued that “[a] statute depriving the Supreme Court of appellate jurisdiction over ... constitutional litigation would ... violate the spirit of the Constitution, even if it would not violate its letter.”\(^{16}\) Likewise, Gerald Gunther urged that, although Congress has the

\(^{10}\) U.S. CONST. art. III, § 2 (emphasis added).

\(^{11}\) See Bator, supra note 4, at 1038 (urging that the Exceptions Clause “plainly seems to indicate that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the [Supreme Court’s] appellate jurisdiction, it has the authority to do so”); Berger, supra note 9, at 622 (same); Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 STAN. L. REV. 895, 901 (1984) (same); Martin H. Redish, Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination, 27 VILL. L. REV. 900, 901-02 (1982) (same).

\(^{12}\) See U.S. CONST. art. III, § 1; Sager, supra note 3, at 48.

\(^{13}\) See, e.g., Bator, supra note 4, at 1030-31 (arguing that the Constitution “leaves it to Congress to decide, having created lower federal courts, what their jurisdiction should be”).

\(^{14}\) Redish, supra note 9, at 1637. These “plenary power” scholars do generally assume that Congress’s power is constrained by constitutional sources other than Article III, and that the federal courts can enforce such “external” constraints—although they often dispute the scope of those limits. See Gunther, supra note 11, at 916-22 (discussing some of the debates); Amanda L. Tyler, Suspension as an Emergency Power, 118 YALE L.J. 600, 607-08 (2009) (noting that the Suspension Clause, “[b]y its terms, ... constitutes [...] a limitation upon ... congressional power” over habeas jurisdiction, but also observing that scholars have debated the scope of that limit).

\(^{15}\) See, e.g., Martin H. Redish, Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For, 9 LEWIS & CLARK L. REV. 363, 369 (2005) (arguing that, “as a matter of policy,” Congress should have a “very strong presumption against” jurisdiction stripping).

\(^{16}\) Bator, supra note 4, at 1039.
“sheer legal authority” to eliminate federal jurisdiction over constitutional claims, any such law would be “unwise” and contrary to “the ‘spirit’ of the Constitution.”

Other scholars, however, have proposed broader—and judicially enforceable—limits on Congress’s power over federal jurisdiction. Much of this work (albeit not all) also emphasizes the importance of the Supreme Court’s appellate jurisdiction and federal jurisdiction over constitutional claims.

A growing number of commentators have argued that the Supreme Court has an “essential role” in the constitutional scheme and that Congress must provide the Court with sufficient appellate jurisdiction to perform that role. The foundation for this argument was laid in a famous essay by Henry Hart. In his *Dialogue*, Professor Hart asserted that “the exceptions [to the Court’s appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.” Leonard Ratner and Evan Caminker later expanded upon this theory. Professor Ratner argued that the Supreme Court’s “essential appellate functions” are to preserve the uniformity and supremacy of federal law, while Professor Caminker asserts that the Supreme Court must have sufficient appellate jurisdiction to “provid[e] general leadership in defining federal law” for the judiciary.

Some scholars have recently claimed that, in order to maintain its “supreme” role, the Supreme Court must have the power to review every lower court case involving federal law. James Pfander asserts that the Court must be able to review all lower federal and state court decisions either on direct appeal or by issuing “supervisory writs,” such as writs of habeas

17 Gunther, *supra* note 11, at 921. Professor Redish has suggested that a statute preventing federal courts from adjudicating constitutional claims against federal officials might violate the Due Process Clause—unless state courts were permitted to adjudicate those claims. *See* Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 158-59 (1982).

18 There are, of course, important theories that do not focus on either the Supreme Court or constitutional claims. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209 (1985) (urging that Congress must give either the Supreme Court or the inferior federal courts jurisdiction over cases arising under federal law as well as admiralty and ambassador suits); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749-50 (1984) (Congress must “allocate to the federal judiciary as a whole … every type of case or controversy” listed in Article III).


corpus or mandamus, in individual cases. Other commentators, including Steven Calabresi and Gary Lawson, have argued that the Supreme Court must have the authority to review every federal question, either as an original matter or on appeal from a lower court. These scholars claim that the Exceptions Clause does not permit Congress to “strip” the Supreme Court’s jurisdiction at all, but only to move cases between the Court’s original and appellate jurisdiction (a position that, they acknowledge, is at odds with the holding of Marbury v. Madison that Congress may not enlarge the size of the Court’s original jurisdiction).

Furthermore, although scholars seem to agree that Congress has more power over inferior federal court jurisdiction, they have often sought to ensure that the federal courts as a whole can hear federal constitutional claims. For example, Professor Hart argued that, even if Congress has the power to eliminate federal jurisdiction over constitutional issues, the judiciary should resist such efforts through statutory interpretation. Professor Hart asserted: “If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably.”

Other scholars contend that a statute eliminating federal jurisdiction over constitutional claims would violate Article III. Richard Fallon suggests that such a restriction would be invalid if Congress’s purpose were to invite state court defiance of Supreme Court precedent. And Lawrence Sager asserts that constitutional claims must be heard by judges with life tenure and salary protections. Thus, Congress may take jurisdiction over such claims from either the Supreme Court or the lower federal courts, but not both.

Some commentators have also recently emphasized the importance of federal jurisdiction over constitutional claims in the context of the war on terror. They focus on a provision of the Military Commissions Act of 2006 (MCA), which purports to prevent any federal court from reviewing an action “against the United States or its agents relating to any aspect of the … conditions of confinement” of a designated “enemy combatant.” (Notably, state courts likely have no power to review federal military detention;
accordingly, this provision seems to cut off all judicial review of detainee claims.\(^\text{30}\) Scholars assert that the MCA is unconstitutional to the extent that it precludes federal jurisdiction over constitutional claims. Thus, Richard Fallon and Daniel Meltzer contend that the MCA’s “total preclusion of review” violates a fundamental “postulate of the constitutional structure”: that “some court must always be open to hear an individual’s claim to … judicial redress of a constitutional violation.”\(^\text{31}\) Janet Alexander has asserted that “the complete denial of judicial review of constitutional claims is beyond Congress’s power under the Exceptions [] Clause” of Article III, because it deprives the Supreme Court of its “essential role.”\(^\text{32}\)

The above scholarship reflects two basic normative premises: Congress must provide the Supreme Court with sufficient jurisdiction to perform its “supreme” role in the judiciary, and there must be judicial review of constitutional claims. Furthermore, although these scholars offer sharply different theories, they do appear to agree on one thing: the only way to limit Congress’s power is through judicial enforcement—either via statutory construction or judicial review. Absent such enforcement, the federal judiciary is essentially at the mercy of Congress.

I seek to challenge that assumption. I assert that the primary constitutional protection for the federal judiciary lies not in judicial enforcement, but instead in the structural and political constraints built into our constitutional system. In prior work,\(^\text{33}\) I focused on the Article I lawmaking process, which gives competing political factions—even political minorities—considerable power to “veto” legislation. Drawing on social science scholarship, I argued that political factions are especially likely to use their structural veto in the House or in the Senate to block jurisdiction-stripping legislation favored by their opponents.

In this Article, I contend that there is another important (and surprising) structural protection for the federal judiciary: the executive branch. I argue that the executive branch has a strong incentive to use its independent role in the enactment and enforcement of federal law to preserve the scope of federal jurisdiction. Furthermore, these incentives seem to be particularly strong in the very areas that most concern scholars: the Supreme Court’s appellate review power and federal jurisdiction over constitutional claims.

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\(^\text{30}\) See Tarble’s Case, 80 U.S. (13 Wall.) 397, 411-12 (1871).
\(^\text{32}\) Janet Cooper Alexander, Jurisdiction-Stripping in a Time of Terror, 95 Cal. L. Rev. 1193, 1208, 1239 (2007). Professor Alexander also contends that this provision violates the Suspension and Due Process Clauses. See id. at 1208.
B. The Article II Safeguards of Federal Jurisdiction

The Constitution gives the President an important role in both the enactment and the enforcement of federal legislation. Article II provides for an executive role in proposing legislation, stating that the President “shall from time to time … recommend to [Congress] such Measures as he shall judge necessary and expedient.”\(^{34}\) Furthermore, the President has the constitutional authority to veto or threaten to veto any piece of legislation.\(^{35}\) As social scientists have observed, even the threat of a veto can be a powerful tool, one that frequently leads Congress to modify or even forego proposals before they reach the President’s desk.\(^ {36}\) The President can use this constitutional authority to block unconstitutional (or at least constitutionally questionable) legislation and to steer Congress toward proposals that he views as more constitutionally legitimate.\(^ {37}\)

Moreover, once a bill is enacted into law, the President is in charge of the enforcement and execution of that law. Article II requires the President to “take Care that the Laws [are] faithfully executed.”\(^ {38}\) The executive branch can use this enforcement authority to lessen the impact of legislation that seems to impinge on constitutional values. Although scholars strongly dispute whether the President can simply decline to enforce statutes that he considers invalid,\(^ {39}\) most commentators seem to agree that the

\(^{34}\) U.S. CONST. art. II, § 3 (“[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.

\(^{35}\) See U.S. CONST. art. I, § 7, cl. 2; Rebecca E. Deen & Laura W. Arnold, Veto Threats as a Policy Tool: When to Threaten?, 32 PRES. STUD. Q. 30, 30 (2002) (asserting that “[p]residents have many tools in the policy-making process. One of the most powerful of these is vetoing legislation”); Daniel E. Ingberman & Dennis A. Yao, Presidential Commitment and the Veto, 35 AM. J. PUBL. POL. SCI. 357, 357 (1991) (arguing that “[t]he power to veto legislation is an important means through which a president can influence policy”).

\(^{36}\) See Richard S. Conley, George Bush and the 102d Congress: The Impact of Public and “Private” Veto Threats on Policy Outcomes, 33 PRES. STUD. Q. 730, 731 (2003) (noting “presidents’ ability to halt” or change bills not only “through the veto power” but also through “their strategic use of” veto threats); Deen & Arnold, supra note 35, at 44 (“[t]he veto threat can be an effective tool in the arsenal of [the president’s] legislative powers”).

\(^{37}\) See THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (asserting that the veto power “not only serves as a shield to the executive, but [] furnishes an additional security against the enaction of improper laws”); Richard Broughton, Rethinking the Presidential Veto, 42 HARV. J. ON LEGIS. 91, 127-32 (2005) (noting that modern Presidents have vetoed bills on constitutional grounds, albeit less often than early Presidents).

\(^{38}\) U.S. CONST. art. II, § 3.

\(^{39}\) Compare, e.g., Eugene Gressman, Take Care, Mr. President, 64 N.C. L. REV. 381, 382 (1986) (arguing that once a bill becomes law, “the President has no option under article II but to enforce the measure faithfully”); with David Barron, Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 63 (asserting that the President should at times decline to enforce statutes that would be upheld by courts, because the President can protect constitutional values that courts cannot enforce); Dawn E. Johnsen, Presidential Non-Enforcement of Constitutionally Objectionable
executive branch can give such laws a narrow construction that better accords with constitutional values.\textsuperscript{40} Indeed, Dawn Johnsen has asserted that Presidents \textit{should} “avoid constitutional problems … through their interpretation of ambiguous statutes.”\textsuperscript{41}

I argue that the executive branch has a strong incentive to use this constitutional authority to oppose jurisdiction-stripping legislation. I base this argument on two strands of recent social science research. First, social scientists have argued that the President often advances his constitutional philosophy through litigation in the federal courts.\textsuperscript{42} The judiciary serves as a useful focal point for presidential policies, in part because the executive branch has “close contact” with the federal courts.\textsuperscript{43} The President not only plays a central role in selecting federal judges\textsuperscript{44} but also “[t]hrough control

\textit{Statutes, LAW & CONTEMP. PROBS.}, Winter/Spring 2000, at 12-14 (arguing that non-enforcement is appropriate in certain limited circumstances); \textit{with Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation}, 81 IOWA L. REV. 1267, 1303 (1996) (arguing that the President must refuse to enforce a statute that he views as unconstitutional); Saikrishna Bangalore Prakash, \textit{The Executive’s Duty To Disregard Unconstitutional Laws}, 96 GEO. L.J. 1613, 1616 (2008) (same); see also Michael Stokes Paulsen, \textit{The Most Dangerous Branch: Executive Power To Say What the Law Is}, 83 GEO. L.J. 217, 221-22 (1994) (arguing that the President “may decline to execute acts of Congress on constitutional grounds,” and may even “refuse to execute (or … obey) judicial decrees”).

\textit{See Ronald Cass & Peter Strauss, The Presidential Signing Statements Controversy}, 16 WM. & MARY BILL RTS. J. 11, 15-16 (2007) (asserting that the President’s “obligation to ‘take Care that the Laws be faithfully executed’ … gives him authority to advise agencies how they may avoid constitutional issues lurking in” complex statutes); Johnsen, supra note 39, at 9 (“Presidents often avoid constitutional problems, as they should, through their interpretation of ambiguous statutes or through the exercise of enforcement discretion.”); Trevor W. Morrison, \textit{Constitutional Avoidance in the Executive Branch}, 106 COLUM. L. REV. 1189, 1226 (2006) (arguing that, if “[t]he fundamental aim of the avoidance canon … is to implement constitutional norms,” then the executive branch should “use the avoidance canon” in interpreting statutes); see also Cornelia T.L. Pillard, \textit{The Unfulfilled Promise of the Constitution in Executive Hands}, 103 MICH. L. REV. 676, 677, 686 (2005) (arguing that, in practice, the executive branch has not protected individual rights, although agreeing that such constitutional enforcement is normatively attractive). Notably, although Jefferson Powell argues that the executive branch should not use statutory construction to protect its own power, he does not appear to question the propriety of the practice in other contexts. \textit{See H. Jefferson Powell, The Executive and the Avoidance Canon}, 81 IND. L.J. 1313, 1316 (2006).

41 Johnsen, supra note 39, at 9.


42 \textit{See Whittington, supra} note 42, at 196.

43 \textit{See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the supreme Court[,]”); Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan} 6 (1997) (“[T]he placement of the power of judicial selection with the
over the Justice Department … can exercise significant influence over … what arguments are presented” to the courts.\(^\text{45}\)

The President has a particularly strong incentive to press his policies through the federal judiciary when he faces a hostile (or divided) Congress.\(^\text{46}\) For example, President Harry Truman expressly acknowledged his use of litigation to advance constitutional values in the face of legislative opposition. President Truman explained that, after Congress refused to pass a civil rights law, he “did what the President can do, unaided by the Congress.”\(^\text{47}\) He sent “the Department of Justice … into the Supreme Court” to argue for constitutional rulings that would protect civil rights.\(^\text{48}\) Likewise, Presidents Ronald Reagan and George H.W. Bush sought to use the federal judiciary to advance their vision of constitutional federalism, when their legislative efforts were stymied in Congress.\(^\text{49}\)

The President’s unique position in enforcing federal law gives him an opportunity to advance his constitutional policies through litigation, without substantial interference from the legislature. Political scientist Keith Whittington asserts that this largely explains the President’s support for the judiciary, and particularly for the exercise of judicial review.\(^\text{50}\) I argue that this unique opportunity also gives the President a strong incentive to ensure that the federal courts retain jurisdiction over constitutional claims.

These presidential incentives are reinforced by the institutional incentives of the Department of Justice. Drawing on theories of path dependence and institutional entrenchment,\(^\text{51}\) I argue that the DOJ has a powers of the president [in Article II] rather than those of Congress suggests that the executive branch is a principal player in the appointment process.”); Mark A. Graber, James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25, 88 Or. L. Rev. 95, 103 (2009) (“Presidents … typically have more influence than legislators on the staffing of federal courts.”).

\(^{45}\) Whittington, supra note 42, at 196.

\(^{46}\) See Graber, supra note 44, at 102 (observing that the judiciary can be “a vital presidential ally against a recalcitrant Congress”).

\(^{47}\) President Harry S. Truman, Address in Harlem, New York, Upon Receiving the Franklin Roosevelt Award, 1948 PUB. PAPERS 924 (Oct. 29, 1948).

\(^{48}\) Id.; see Whittington, supra note 42, at 99 (observing that “Harry Truman’s Justice Department … urged the Court to take action on” civil rights issues).

\(^{49}\) See Douglas W. Kmiec, The Attorney General’s Lawyer: Inside the Meese Justice Department 136-37 (1992) (observing that the Reagan Administration used litigation “to redress the federalism imbalance” in existing law); Gillman, supra note 42, at 159.

\(^{50}\) See Whittington, supra note 42, at 5 (arguing that “[t]hrough much of American history, presidents have found it in their interest to defer to the Court and encourage it to take an active role in defining the Constitution and resolving constitutional controversies”).

\(^{51}\) See Douglass C. North, Institutions, Institutional Change and Economic Performance 100 (1990) (arguing that “[p]ath dependence means that history matters. We cannot understand today’s choices … without tracing the [past] … evolution of institutions”); Paul Pierson, Politics in Time: History, Institutions, and Social Analysis 35 (2004). For a definition of “path dependence,” see Margaret Levi, A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis, in COMPARATIVE POLITICS:
strong incentive to defend the scope of federal jurisdiction, because it can thereby maintain its own authority and influence over the development of federal law.

Social scientists have argued that institutions, like the judiciary, may become “entrenched” (or “locked-in”), in part because they serve as sources of power and influence for other groups in society. For example, many special interest groups have found that litigation is a useful way to achieve their policy objectives. Such organizations develop considerable legal expertise (what social scientists refer to as “asset-specific investments” in the judicial system) and, as a result, have an interest in ensuring that legal and policy decisions are made by courts, rather than by other government institutions. In other words, these “litigation machines” have a strong interest in the preservation (or entrenchment) of the judiciary. Any policy that undermines the court system simultaneously takes away their primary source of power and influence.

I argue that this analysis also applies to the relationship between the Department of Justice and the federal judiciary, particularly the Supreme Court. The DOJ’s primary function is to represent the interests of the United

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**RATIONALITY, CULTURE, AND STRUCTURE** 28 (Mark Irving Lichbach & Alan S. Zuckerman eds., 1997) (“Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high…. [T]he entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.”).

52 See NORTH, supra note 51, at 35, 159 (arguing that institutions “induce self-reinforcing processes that make reversals increasingly unattractive over time…. Institutions and policies may encourage individuals and organizations to invest in specialized skills … These activities increase the attractiveness of existing institutional arrangements [and] … push individual behavior onto paths that are hard to reverse”). Notably, the older an institution is, the more “locked-in” it will be. See PIERSON, supra note 51, at 147 (asserting that the incentives created by asset-specific investments are “likely to accumulate with the passage of time”).


54 See Peter Alexis Gourevitch, *The Governance Problem in International Relations, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS* 144-45 (David A. Lake & Robert Powell eds., 1999) (“Political actors develop investments, ‘specific assets,’ in a particular arrangement—relationships, expectations, privileges, knowledge of procedures, all tied to the institution at work…. [This] helps to explain institutional persistence. [A]ctors … have incentives to protect their investment by opposing change.”).

55 See PIERSON, supra note 51, at 159 (urging that “[t]here are a number of mechanisms that appear to make expansions of court power virtually irreversible. The emergence of courts as the site of political and legal dispute resolution generates a rapid expansion of law-centered actors who have a considerable stake in preserving and expanding the use of these procedures”) (footnote omitted).

56 Pierson & Trowbridge, supra note 53, at 22, 26 (“[M]any advocacy groups are little more than fund-raising and litigation machines.”). Notably, social scientists do not contend that change is impossible, just that it is made more difficult by these institutional arrangements. See PIERSON, supra note 51, at 52.
States in federal court.\textsuperscript{57} Thus, the Justice Department is, in many respects, the government’s “litigation machine.”\textsuperscript{58} The DOJ’s power and influence within the executive branch is therefore greatest when decisions are hammered out in litigation.

The DOJ’s “asset-specific investments” in the judiciary give it a strong interest in preserving the federal courts’ authority. But that is particularly true at the Supreme Court level. Although the Justice Department is responsible for most federal litigation, it does share some of that authority with other agencies at the lower court level.\textsuperscript{59} In the Supreme Court, by contrast, the Solicitor General is the exclusive representative of the United States.\textsuperscript{60} Thus, as former Solicitor General Drew Days put it, “[o]nce cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law” and can have a substantial “impact upon the establishment of constitutional and other principles.”\textsuperscript{61} For this reason, the Justice Department has a strong interest in the “entrenchment” of the Court’s appellate review power.

I assert that these executive branch incentives (\textit{i.e.}, the President’s desire for a judicial forum for constitutional claims and the DOJ’s interest in Supreme Court review) provide considerable protection for the federal judiciary. The executive branch has a strong incentive to use its authority over the enactment and enforcement of federal law to safeguard federal jurisdiction.

\textsuperscript{57} See 28 U.S.C. § 516 (“Except as otherwise authorized by law, the conduct of litigation in which the United States ... is interested... is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

\textsuperscript{58} The DOJ does, of course, engage in non-litigation activities, such as the law enforcement tasks of the Federal Bureau of Investigation. See Department of Justice: Agencies, available at http://www.justice.gov/agencies/ (providing an overview of the current components of DOJ). But the DOJ’s central function (and, indeed, the primary reason for its creation) is to litigate cases on behalf of the United States. \textit{See} Act of June 22, 1870, ch. 150, 16 Stat. 162; CONG. GLOBE, 41st Cong., 2nd Sess. 3035 (1870) (statement of Rep. Thomas Jenckes (Republican) (Rhode Island) (stating that a primary object of “this bill [creating the DOJ] is to establish a staff of law officers ... to transact [the] law business of the Government in all parts of the United States”). Notably, throughout this Article, for the party affiliation of members of Congress, I rely on Congress’s online database, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, http://bioguide.congress.gov/biosearch/biosearch.asp.


\textsuperscript{60} See 28 U.S.C. § 518(a) (“[T]he Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court[.]”); Fed. Election Comm’n v. NRA Political Victory Fund, 513 U.S. 88, 93 (1994) (“[I]f a case is one ‘in which the United States is interested,’ ‘it must be conducted and argued in this Court by the Solicitor General or his designee.’”) (quoting United States v. Providence Journal Co., 485 U.S. 693, 700 (1988)).

\textsuperscript{61} Drew S. Days, III, \textit{Executive Branch Advocate v. Officer of the Court: The Solicitor General’s Ethical Dilemma}, 22 NOVA L. REV. 677, 680 (1998); see Richard L. Paclelle, Jr., \textit{Between Law & Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation} 11 (2003) (arguing that the Solicitor General’s power has increased as the role of the Supreme Court has grown in importance).
This structural claim has considerable historical support. The executive branch (as discussed in Part III) has repeatedly opposed jurisdiction-stripping proposals in Congress, even when the President strongly disagreed with the federal courts’ jurisprudence. Thus, both the Roosevelt and the Reagan Justice Departments fought efforts to strip the Supreme Court’s appellate jurisdiction and to eliminate federal jurisdiction over constitutional claims. Moreover (as discussed in Part IV), even when jurisdiction-stripping legislation has been enacted into law, the Justice Department has repeatedly urged the courts to construe those provisions narrowly in order to preserve federal jurisdiction over constitutional claims. The executive branch has thus turned out to be an important, and effective, advocate for the federal courts.

At the outset, however, I should note some qualifications and clarifications about this argument. First (as discussed in Part V), I do not assert that these Article II safeguards are absolute. Although the executive branch has consistently opposed jurisdiction-stripping bills that were considered as stand-alone measures, more recent proposals have been part of omnibus legislation (like the Antiterrorism and Effective Death Penalty Act)—the bulk of which the President supported. As social scientists have observed, Presidents rarely veto such omnibus legislation, even when they oppose particular provisions on constitutional or policy grounds. Presidents have thus assented to the jurisdictional restrictions buried in such expansive statutes. Furthermore, the DOJ has not always argued for a narrow construction of jurisdiction-stripping laws. But, notably, the Solicitor General has done so consistently in recent years—during the same period that Congress has relied on omnibus legislation. Thus, in the past few decades, even when the executive branch has failed to protect the judiciary in the legislative process, it has done so via litigation.

Second, I do not seek to evaluate whether the Justice Department should have argued for a narrow construction of these jurisdiction-stripping laws. Instead, my goal here is to show that the executive branch’s institutional interest in preserving federal jurisdiction has led it to be an important (and previously overlooked) ally for the federal courts.

Finally, I do not mean to suggest that the executive branch is exclusively focused on advancing its own power and entirely unconcerned with constitutional values. Indeed, the very fact that the executive branch has repeatedly focused on the Supreme Court and constitutional claims suggests that it may share the intuition of scholars that restricting jurisdiction

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62 See infra notes 318-319 and accompanying text.
63 The DOJ has sometimes adopted a narrow construction of jurisdiction-stripping laws even in the face of statutory language and legislative history strongly indicating that Congress sought to strip all federal jurisdiction. See infra Part IV. One might question whether the DOJ in those cases was “faithfully” executing the law. But that normative inquiry is not my project here.
in those areas would “violate the spirit of the Constitution, even if it would not violate its letter.”

I do not doubt that many members of the executive branch share that basic constitutional intuition, or that this motivates their conduct to some degree. But I do assert that the institutional incentives of the President and the Justice Department help ensure that they will act upon that intuition and oppose jurisdiction-stripping measures, even when the President has other strong reasons to attack the federal courts.

Notably, this account of federal jurisdiction accords with the design of our constitutional scheme of separated powers. James Madison hoped that the Constitution “could be made politically self-enforcing by aligning the political interests of officials ... with constitutional rights and rules.” Thus, “the great security ... consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.... Ambition must be made to counteract ambition.” In this context, the executive branch’s “ambition”—its interest in preserving its own power and influence over the development of federal law—has led it to “resist” congressional encroachments on the federal judiciary. Thus, the executive branch has used the structural tools of Article II to protect the Article III judicial power.

III. Article II Safeguards in the Legislative Process

Beginning in the early twentieth century, there were a series of proposals to curtail the Supreme Court’s appellate jurisdiction and federal jurisdiction over constitutional claims. The executive branch repeatedly opposed these proposals—not only when the President favored the federal courts’ jurisprudence, but also when he strongly opposed it. I focus here

64 Bator, supra note 4, at 1039. Furthermore, the President does have some interest in ensuring that the federal courts maintain jurisdiction in other areas. He can use the judiciary to pursue non-constitutional policies in the face of legislative opposition. See Whittington, supra note 42, at 197 n.124 (noting that “constitutional interpretation is not the only form of policymaking that presidents might pursue through the courts”). But, in part because of our longstanding tradition of judicial supremacy, it is easier for the President to advance his constitutional philosophy in this context. The President can use the administrative state to advance other policies. See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2248 (2001) (noting that agencies can “showcase and advance presidential policies”).


66 The Federalist No. 51 (James Madison).

67 For example, the Kennedy Administration strongly favored reapportionment and filed briefs in support of the Supreme Court’s decisions in Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964). See BARRY FRIEDMAN, THE WILL OF THE PEOPLE 270 (2009). Accordingly, it is perhaps unsurprising that Attorney General Robert Kennedy was “strongly against” congressional efforts to strip federal jurisdiction over reapportionment, Anthony Lewis, Democrats Weigh Policy on Seating and Districting, N.Y. Times, Aug. 20,
on four cases involving Presidents from different political parties, who had very different views of the federal judiciary. The consistency of the executive branch’s approach in these (otherwise distinct) administrations indicates that the executive branch has strong long-term institutional reasons to protect the scope of federal jurisdiction.

A. The Roosevelt Justice Department and Jurisdiction Stripping

Social scientists have argued that President Franklin Roosevelt was a “reconstructive” leader, who sought to reshape the prior constitutional and political order. For many decades, national politics had been dominated by concerns about economic growth and industrial development. Accordingly, many prior Presidents had supported policies that aided large corporations. In the wake of the stock market crash of 1929 and in the midst of the Great Depression, President Roosevelt promised to usher in a new “economic constitutional order.” He offered the nation a “New Deal.”

Of course, the Supreme Court proved to be a substantial obstacle to President Roosevelt’s reconstruction. Although the Court upheld parts of what became the New Deal, it also invalidated key portions. For 1964, at 1. An analogous example comes from the nineteenth century. The reconstruction laws were enacted over President Andrew Johnson’s veto. See Keith E. Whittington, Bill Clinton Was No Andrew Johnson: Comparing Two Impeachments, 2 U. PA. J. CONST. L. 422, 437 (2000). It thus seems unsurprising that he also vetoed Congress’s attempt to prevent the Supreme Court from reviewing those laws. See CONG. GLOBE, 40th Cong., 2nd Sess. 2094 (1868) (showing that the President vetoed the bill on the ground that it was “not in harmony with the spirit and intention of the Constitution”). Congress, however, also overrode that veto. See id. at 2128, 2170; infra note 82 (discussing these events).

69 See infra Part II(A),(D) (discussing the Roosevelt and Reagan Administrations).

68 I also focus on cases in which there is publicly available information about the executive branch’s views on jurisdiction stripping. Notably, these examples appear to reflect the executive branch’s consistent practice. See 128 CONG. REC. 9094 n.1 (1982) (letter dated May 6, 1982 from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond) (stating that “[t]he Department of Justice … has consistently opposed proposals to restrict Supreme Court jurisdiction,” and citing both public records and internal DOJ documents); infra notes 305-308 and accompanying text (discussing the DOJ’s reliance on its own precedents).


72 Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), 1 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 752.

73 See Crowell v. Benson, 285 U.S. 22, 62-63 (1932) (upholding the Longshoremen’s and Harbor Workers’ Compensation Act); Larry D. Kramer, Putting the Politics Back Into the
example, in *Schechter Poultry Corp. v. United States* (1935),\(^{72}\) the Court struck down the National Industrial Recovery Act, the centerpiece of Roosevelt’s economic program. At a press conference following the *Schechter* decision, President Roosevelt accused the Court of “relegat[ing]” the nation to the “horse and buggy age” of interstate commerce and potentially undermining every New Deal reform.\(^{76}\) Although he declined to say “what [he was] going to do” in response to the decision, he noted that various proposals were being considered by “a central source—the Solicitor General and the Attorney General.”\(^{77}\)

The President made few other public attacks on the Court during the next year and a half.\(^{78}\) But the Roosevelt Justice Department was indeed working behind the scenes to find a solution to the “Court problem.” There were many ideas: suggestions for constitutional amendments, proposals to enlarge the size of the Supreme Court, and—most important for present purposes—efforts to curb federal jurisdiction.\(^{79}\) Although some legislators sought to curtail the jurisdiction of the lower federal courts (which had also struck down New Deal programs),\(^{80}\) most proposals were targeted at the Supreme Court. For example, soon after the *Schechter* decision, Senator Robert Owen contacted Roosevelt’s first Attorney General Homer Cummings and suggested that Congress could, pursuant to the Exceptions Clause, restrict the Supreme Court’s appellate jurisdiction over constitutional claims.\(^{81}\)

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\(75\) 295 U.S. 495 (1935).


\(77\) Id.

\(78\) See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 107 (1995) (noting Roosevelt’s reluctance to attack the Supreme Court prior to the 1936 election); Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* 223-24 (2010) (noting Roosevelt’s awareness that “[h]istorically, election-year attacks on the court were a losing proposition”).

\(79\) See Leuchtenburg, supra note 78, at 102; Shesol, supra note 78, at 203-04 (noting that there were “more than a hundred” proposals to curb the Supreme Court).

\(80\) See Memorandum from Warner W. Gardner, Department of Justice, Washington, D.C., to the Solicitor General 2 (Dec. 10, 1936) (copy on file with author).

\(81\) See Memorandum from Alexander Holtzoff, Department of Justice, Washington, D.C., to the Attorney General 1 (June 6, 1935) (copy on file with author) (noting the suggestion by Sen. Robert Owen (Democrat) (Oklahoma)). Interestingly, no one seems to have suggested that the Court’s jurisdiction be restricted in certain classes of cases. Thus, the DOJ analyzed Congress’s power to limit—or eliminate—its appellate jurisdiction over all constitutional claims.
Two Justice Department attorneys were assigned the task of examining such proposals to strip federal jurisdiction. In a series of memoranda, Assistant Attorney General Alexander Holtzoff advised Attorney General Cummings that “[t]he decisions of the Supreme Court … support the view” that Congress could restrict—and even eliminate—the Supreme Court’s appellate jurisdiction. But he “greatly doubted [the] wisdom” of such a restriction. Holtzoff was concerned in part about the need for uniformity on issues of constitutional law. He declared that “it would be a highly dangerous step to take away from the Supreme Court the power” to review lower federal court decisions in constitutional cases, “for then we are likely to be confronted by a situation where a statute might be valid in one Circuit and invalid in another.” In his view, the best way to address the problems created by the Supreme Court’s decisions was to adopt a constitutional amendment.

Assistant Solicitor General Warner Gardner also analyzed proposals to eliminate the Supreme Court’s appellate jurisdiction. He found that, although Congress had broad power to restrict the Supreme Court’s jurisdiction, there was an important limit on Congress’s authority. The Supreme Court’s “exercise of judicial power seems to be exempt from legislative interference under the separation of powers doctrine.”

Gardner noted that it would be “difficult, of course, to fix the line which separates judicial power, which is immune from Congressional

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82 The attorneys focused in part on a precedent from the Reconstruction era. See Memorandum from Alexander Holtzoff, Department of Justice, Washington, D.C., to the Attorney General 1-2 (Jan. 16, 1935) (copy on file with author); Memorandum from Warner W. Gardner, Department of Justice, Washington, D.C., to the Solicitor General 5 (Aug. 15, 1935) (copy on file with author). In 1868, William McCardle was arrested by federal military authorities in the South for publishing newspaper articles that criticized the military’s reconstruction activities. See William W. Van Alstyne, A Critical Guide to Ex parte McCardle, 15 ARIZ. L. REV. 229, 236 (1973). When the lower courts denied habeas relief, McCardle sought Supreme Court review under the Habeas Corpus Act of 1867. See id. at 237. While the case was pending, Congress enacted (over President Andrew Johnson’s veto) a statute that repealed the Court’s appellate jurisdiction under the 1867 Act. See Repeal Act of 1868, 15 Stat. 44; CONG. GLOBE, 40th Cong., 2nd Sess. 2128, 2170 (1868). In Ex parte McCardle, the Supreme Court upheld Congress’s power to withdraw its appellate jurisdiction over the case. 74 U.S. (7 Wall.) 506, 515 (1869). But the Court emphasized that the statute had not cut off all avenues of Supreme Court review. See id. The Court later explained in Ex parte Yerger that it could still review lower court habeas decisions by way of an original habeas petition under the Judiciary Act of 1789. See 75 U.S. (8 Wall.) 85, 105-06 (1869).

83 Memorandum from Alexander Holtzoff, Department of Justice, Washington, D.C., to the Attorney General 4 (June 6, 1935) (copy on file with author).

84 Id. at 5.

85 Memorandum from Alexander Holtzoff, Department of Justice, Washington, D.C., to the Attorney General 4-5 (June 22, 1935) (copy on file with author).

86 See id. at 5.


88 Id. at 6 (emphasis added).
regulation, and appellate jurisdiction, over which Congress has control.”

But he found that it was unnecessary to determine “the precise limits of the judicial power,” because he concluded that the Supreme Court’s “immunity from legislative control includes the power to declare legislation unconstitutional.” Thus, he stated:

It is abundantly clear that the members of the Federal Convention of 1787 viewed as one of the basic functions of the judiciary the power to declare legislation unconstitutional.... It would seem that a power apparently considered to be fundamental to the framework of our Government must be a judicial power rather than a mere incident of jurisdiction, subject to regulation and control by Congress.

Gardner also considered whether Congress could strip inferior federal court jurisdiction over constitutional claims. Although the Supreme Court had often stated “in sweeping language” that Congress had essentially unlimited power over the lower courts, he concluded (with some hesitation) that Congress could not strip jurisdiction over constitutional claims. He stated that, even as to the lower courts, it seemed “relatively clear that the power of judicial review” was an “inherent attribute of the judicial power ... beyond congressional control.”

In subsequent months (and particularly after Roosevelt’s landslide reelection in 1936), the President and Attorney General Cummings began to focus on alternative proposals, including suggestions that the President “pack” the Supreme Court. The Attorney General asked Gardner to analyze the various proposals. Gardner subsequently produced a lengthy memorandum, concluding that most of the suggestions—including, of course, the proposals to limit federal jurisdiction—were either unwise or unconstitutional (or both). Ultimately, he determined that the proposal to enlarge the Supreme Court, while not without flaw, was “the only one which is certainly constitutional and ... may be done quickly and with a fair assurance of success.” Indeed, it was the only “undoubtedly constitutional method by which to obtain a more sympathetic majority of the Court.”

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89 Id.
90 Id. at 10, 13.
91 Id. at 10-11.
93 See id. at 47 (stating that it was “impossible to reach any certain conclusion” on this issue).
94 Id. (internal quotation marks omitted).
96 See id. 251-52.
97 See Memorandum from Warner W. Gardner, Department of Justice, Washington, D.C., to the Solicitor General 64-65 (Dec. 10, 1936): supra notes 87-94 and accompanying text.
98 Id. at 57; see id. at 56 (noting policy objections, including that the proposal could “mak[e] the court ... unwieldy”).
99 Id. at 65.
President Roosevelt and Attorney General Cummings already favored the Court-packing idea, but Gardner’s memo seemed to confirm the validity of the approach.100 Cummings asked Gardner to draft the legislation that (after modifications by the Attorney General) became Roosevelt’s famous Court-packing plan.101

The story of the Roosevelt Administration’s approach to the judiciary thus reveals an apparent contradiction. Although the Roosevelt Justice Department strongly opposed efforts to strip federal jurisdiction, the DOJ not only supported but crafted what may be the most notorious Court-curbing bill in history.102

But the difference between these types of “court-curbing” measures may in fact say a great deal about the Article II safeguards of federal jurisdiction. As discussed, Presidents have an incentive to preserve federal jurisdiction, because they can use the courts to advance their constitutional philosophy. Those same incentives lead Presidents to appoint judges who are sympathetic to that philosophy. In short, Presidents who seek to promote their constitutional views through the judiciary have a strong incentive to “pack” the federal courts. For that reason, as Professor Whittington has observed, “Roosevelt’s proposal to pack the Court with his supporters contained no provision requiring judicial restraint at all.... The administration hoped to harness the power of the Court, not destroy it.”103

Congress, in turn, seems to have rejected the Court-packing plan in order to prevent such executive “harnessing.” As Jeff Shesol asserts in his recent account of the Court-packing proposal, even Roosevelt’s Democratic supporters ultimately opposed the plan because they viewed it as a “power grab in the guise of reform.”104 “The idea of giving any president … the authority to remake the Supreme Court virtually overnight was abhorrent.”105

100 See LEUCHTENBURG, supra note 78, at 118; SHESOL, supra note 78, at 253 (asserting that “Cummings saw in Gardner’s memo that which he wished to see—that which confirmed the trend of his own thinking”).
101 See SHESOL, supra note 78, at 253, 256.
102 Of course, there were some dissenters within the Justice Department. Solicitor General Stanley Reed did not support of the Court-packing proposal. See id. at 255-56 (noting that Solicitor General Reed “distanced himself” from the project, perhaps because of a “simple discomfort at the idea of conspiring against the Court, when it was [his] job … to represent the government before those same justices”) (internal quotation marks omitted).
103 WHITTINGTON, supra note 42, at 266-67 (“Even as [the administration] sought to temporarily displaced judicial authority, it was setting the stage for its reconstruction.”) (emphasis added).
104 SHESOL, supra note 78, at 315-16, 321 (noting that the opposition of Senate progressives was based on concerns about executive power); see LEUCHTENBURG, supra note 78, at 137 (observing that some of Roosevelt’s opponents “compare[ed] [him] to Stuart tyrants and European dictators”); SKOWroneK, supra note 70, at 322-23 (stating that “[t]he specter of European autocrats [i] haunted this ‘dictator bill’.... Congress … mounted its own defense of the Constitution against the arbitrary view of executive power it found so offensive in the president’s proposal”).
105 SHESOL, supra note 78, at 316.
The demise of the court-curbing proposals in the 1930s may thus be a tribute to the constitutional separation of powers. The executive branch resisted proposals to restrict federal jurisdiction and instead sought to “harness the power of the Court.” Congress, in turn, sought to prevent that from happening. Accordingly, “[a]mbition [was] made to counteract ambition” in a manner that protected the constitutional value in an independent judiciary.\textsuperscript{106}

**B. Jurisdiction-Stripping Efforts in the Eisenhower Administration**

The Supreme Court’s appellate review power once again became a subject of controversy during the Second Red Scare.\textsuperscript{107} Although the Supreme Court initially steered clear of the controversy (or upheld the government’s policies),\textsuperscript{108} the Court in the mid-1950s began to issue a series of decisions that placed constraints on government investigations of suspected communists.\textsuperscript{109} For example, in \textit{Cole v. Young},\textsuperscript{110} the Court began to scrutinize executive agency decisions to discharge allegedly “disloyal” employees.\textsuperscript{111} And, in \textit{Jencks v. United States},\textsuperscript{112} the Court required federal prosecutors in criminal cases to turn over all relevant evidence about government witnesses to the defendants (the suspected “subversives”).\textsuperscript{113}

During this period, the nation was led by President Dwight Eisenhower. Social scientists have described Eisenhower as a “preemptive” president, a moderate conservative who came to power when the progressive politics of the post-New Deal era were still dominant.\textsuperscript{114} In that environment, President Eisenhower was a pragmatic politician, who was “personally sympathetic to conservative Republican ideals” but who “refused...
to take on New Deal liberalism” or to be controlled by the right wing of the Republican Party.\footnote{SKOWRONK, supra note 70, at 46.}

President Eisenhower likewise took a pragmatic approach to the judiciary. He generally declined to take a strong stand either in favor of or in opposition to Warren Court civil liberties decisions. Instead, President Eisenhower typically asserted that the federal judiciary was responsible for making “legal decisions,” and that his duty as president was to enforce those decisions, whether or not he agreed with them.\footnote{See, e.g., President Dwight D. Eisenhower, The President’s News Conference of August 20, 1958, 1958 PUB. PAPERS 626 (Aug. 20, 1958) (stating, in response to a question about whether he “personally favor[ed]” the Court’s desegregation decisions, that he “always declined” to express an opinion because he had an obligation to enforce the Supreme Court’s judgments even if he “disagree[d] very violently with a decision”).}

In keeping with that general approach, President Eisenhower declined to publicly criticize the Supreme Court’s decisions in these “subversive activity” cases.\footnote{See President Dwight D. Eisenhower, The President’s News Conference of June 26, 1957, 1957 PUB. PAPERS 503 (June 26, 1957) (stating only that “in their latest series of decisions [in communism-related cases] there are some that each of us has very great trouble understanding”). He later referred to these (and criminal justice) decisions when he remarked that the appointment of Earl Warren was the “biggest mistake” he made as president. See 2 STEPHEN E. AMBROSE, EISENHOWER: THE PRESIDENT 190 (1984).}

But his administration did not support the Court’s jurisprudence.\footnote{Notably, the Eisenhower Administration was quite concerned about the perceived threat of global communism. See President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union, 1957 PUB. PAPERS 28 (Jan. 10, 1957) (commenting on “the threat of Soviet aggression”); CAUTE, supra note 107, at 49.} In several letters to Congress, President Eisenhower’s first Attorney General Herbert Brownell endorsed legislation to modify the \textit{Cole v. Young} decision and to give federal agencies broader authority to terminate “disloyal” employees.\footnote{The Court’s decisions had permitted such terminations only when an employee was in a “sensitive” position. The DOJ advocated legislation that would permit the dismissal of any allegedly “disloyal” employee, at least pending further study. See Bill to Protect the National Security of the United States By Preventing the Employment by the United States of Persons Found to be Disloyal to the United States: Hearing Before the House Comm. on Post Office and Civil Service, 84th Cong. 4-5 (1956) (letter from Attorney General Herbert Brownell) (“favor[ing] the enactment” of a bill to overrule \textit{Cole v. Young}); Federal Employees Security Program: Hearings Before the House Comm. on Post Office and Civil Service, 85th Cong. 140 (1957) (letter from Deputy Attorney General William P. Rogers) (same).} The DOJ was even more alarmed by the \textit{Jencks} ruling. At a hearing, Attorney General Brownell told Congress that \textit{Jencks}, at least as interpreted by the lower federal courts, had created “a grave emergency in law enforcement” and requested legislation to undo the decision.\footnote{Establishing Procedures for the Production of Gov’t Records in Criminal Cases in U.S. Courts: Hearing Before the Subcomm. on Improvements in the Federal Criminal Code of the S. Comm. on the Judiciary, 85th Cong. 8-9 (1958) (testimony of Attorney General Herbert}
Many members of Congress were more vocal in their criticism.\textsuperscript{121} In August 1957, Senator William Jenner introduced a bill to eliminate the Supreme Court’s appellate jurisdiction over a range of cases involving subversive activity.\textsuperscript{122} He argued that the “so-called Warren Court” had done much to “confuse, disarm and paralyze the people in their fight … against the world Communist conspiracy.”\textsuperscript{123} Indeed, Senator Jenner complained, the Court had become “so befuddled as to hold” that a federal agency could not remove “a spy” from its employment roles.\textsuperscript{124} He declared: “[W]hen [such] things have come to pass …, it is time to curtail the appellate jurisdiction of the Supreme Court.”\textsuperscript{125}

The Senate Judiciary Committee conducted hearings on the Jenner bill and invited Eisenhower’s second Attorney General William Rogers to comment on the measure.\textsuperscript{126} Despite the administration’s concerns about the Court’s decisions, the Eisenhower Justice Department strongly opposed this jurisdiction-stripping bill.

On March 4, 1958, Attorney General Rogers sent a letter to the Senate Judiciary Committee, “urg[ing] … the committee [to] report the bill adversely.”\textsuperscript{127} The Attorney General stated that “[f]ull and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government.”\textsuperscript{128} He emphasized in part the need for uniformity in the administration of federal law. “If this legislation should be enacted, constitutional questions … would be left for decision to the [various] Federal Brownell). Congress did later modify Jencks, and the Court upheld that new law. CAUTE, supra note 107, at 138; Palermo v. United States, 360 U.S. 343, 350-53 & n.11 (1959).

\textsuperscript{121} See e.g., 104 CONG. REC. 18678 (1958) (statement of Sen. James Oliver Eastland (Democrat) (Mississippi)) (contending that the Court’s “decisions … have effectively destroyed this Nation’s defense against [the communist] conspiracy”). Other legislators, however, rushed to the Court’s defense. See, e.g., id. at 18679-80 (statement of Sen. Jacob Javits (Republican) (New York)) (arguing that “the maintenance of the proper balance between the Constitution and the laws made by Congress is at least as important as the efforts” to root out Communists).

\textsuperscript{122} See Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the S. Comm. on the Judiciary, 85th Cong. 1-2 (1957) (the bill sought to strip the Court’s appellate jurisdiction over (1) the functions of congressional committees; (2) decisions by executive agencies to terminate disloyal employees; (3) any state law on subversive activity; (3) any school board rule governing subversive activity among teachers; and (5) any state law pertaining to bar admissions).

\textsuperscript{123} Id. at 6 (1957) (statement of Sen. William Ezra Jenner (Republican) (Indiana).

\textsuperscript{124} Id. at 23.

\textsuperscript{125} Id.

\textsuperscript{126} See Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing, 85th Cong. 572-73 (1958).

\textsuperscript{127} Id. at 574 (letter from Attorney General William P. Rogers to Senator James O. Eastland, Chairman, Senate Committee on the Judiciary).

\textsuperscript{128} Id. at 573.
courts of appeal and the highest appellate court for each of the 48 States.” 129
But the Attorney General also worried about the effect of the measure on judicial independence. 130 He declared: “I am convinced that [the] enactment [of this bill] would be extremely detrimental to the proper administration of justice and harmful to our balanced system of government.” 131

Following the Senate Judiciary Committee hearing, Senator John Butler proposed an amended bill that eliminated most of the jurisdictional restrictions. 132 But, ultimately, the Senate rejected this new “Jenner-Butler bill” in its entirety. 133

C. Jurisdiction-Stripping Efforts in the Carter Administration

The number of attacks on the federal judiciary exploded in the late 1970s (during the presidency of Jimmy Carter), largely in response to the constitutional jurisprudence of the Warren Court. There were countless proposals to strip federal jurisdiction over constitutional claims ranging from school prayer and abortion to the use of busing to integrate public schools. 134

Social scientists have described President Carter as a “disjunctive” leader who came to power at the tail end of a political era; in his case, it was the end of the progressive era originally ushered in by Franklin Roosevelt. 135 Like many “disjunctive” leaders, President Carter oversaw a deeply divided political party. The Democratic Party was split between social progressives, who favored the Court’s civil rights jurisprudence, and social conservatives (primarily from the South) who opposed it. 136 Thus, President Carter’s greatest challenge was maintaining this fractured coalition. 137

129 Id.
130 Id. at 574 (“The natural consequence[] of such an enactment is that the courts would operate under the constant apprehension that if they rendered unpopular decisions, jurisdiction would be further curtailed.”).
131 Id. at 574.
132 See 104 CONG. REC. 18647-49 (1958) (statement of Sen. John Butler) (Republican) (Maryland)). The new “Jenner-Butler” bill sought to remove the Supreme Court’s appellate jurisdiction in only one area—review of state court decisions on bar admissions. See id. at 18647. Bar admissions became an area of controversy, after the Court began to review state court decisions denying admission to suspected communists. See Konigsberg v. State Bar, 353 U.S. 252, 273-74 (1957). Notably, the NAACP was strongly opposed to the elimination of the Court’s appellate jurisdiction in this area. The organization was concerned that state courts would use that freedom from Supreme Court supervision to bar civil rights attorneys from practicing law in their States. See Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing, 85th Cong. 491-92 (1958) (statement of Clarence Mitchell, Director of the Wash. Bureau of the Nat’l Ass’n for the Advancement of Colored People).
133 See 104 CONG. REC. 18687 (1958) (the Senate defeated the measure by a vote of 49 to 41).
135 See SKOWRONET, supra note 70, at 361-62, 365.
136 See WHITTINGTON, supra note 42, at 66, 268-69.
137 See id. at 66.
Perhaps for this reason, as political scientist Stephen Skowronek has explained, President Carter gained a reputation for “fuzziness” on controversial issues. For example, while President Carter courted the vote of the religious right in 1976 by emphasizing his own born-again Christianity, he declined to support their efforts to reinstate prayer in school. Likewise, although Carter declared that he was “personally against abortion,” he treated the issue as a “legal” matter for the courts to decide. He thus declined to support efforts to ban abortion.

The Carter Justice Department was, however, somewhat less “fuzzy” on jurisdiction stripping. In April 1979, while the Senate was considering a proposal by Senator Jesse Helms to eliminate federal jurisdiction over school prayer cases, Attorney General Griffin Bell sent a letter to Congress, urging them to reject the measure.

The Attorney General stated that any proposal to strip federal jurisdiction over constitutional claims was “ill-advised as a matter of constitutional law and of public policy,” because “[m]atters of constitutional interpretation and adjudication are ... pre-eminently within the province of the Federal judiciary.” But Bell was especially concerned about the proposed limitation on the Supreme Court’s appellate jurisdiction. Although he declined (at that point) to take a position on Congress’s power to enact

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138 SKOWRONEK, supra note 70, at 372 (“[T]he more [Carter] attempted to ... clarify his position publicly, the more dissonance people heard, and by the end of the 1976 primary campaign, he was already stamped indelibly with a debilitating reputation for ‘fuzziness.’”).


140 Carter explained that “as President [he took] an oath to uphold the laws ... as interpreted by the Supreme Court[,] So, if the [Court] should rule, as they have, on abortion and other sensitive issues contrary to my own personal beliefs, I have to carry out” that ruling. President Jimmy Carter, Remarks and a Question-and-Answer Session during a Live Television Broadcast, 3 PUB. PAPERS 2354 (Oct. 20, 1980).

141 See Flint & Porter, supra note 139, at 35.

142 See LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS 130 (2002) (noting that Senator Jesse Helms (Republican) (North Carolina) “took the lead in promoting this type of court-stripping bill”). The bill provided:

[T]he Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State [law] ... which relates to voluntary prayers in public schools and public buildings....

[T]he district courts shall not have jurisdiction of any case or question which the Supreme Court does not have the jurisdiction to review under [the above provision].

125 CONG. REC. 7577 (1979).

143 See id. at 7636-37. (letter dated April 9, 1979, from Attorney General Bell to Senator Abraham Ribicoff, Chairman, Senate Committee on Government Operations). Although Attorney General Bell’s letter specifically addressed the school prayer bill, his analysis was not limited to that proposal. See id. at 7636-37.
such a measure, he made clear that any such law would be unwise. The elimination of Supreme Court review would “run afoul of the public interest in . . . a uniform, definitive and dispositive nation-wide resolution of issues of constitutional magnitude.”

The Senate ultimately passed the jurisdiction-stripping bill, and the measure went to the House Judiciary Committee. The Carter Justice Department then provided its views on the constitutionality of the proposal. As Assistant Attorney General John Harmon explained at a subcommittee hearing, the DOJ believed that the school prayer measure was “unconstitutional to the extent that it would purport to divest the Supreme Court of [ ] jurisdiction.”

The Carter Justice Department endorsed Professor Hart’s “essential role” theory and concluded that it would be “difficult to conceive of a more essential role for the Court than to preserve the unity of our constitutional law.” Accordingly, the school prayer proposal was “unconstitutional because it impinge[d] on the essential role of the Supreme Court.” Harmon declared that he was “confident” the DOJ would recommend that President Carter “veto” any bill containing such a jurisdiction-stripping provision.

The school prayer bill ultimately died in the House Judiciary Committee. No other jurisdiction-stripping bill made it to the floor of either the House or the Senate during the Carter Administration. But legislators continued to propose such bills after President Carter left office in 1981.

D. The Reagan Era: Continuing Opposition to Jurisdiction Stripping

Social scientists have described Ronald Reagan as the most recent “reconstructive” leader. President Reagan articulated a new economic and social policy that differed sharply from the politics of the progressive leaders in the post-New Deal era. He sought to redefine the role of the federal government by reducing government regulation of the economy and enhancing the powers of the several States.

144 Id. at 7637.
147 Id. at 16-17 (DOJ memorandum).
148 Id. at 17.
149 Id. at 23 (statement of John Harmon, Assistant Attorney General, Office of Legal Counsel, U.S. Dep’t of Justice).
150 See SKOWRONIEK, supra note 70, at 414-15.
151 See id. at 415 (noting that Reagan promised to “release[e] the creative energies of the private sector” by deregulating business); WHITTINGTON, supra note 42, at 275 (“Central to Reagan’s constitutional vision was a more limited national government.”).
President Reagan also articulated a more socially conservative stance on constitutional issues. He was deeply skeptical of the civil rights jurisprudence of the Warren Court (and its progeny). Thus, throughout his presidency, Reagan strongly criticized the Supreme Court’s decisions on school prayer, busing, and abortion.\textsuperscript{152} For example, President Reagan “express[ed] profound disappointment” with the Court’s abortion decisions and “call[ed] on the Congress to make its voice heard against abortion on demand … whether by statute or constitutional amendment.”\textsuperscript{153} Likewise, Reagan asserted that “the decision that prevented voluntary prayer by anyone who wanted to do so in a school or a public building is just not in keeping with the Constitution at all.”\textsuperscript{154}

The Reagan Justice Department actively promoted the President’s pledge for a new and more socially conservative constitutional jurisprudence.\textsuperscript{155} Reagan’s first Attorney General William French Smith denounced the federal courts’ “activist” constitutional rulings.\textsuperscript{156} During his tenure, the DOJ (through Solicitor General Rex Lee) urged the Court to moderate its school prayer jurisprudence.\textsuperscript{157} And Reagan’s second Attorney General Ed Meese challenged not only the Court’s decisions but judicial supremacy itself. Thus, Meese articulated a departmentalist view of constitutional interpretation, arguing that if the President believed the federal courts erred in their constitutional judgments, he had a responsibility to advance his opposing view.\textsuperscript{158} During Meese’s tenure, the Justice Department advanced the President’s view on abortion when it (through Solicitor General Charles Fried) filed amicus briefs expressly calling for the reversal of \textit{Roe v. Wade}.\textsuperscript{159}

\textsuperscript{152} See \textit{infra} notes 153-154 and accompanying text; President Ronald Reagan, Remarks at a Reagan-Bush Rally in Charlotte, N.C., 2 PUB. PAPERS 1466 (Oct. 8, 1984) (“[B]using [] takes innocent children out of the neighborhood school and makes them pawns in a social experiment that nobody wants. We’ve found out it failed.”).

\textsuperscript{153} President Ronald Reagan, Statement on the United States Supreme Court Decision on Abortion, 1 PUB. PAPERS 876 (June 16, 1983).

\textsuperscript{154} President Ronald Reagan, Interview With Eleanor Clift, Jack Nelson, and Joel Havemann of the Los Angeles Times, 1 PUB. PAPERS 830 (June 23, 1986).

\textsuperscript{155} See REBECCA MAE SALOKAR, \textit{THE SOLICITOR GENERAL: THE POLITICS OF LAW} 76 (1992) (noting that the Reagan Administration “coined a new term in … the solicitor general’s office, ‘agenda cases,’” which included cases involving abortion, prayer, and busing).


\textsuperscript{157} See FISHER, supra note 142, at 133 (noting that the Reagan Administration asked the Court to “take a fresh look” at its school prayer decisions) (internal quotation marks omitted).


\textsuperscript{159} 410 U.S. 113 (1973); see Brief for the United States as Amicus Curiae in Support of Appellants, at 2, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (No. 84-495) (asserting that “Roe v. Wade is so far flawed … that this Court should reconsider that decision and … abandon it”).
In this environment, one might have expected the Reagan Administration to favor efforts to strip federal jurisdiction, at least in the areas of jurisprudence that the President had so roundly criticized. But the Reagan Justice Department took the same basic approach as its predecessors. Attorney General Smith explained the DOJ’s position in a May 1982 letter to Congress (which he separately published as an official Office of Legal Counsel opinion).  

Attorney General Smith asserted that Congress lacked the power to strip the Supreme Court’s jurisdiction over constitutional claims. He acknowledged that, under the plain language of the Exceptions Clause, there was “no doubt that Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court.” But he insisted that “Congress may not ... consistent with the Constitution, make ‘exceptions’ to Supreme Court jurisdiction which would intrude upon [its] core functions … as an independent and equal branch in our system of separation of powers.”

Smith further argued that, even if Congress had the power to eliminate the Supreme Court’s appellate jurisdiction, it should not do so. He emphasized the importance of the Supreme Court in preserving the uniformity and supremacy of federal law, declaring that “[t]he integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions.”

Attorney General Meese endorsed these statements during his confirmation hearings. Senator Max Baucus asked him about measures “to limit the Supreme Court’s jurisdiction over, say, school prayer, busing, abortion, the right to bear arms, any provision that is contained in the Constitution.” Meese stated that he agreed with his predecessor that Congress lacks the power to “diminish or take away the core functions of the

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162 Although Attorney General Smith’s letter specifically addressed a school prayer provision, he did not limit his analysis to such a proposal. See 128 CONG. REC. at 9093-97.

163 Id. at 9093.

164 Id.

165 Id. at 9097 (asserting that “[s]tate courts could reach disparate conclusions on identical questions of federal law” and that, absent Supreme Court oversight, there would be “no guarantee … that state courts [would] accord appropriate supremacy to federal law”).


167 Id. at 185 (statement of Sen. Max Baucus) (Democrat) (Montana).
Supreme Court,” including the power to rule on constitutional claims. Meese declared that if he believed that a bill infringed on “a core function of the Supreme Court,” then he “would recommend a veto.”

The Reagan Justice Department also opposed bills that would eliminate inferior federal court jurisdiction over constitutional claims. Attorney General Meese explained that, although Congress “has a greater latitude” over lower court jurisdiction, it would be unwise for Congress to exercise that power. The judicial system could become very unstable if Congress “chang[ed] … jurisdiction based upon what may be in vogue at a particular time.” Thus, he believed that, as a general rule, Congress should not “limit lower Federal court jurisdiction over a Federal constitutional question.”

Given President Reagan’s declarations that the Supreme Court’s civil rights jurisprudence was “just not in keeping with the Constitution at all” (views that were shared by his Attorneys General), the Reagan Justice Department’s opposition to jurisdiction-stripping legislation seems remarkable. Yet there may be no inconsistency. The Reagan Justice Department had an alternative way of addressing what it viewed as the Supreme Court’s constitutional errors.

As Attorney General Smith explained in his May 1982 letter, the DOJ sought to “remedy … judicial overreaching,” not by restricting federal

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168 Id. at 185 (statement of Ed Meese) (stating that such a measure “would be unwise as well as impermissible under the Constitution”).

169 Id. at 186.

170 See Limitations on Court-Ordered Busing—Neighborhood School Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong. 166 (1982) (statement of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Department of Justice) (stating that the DOJ “recommended against” proposals that would “take classes of cases out of the jurisdiction” of the lower federal courts). The Reagan Administration took a more nuanced view of what it saw as proposals to limit the lower federal courts’ remedial power, supporting a proposal to restrict their authority to order busing in school desegregation cases. See id. at 131-34. But, notably, the DOJ interpreted the measure so as to exempt the Supreme Court. See id. at 133-34. In the DOJ’s view, the validity of the busing measure would be “far more debatable” if it applied to the Supreme Court’s appellate jurisdiction. Id. at 134.


172 Id.

173 Meese expressed this view in response to a question from Senator Baucus:

Senator Baucus. So, as I understand your answer, then, you think it is clearly unconstitutional for Congress to attempt to prevent the Supreme Court from having jurisdiction over a Federal constitutional question and that it is probably unwise for Congress to attempt to limit lower Federal court jurisdiction over a Federal constitutional question.

Mr. Meese. I would say as a general rule, yes, Senator. Obviously as to the latter part, the lower Federal courts, each would depend clearly on the specific case, the specific subject, and the specific proposal.

Id.

174 Supra notes 152-159 and accompanying text.
jurisdiction, but instead by challenging the courts’ constitutional rulings through litigation. Likewise, Meese argued that one of the best ways for the President to express his alternative constitutional vision was through litigation. “A lawsuit … can help clarify the law by better defining its edges. It can also give the Court an opportunity for rethinking a previous holding.” President Reagan indicated his support for this approach, when he declared that “[i]n many areas—abortion, crime, pornography, and others—progress will take place [only] when the Federal judiciary is made up of judges who believe in law and order and a strict interpretation of the Constitution” and promised to nominate federal judges “who share[d] the fundamental values” of his administration.

Thus, much like his reconstructive predecessor during the New Deal, President Reagan had little reason to favor restrictions on federal jurisdiction. He sought (overtime, of course) to “pack” the Supreme Court and the lower federal courts with judges who would be sympathetic to his constitutional vision. The Reagan Justice Department could then use litigation to “give the [Supreme] Court an opportunity for rethinking a previous holding.” In short, much like President Roosevelt, Reagan sought to “harness the power of the [federal judiciary], not destroy it.”

As this historical survey demonstrates, the executive branch has repeatedly used its constitutional authority in the legislative process to oppose legislation targeted at the Supreme Court’s appellate review power or at federal jurisdiction over constitutional claims. During the Roosevelt era, legislators waited for the President to “recommend … Measures [that] he judge[d] necessary and expedient” to address the “problem” created by the Supreme Court’s rejection of New Deal legislation. The Roosevelt Administration used this authority to reject jurisdiction-stripping proposals and to suggest an alternative that would have been more beneficial to the executive branch. In later years, the Carter and Reagan Justice Departments explicitly invoked the threat of a presidential veto.

Furthermore, this historical evidence indicates that the DOJ’s preference for Supreme Court review is reinforced by the executive branch’s

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175 See 128 CONG. REC. 9093-94 (1982) (letter from Attorney General William French Smith) (“The Department of Justice will continue, through its litigating efforts, to urge the courts not to intrude into areas that properly belong to the State legislatures and to Congress.”).


177 Id. at 1006.

178 President Ronald Reagan, Remarks by Telephone to the Annual Convention of the Knights of Columbus in Chicago, IL, 2 PUB. PAPERS 1055 (Aug. 5, 1986); see GOLDMAN, supra note 44, at 285 (arguing that Reagan, like Roosevelt, “self-consciously attempted to use the power of judicial appointment to place on the bench judges who shared [his] general philosophy”).

179 Meese, supra note 176, at 1006.

180 WHITTINGTON, supra note 42, at 267.

181 U.S. CONST. art. II, § 3.
interest in the uniform enforcement of federal law. It is extremely expensive and administratively cumbersome if state court or lower federal court decisions require the federal government to enforce federal law differently in different regions of the country.\textsuperscript{182} Perhaps for this reason, the Carter Justice Department underscored the need for Supreme Court review to protect “the public interest in … a uniform, definitive and dispositive nation-wide resolution of issues of constitutional magnitude.”\textsuperscript{183} Likewise, the Reagan Administration warned that, absent Supreme Court oversight, “[s]tate courts could reach disparate conclusions on identical questions of federal law” and declared that “[t]he integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions.”\textsuperscript{184}

Accordingly, various administrations—with vastly different views of and approaches to the federal judiciary—have found it in their interest to protect the scope of federal jurisdiction. The executive branch has thus proven, in the legislative process, to be an important ally for the federal courts.

\textbf{IV. Article II Safeguards in Litigation}

The executive branch has repeatedly opposed jurisdiction-stripping bills, and most such proposals have been killed in the legislative process. The executive branch’s opposition has not, however, been absolute. Instead, in recent decades (as discussed further in Part V), some jurisdiction-stripping measures have been enacted into law with the President’s assent.

But, even after a bill becomes law, the executive branch has a second constitutional tool to protect the federal judiciary. Under the Take Care Clause of Article II, the executive branch maintains control over the enforcement of that law. The Justice Department has often used this authority to urge narrow constructions of jurisdiction-stripping measures in order to preserve the Supreme Court’s appellate jurisdiction and federal jurisdiction over constitutional claims.

\textbf{A. Construing Limits on the Supreme Court’s Appellate Jurisdiction}

As David Cole has observed, the political branches in 1996 “broke the taboo” on jurisdiction-stripping legislation with the enactment of several statutes, including the Antiterrorism and Effective Death Penalty Act

\textsuperscript{182} Indeed, the government often seeks certiorari on this basis. \textit{See, e.g.}, Brief for the United States at 11, \textit{Lockhart v. United States}, 546 U.S. 142 (2005) (No. 04-881) (arguing that “[t]his Court’s review is warranted to resolve [a] direct circuit conflict, which prevents the uniform administration of . . . the federal student loan program”).

\textsuperscript{183} 125 CONG. REC. 7637 (1979) (letter from Attorney General Griffin Bell).

(AEDPA)—a law that completely overhauled federal habeas litigation. Notably, AEDPA was enacted with the strong support of President Bill Clinton. Social scientists have described Clinton as a “preemptive” president, who came to power when the conservative era ushered in by President Reagan was still dominant. Like many preemptive leaders, Clinton adopted a “hybrid” form of politics that integrated the views of both progressives and moderate conservatives. Clinton’s support for anti-crime legislation was central to this hybrid approach. Thus, in signing AEDPA into law, President Clinton expressed support for many of the habeas reforms, stating that he had “long sought to streamline Federal appeals” in capital cases. He did not, however, comment on the jurisdiction-stripping provisions in AEDPA.

One of those provisions restricts the Supreme Court’s appellate review power. AEDPA requires an inmate to obtain leave from a federal court of appeals before filing a second (or successive) habeas petition and provides that “[t]he grant or denial of [such] an authorization … shall not be appealable and shall not be the subject of a petition … for a writ of certiorari.”

Soon after the enactment of AEDPA, a capital defendant in Georgia (Ellis Wayne Felker) challenged this provision. The Supreme Court granted certiorari, ordered expedited briefing and argument, and invited the Solicitor General to file a brief “expressing the views of the United States.”

The Court directed the parties to address the following issues:

1. Whether [the appellate review provision of AEDPA] … is an unconstitutional restriction of the jurisdiction of this Court.
2. Whether and to what extent [the provision applies] … to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U.S.C. § 2241.

In the litigation, the parties seemed to agree that AEDPA restricted the Supreme Court’s appellate jurisdiction in one respect. The statute prevented the Court from entertaining a direct appeal from a prisoner who

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186 AEDPA curtailed the scope of federal habeas review of state criminal convictions and significantly cut back on multiple habeas filings. See 28 U.S.C. §§ 2244, 2254.
187 See SKOWRONEK, supra note 70, at 449; WHITTINGTON, supra note 42, at 163 n.2.
188 See SKOWRONEK, supra note 70, at 449, 451.
189 See id. at 455; WHITTINGTON, supra note 42, at 5, 158, 247.
190 President William J. Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty of 1996, 32 WEEKLY COMP. PRES. DOC. 720 (April 24, 1996).
193 Felker v. Turpin, 517 U.S. 1182, 1182 (1996). The Court also instructed the parties to address whether the Act violated the Suspension Clause of Article I, Section 9. See id.
was denied leave to file a successive habeas petition. The primary issue of contention was whether the statute cut off all avenues to the Court and, if so, whether such a limitation was constitutional. Thus, the debate centered on whether AEDPA should be read to prevent a habeas petitioner from filing an “original” petition in the Supreme Court under 28 U.S.C. § 2241. (The Court had long treated such habeas petitions as part of its appellate jurisdiction, but such petitions were nonetheless known as “original” writs.)

The State of Georgia argued that the statute cut off all avenues to the Supreme Court. Accordingly, when an appellate court refused to authorize a successive petition, a prisoner could not seek further review. The State’s position was supported by an amicus brief filed by a bipartisan group of legislators, including the Senate sponsor of AEDPA. The legislators asserted that Congress had ample power to eliminate the Court’s appellate jurisdiction over this class of habeas cases. They further emphasized that one of the principal purposes of AEDPA was to reduce the delay caused by multiple appeals of state convictions. That purpose would be undermined if the Court permitted successive habeas petitions to be filed as original writs. Indeed, “[i]nterpreting § 2241 in that manner would nullify the gatekeeper provision of the Antiterrorism Act.”

By contrast, Felker (supported by several amici) urged the Supreme Court to construe the appellate review restriction narrowly so as to preserve its original habeas jurisdiction. Felker argued that, if the statute were

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194 See, e.g., Brief for the Petitioner, at 11-12, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836) (arguing that a prisoner lacks “recourse … in this Court on ordinary certiorari review”).
195 See Ex parte Bollman, 8 US (4 Cranch) 75, 100-01 (1807) (concluding that an “original” habeas action was an exercise of the Court’s appellate jurisdiction because it involved “revising [the] decision” of a lower court). One might argue that, given this interpretation, the plain text of the statute—that a lower court gatekeeping decision “shall not be appealable”—barred “original” habeas actions. But no party made that precise argument.
196 See Transcript of Oral Argument at 29, 35-36, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836) (Oral Argument of Susan V. Boleyn on Behalf of Respondent) (“QUESTION: So that means—I mean, the practical effect of [your argument], then, is that our original jurisdiction is, in fact, gone. MS. BOLEYN: Yes.”).
197 See Brief for Senator Orrin G. Hatch, et al., as Amici Curiae supporting Respondent, at 3, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836) (oral argument of Susan V. Boleyn on behalf of respondent) (“[a]micus Orrin Hatch was the primary sponsor … in the Senate”).
198 See id. at 15 (arguing that “Congress can modify appellate jurisdiction granted to this Court in habeas cases”) (citing Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869)).
199 See id. at 4, 22-25.
200 See id. at 29 (arguing that court of appeals’ “gatekeeping decisions” are meant to be “final” and thus “it makes no sense to conclude that this Court may still review such actions under § 2241).”
201 Id. at 29.
202 See Brief for the Petitioner, at 8-9, 10-12, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836); e.g., Brief for Amici Curiae of the American Civil Liberties Union and the ACLU of Georgia in support of Petitioner, at 5, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836) (contending that “nothing in the language of the new Act even purports to limit this Court’s jurisdiction over habeas actions under 28 U.S.C. §2241”).
construed “to bar all review by this Court .... it [would be] unconstitutional,” because it would impermissibly undermine the Court’s “essential role.”

The Justice Department (through Solicitor General Drew Days) likewise urged the Supreme Court to construe the jurisdictional limitation narrowly to permit original habeas petitions under § 2241. In its brief, the government discussed in detail the academic debate over Congress’s power to limit the Court’s jurisdiction. Although the DOJ declined to take a firm position on that debate in Felker, it did note that Attorney General Smith had endorsed the “essential role” theory. The government declared that it was unnecessary for the Court to resolve that “difficult and important constitutional issue[,]” because AEDPA complied with all “the prevailing theories” of Congress’s power over federal jurisdiction. The DOJ emphasized that the statute (narrowly construed) was consistent with the “essential role” theory because it left open an avenue for the Court “to serve as expositor of the federal constitutional rules governing criminal prosecutions.”

The Supreme Court ultimately adopted that narrow construction. In Felker v. Turpin, the Court declared that, although AEDPA prohibited a direct appeal from a lower court “gatekeeping” decision, it had “not repealed [the Court’s] authority to entertain original habeas petitions.” While this “reservation of authority” may have seemed at the time like a fairly empty gesture (since the Court had not granted an original habeas petition in decades), recent events have demonstrated the importance of this protection. In August 2009, the Court in In re Davis granted an original petition in a capital case and directed the federal district court to consider the inmate’s claim of actual innocence.

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204 See Brief for the United States as Amicus Curiae, at 11-12, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836).
205 See id. at 24-27.
206 Notably, any such position would undermine the Solicitor General’s ability to defend the constitutionality of AEDPA, if the Supreme Court rejected its narrow interpretation.
207 See Brief for the United States as Amicus Curiae, at 25-26, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836) (“[S]cholars … have argued that Congress may not … prevent the Court from performing its ‘core’ or ‘essential’ functions. … That view was more recently articulated by then-Attorney General William French Smith[.]”).
208 Id. at 13.
209 Id. at 25.
Notably, I do not mean to contend that the Solicitor General’s position led the Supreme Court to adopt this narrow construction of AEDPA. But the government’s approach did assure the Court that, if it were inclined to interpret the restriction narrowly, that interpretation would have the support of a coequal branch of the federal government.

B. Federal Jurisdiction over Constitutional Claims

The Justice Department has also urged the courts to construe legislation narrowly in order to preserve federal jurisdiction over at least constitutional claims. This practice (much like the government’s position in *Felker*) invites the federal courts to avoid potentially difficult constitutional questions about the scope of Congress’s power over federal jurisdiction.

1. Early Examples: The Johnson, Nixon, and Reagan Justice Departments

Prior to 1996, Congress enacted few statutes that were widely viewed as “jurisdiction-stripping” laws. But many of the same issues did arise in the context of judicial review of federal administrative action. The following examples illustrate both the promise—and the limitations—of the Article II safeguards in litigation.

The scope of federal jurisdiction became salient during the Vietnam War era, when various individuals challenged their eligibility for the draft. For example, in *Oestereich v. Selective Service System*, a divinity school student argued that, under the relevant statutes, he was exempt from military service and that the local selective service agency had called him up solely to punish him for protesting the war. He filed suit, alleging violations of both the statute and his free speech rights under the First Amendment, seeking to enjoin his induction into military service.

A provision of the Selective Service Act of 1967, however, seemed to foreclose the lawsuit. The statute provided:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution.

During both the Johnson and the Nixon Administrations, the Department of Justice (through Solicitor General Erwin Griswold) argued for

\[213\] 393 U.S. 233 (1968).
\[214\] See id. at 234-35. The statute did, in fact, exempt the student from immediate military service. See 50 U.S.C. App. 456(g) (“Regular or duly ordained ministers of religion … and students preparing for the ministry …. shall be exempt from training and service (but not from registration) under this title.”).
\[215\] See Oestereich, 393 U.S. at 235.
a narrow construction of this provision.\textsuperscript{217} The DOJ noted that the statute appeared to permit review only in the context of a criminal proceeding.\textsuperscript{218} But the law would thereby leave a jurisdictional gap: anyone who submitted to induction (and, thus, committed no crime) would have no avenue for judicial review.\textsuperscript{219}

The DOJ asserted that the statute should not be construed to preclude judicial oversight in such cases. The government argued that, “despite [its] sweeping language,” “this provision is subject to an exception or qualification in that review may be had, after induction, not only through a criminal prosecution but also by habeas corpus.”\textsuperscript{220} The government acknowledged that “no such qualification is stated in the sweeping language of the statute.”\textsuperscript{221} Indeed, habeas petitions would “surely [be] a means of ‘judicial review’ other than by ‘criminal prosecution.’”\textsuperscript{222} But there was some evidence in the legislative history that Congress had not intended to preclude the preexisting scheme of habeas review.\textsuperscript{223} Moreover, the DOJ noted, this narrow construction was necessary to “avoid the constitutional problem that would arise if the statute were construed to bar habeas corpus.”\textsuperscript{224}

The Justice Department also urged the Court to create an even broader exception for an individual like Oestereich with a strong constitutional and statutory challenge to induction.\textsuperscript{225} The DOJ recommended that, in such a case, the Court should permit immediate review under 28 U.S.C. § 1331.\textsuperscript{226} (This latter concession was especially remarkable because Congress had enacted the jurisdictional restriction largely to overturn a court of appeals decision allowing such pre-induction review,\textsuperscript{227} and because the Selective Service itself opposed such review.\textsuperscript{228})

\footnotesize
\begin{itemize}
  \item \textsuperscript{217} See infra notes 218-228 and accompanying text; Brief for the Respondent, at 13-14 & n.7, Fein v. Selective Service System Local Bd. No. 7, Yonkers, N. Y., 405 U.S. 365 (1972) (No. 70-58).
  \item \textsuperscript{218} See Brief for the Respondent, at 22 & n. 7, Oestereich v. Selective Service System Local Bd. No. 11, Cheyenne, Wyo., 393 U.S. 233 (1968) (No. 46).
  \item \textsuperscript{219} See id. at 22 & n. 7.
  \item \textsuperscript{220} Id. at 60 (emphasis in original).
  \item \textsuperscript{221} Id.
  \item \textsuperscript{222} Id.
  \item \textsuperscript{223} See id. at 22 n.7, 60. The legislative history indicated that Congress sought to preclude only pre-induction review. See H.R. No. 90-267 (1967) (“The committee was disturbed by the apparent inclination of some courts to review the classification action of local … boards before the registrant had exhausted his administrative remedies.”).
  \item \textsuperscript{224} Brief for the Respondent, at 60, Oestereich v. Selective Service System Local Bd. No. 11, Cheyenne, Wyo., 393 U.S. 233 (1968) (No. 46); see id. at 22 n.7 (stating that if the law barred habeas review, it might violate the Suspension Clause).
  \item \textsuperscript{225} See id. at 62-66, 66.
  \item \textsuperscript{226} See id. at 13-14, 66.
  \item \textsuperscript{227} See Wolff v. Selective Serv. Bd., 372 F.2d 817, 822-23 (2d Cir. 1967); Ralph Reisner, The Conscientious Objector Exemption: Administrative Procedures and Judicial Review, 35 U. CHI. L. REV. 686, 704 (1968) (noting that, after the court in Wolff permitted a pre-enforcement
The Supreme Court agreed with the Justice Department’s construction. The Court noted that “[n]o one … suggests that [the Act] can sustain a literal reading. For while it purports on its face to suspend the writ of habeas corpus …, everyone agrees that such was not its intent.” The Court thus held that the statute was “unambiguous” in permitting “judicial review … in a criminal prosecution or, as the Government concedes, … [via] habeas corpus after induction.” The Court further held that, in exceptional cases like *Oestereich*, the plaintiff could seek immediate relief in district court under § 1331.

In *Webster v. Doe*, by contrast, the DOJ argued that the relevant statutes foreclosed all judicial review of administrative action. *Webster* involved a suit by a former employee of the Central Intelligence Agency who

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suit by two student war protesters, “Congress attempted to nullify even this narrow exception” for cases with “free speech and association implications, in the 1967 Act”).


Id. at 235; see Fein v. Selective Service System Local Bd. No. 7, Yonkers, N. Y., 405 U.S. 365, 374-75 (1972) (adopting the same construction); Clark v. Gabriel, 393 U.S. 256, 258-59 (1968) (same).


That was also true in *Johnson v. Robison*, 415 U.S. 361 (1974). In *Johnson*, the plaintiff (a conscientious objector who had performed “alternative civilian service” during the Vietnam War) sought veterans’ benefits to pay for law school. See id. at 362-64. Under the statute, such benefits were available only to those who had served on active duty, so the Veterans Administration denied his claim. See id. at 363-64. The plaintiff filed suit, challenging this statutory limitation on equal protection and free exercise grounds. See id. at 364. The relevant statute provided:

> The decisions of the Administrator on any question of law or fact under any law administered by the Veterans’ Administration shall be final and conclusive and no … court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Id. at 365 n. 5 (quoting the provision in effect at that time).

was allegedly terminated for security reasons. The plaintiff employee asserted that he was instead fired because he had informed his supervisor that he was gay. He brought suit under the Administrative Procedure Act, challenging his termination on both statutory and constitutional grounds.

The Reagan Justice Department (through Solicitor General Charles Fried) argued that the courts lacked jurisdiction even over Doe’s constitutional claims. The DOJ noted that the APA prevents courts from reviewing actions that are “committed to agency discretion by law.” Here, the relevant statute (the National Security Act) provided that “the Director of Central Intelligence may, in his discretion, terminate [any] employee whenever he shall deem such termination necessary or advisable in the interests of the United States.” This provision, the DOJ urged, committed termination decisions to the unreviewable discretion of the CIA.

The DOJ recognized that, so construed, the statute raised constitutional concerns. But the government emphasized that “the national security context in which the statute operates” “distinguish this case from the far broader and much debated issue of legislative restriction of federal court jurisdiction.” Given “the risks posed by judicial inquiry into [CIA personnel decisions], … judicial review of national security dismissals must be deemed precluded, even for … constitutional claims.” Notably, however, the Justice Department did identify one limitation on Congress’s authority over federal jurisdiction, even in this national security context. The government stated: “[W]hether a particular preclusion of review is constitutional is itself a constitutional question, review of which may not be precluded.”

The Court in Webster found that the National Security Act (combined with the APA) precluded review of the plaintiff’s statutory claims. But the same language was not sufficient to prevent review of

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234 Id. at 595-96.
235 Id.
236 He alleged in part violations of his privacy and equal protection rights. See id. at 596.
239 Webster v. Doe, 486 U.S. 592, 594 (1988) (quoting the statutory provision). The current version of the statute, which gives the CIA Director the same basic authority, is codified at 50 U.S.C. § 403-4a.
241 See id. at 27-28.
242 Id. at 33-34.
243 Id. at 44.
245 Webster v. Doe, 486 U.S. 592, 600-01 (1988) (concluding that the statute, which “allow[ed] termination … whenever the Director ‘shall deem’ [it] necessary …,” not simply
constitutional issues. “[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear…. Nothing in [these statutes] persuades us that Congress meant to preclude consideration of colorable constitutional claims.”

Webster demonstrates that the Justice Department has not always advocated a narrow construction of statutes that seem to preclude judicial review. But the Court’s decision in Webster (and similar cases) did present a potential opportunity for the DOJ. To the extent that subsequent administrations were inclined to argue for narrow interpretations of jurisdictional restrictions, such arguments would be substantially supported by the Court’s clear-statement rule in Webster. Indeed, future Justice Departments did rely on that case in urging the federal judiciary to adopt narrow constructions of far more explicit jurisdiction-stripping laws.

2. The Clinton and George W. Bush Administrations

The appellate-review provision in the Antiterrorism and Effective Death Penalty Act (discussed above) was not its only controversial jurisdictional restriction. The statute, along with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), purported to eliminate all federal jurisdiction over certain deportation cases.

AEPDA (enacted on April 24, 1996) provided: “[A]ny final order of deportation against an alien who is deportable by reason of [a conviction for certain enumerated crimes] shall not be subject to review by any court.”

On September 30, 1996, Congress enacted IIRIRA and crafted a new jurisdiction-stripping provision to replace the one in AEDPA:

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien

when the dismissal is necessary …” “appear[ed] … to foreclose the application of any meaningful judicial standard of review” (emphasis in original).

246 Id. at 603-04 (remanding the constitutional claim to the district court). The Court had articulated a similar clear-statement rule in a few prior cases. See Johnson v. Robison, 415 U.S. 361, 373-374 (1974); Weinberger v. Salfi, 422 U.S. 749 (1975); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12 (1986). But, notably, in only one of those cases had the Justice Department specifically argued that the Court lacked jurisdiction over a constitutional claim. See supra note 233 (discussing Johnson); Weinberger, 422 U.S. at 786-87 (Brennan, J. dissenting) (sharply criticizing the majority opinion for discussing the jurisdictional issue, given that the issue “was not raised in this Court by the parties”); Brief for the Petitioners, at 17, Bowen, 476 U.S. 667 (1986) (No. 85-225) (arguing that the Court “need not decide” whether Congress precluded review of constitutional claims because the claims at issue were too “insubstantial to support … jurisdiction in any event”).

247 See supra note 246.


249 AEDPA §§ 401(e), 440(a), 110 Stat. 1276-77 (entitled “Elimination of Custody Review by Habeas Corpus”).
who is removable by reason of having committed [certain] criminal offense[s].  

The statutes thus appeared to eliminate all federal jurisdiction over the claims of this class of undocumented immigrants. The legislative history supported that interpretation. Senator Spencer Abraham, the sponsor of the restriction in IIRIRA, declared that the law was designed to “end judicial review for orders of deportation entered against these criminal aliens.”

These provisions provoked considerable scholarly interest. Congress had finally enacted a jurisdiction-stripping law that seemed to raise one of the most fundamental concerns of the court-curbing literature: Congress’s power to strip all federal jurisdiction over a class of cases.

However, as Ernest Young put it, “a funny thing happened on the way to the courthouse.” From the outset of the litigation over these provisions, the Justice Department repeatedly conceded that the federal courts retained jurisdiction over federal constitutional claims. Indeed, the DOJ argued that the provisions “should be interpreted as preserving review” of constitutional claims. “Notwithstanding [IIRIRA]’s categorical language, neither the text nor the legislative history … advert[s] specifically to

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252 See, e.g., Cole, supra note 185, at 2482 (stating that “at least since 1869, Congress’s threats to curtail federal jurisdiction have been for the most part just that—empty threats. … But in 1996, Congress broke the taboo on such legislation”); Vicki C. Jackson, Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy, 86 GEO. L.J. 2445, 2446, 2447 (1998) (agreeing that the 1996 legislation “call[ed] for renewed attention to the problem” of jurisdiction stripping); Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 TEX. L. REV. 1549, 1554-56 (2000) (noting that, “[w]hen the AEDPA [and] the IIRIRA … burst on the scene in 1996, it appeared that some of the much-mooted questions concerning the limits of Congress’s power over federal jurisdiction might at long last be answered”) (footnote omitted).

253 Young, supra note 252, at 1554.


255 Brief for the Respondent, at 9-10, Flores-Miramontes v. INS, 212 F.3d 1133 (9th Cir. 2000) (No. 98-70924) (emphasis added).
preclusion of review of constitutional claims.” Accordingly, the DOJ urged, the courts “retain authority to consider such claims.”

The federal courts willingly accepted the government’s concession that they retained jurisdiction over constitutional claims. Thus, the D.C. Circuit declared that it “need not decide” whether the 1996 laws eliminated jurisdiction over constitutional issues, “because … the Government concedes that [judicial] review remains available [for deportees] … to raise substantial constitutional questions.” Likewise, given the government’s “concession” that federal courts must have jurisdiction to hear claims of substantial constitutional error,” the Tenth Circuit “assumed that federal courts retained some sort of jurisdiction to hear [such] claims.”

The DOJ’s position significantly altered the nature of the litigation over AEDPA and IIRIRA. The main issue was not whether Congress could foreclose all judicial review for this class of claimants. Instead, the litigation focused on the proper forum for review and the scope of review. The government contended that judicial review should take place in the courts of appeals and should be limited to constitutional claims and “jurisdictional facts” (i.e., ensuring that the deportee was in fact convicted of a crime that triggered the jurisdictional bar). By contrast, the immigrants sought a more expansive review via habeas corpus actions in federal district court. But no one claimed, as Senator Abraham had asserted, that Congress “end[ed] judicial review for orders of deportation entered against these criminal aliens.”

Ultimately, the Supreme Court resolved the issues of forum and scope of review. In INS v. St. Cyr and Calcano-Martinez v. INS, the Court held (contrary to the government’s position) that district courts retained jurisdiction to review all legal challenges to removal via habeas corpus.

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257 Id. Notably, this language comes from a brief ultimately filed by the second Bush Administration. See infra note 265 and accompanying text (noting that the Bush Justice Department took the same approach).
258 Ramallo v. Reno, 114 F.3d 1210, 1214 (D.C. Cir. 1997); see Singh v. Reno, 182 F.3d 504, 508-09 (7th Cir. 1999) (noting that “[t]he government concedes that the 1996 Amendments did not extinguish judicial review altogether” and concluding that “direct review in the courts of appeals remains an option for aliens wishing to challenge their deportation on constitutional grounds”).
259 Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1144 n.4 (10th Cir. 1999).
262 142 CONG. REC. 10,052 (statement of Sen. Spencer Abraham) (Republican) (Michigan).
Notably, in the opinion for the Court in *Calcano-Martinez*, Justice Stevens remarked that even the government had not contended that AEDPA and IIRIRA foreclosed all judicial review. He found it “instructive that the Government acknowledge[d] that background principles of statutory construction and constitutional concerns must be considered in determining the scope of [the] jurisdiction-stripping provisions.”

This executive branch practice continued during the George W. Bush Administration (at least outside the context of the war on terror, which is discussed below in Part V). The Bush Justice Department not only retained the government’s arguments in the AEDPA and IIRIRA litigation. But it also applied the same approach in other cases—conceding federal jurisdiction over constitutional claims.

*Demore v. Kim* offers a nice illustration. *Demore* involved a lawful permanent resident alien (Hyung Joon Kim) who was awaiting deportation. Kim had applied for bail and his application was denied by the Immigration and Naturalization Service pursuant to 8 U.S.C. § 1226(c), which requires the detention, without bail, of any deportee who was convicted of an “aggravated felony.” Kim argued that this “mandatory detention” provision was unconstitutional as applied to lawful permanent residents.

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264 533 U.S. at 350 n.2.

265 The Supreme Court briefs in *St. Cyr* and *Calcano-Martinez* were filed after the change in administrations. But the Bush Justice Department maintained the same litigation position. See Brief for the Petitioner, at 30, I.N.S. v. St. Cyr, 533 U.S. 289 (2001) (No. 00-767). Although it would have been extremely unusual for the government to change positions mid-stream, it would not have been unprecedented. See *PACELLE*, *supra* note 61, at 40 (noting that such reversals are rare); *CAPLAN*, *supra* note 156, at 82 (observing that the Reagan Justice Department “switch[ed] sides” in a busing case left over from the Carter era).

266 See, e.g., Brief for the Respondent, at 12-13, *Whitman v. Department of Transportation*, 547 U.S. 512 (2006) (No. 04-1131) (arguing that, although the Civil Service Reform Act generally “provides the exclusive remedy” for federal employee grievances, “[i]f a grievance raises a substantial constitutional claim [that cannot be addressed through that scheme], the Act should not be construed to preclude” review of the claim) (emphasis added); *see also* *Whitman v. Department of Transportation*, 547 U.S. 512, 514-15 (2006) (remanding the case to the court of appeals to address various issues that may “obviate the need to decide [the] more difficult question of preclusion”).


268 See id. at 513-14.

269 *See id.* 513-14; 8 U.S.C. § 1226(c)(1) (“The Attorney General shall take into custody any alien who … is deportable by reason of having committed [certain enumerated] offense[s, including aggravated felonies].”). The INS was then part of the Department of Justice and thus acting under the authority of the Attorney General.

270 *See Demore*, 538 U.S. at 513-15.
An amicus brief filed by two private organizations and a group of legislators asserted that the federal courts lacked jurisdiction over the case.\textsuperscript{271} The amicus relied on the following provision:

The Attorney General’s discretionary judgment regarding the application of [Section 1226] shall not be subject to review. \textit{No court may set aside any action or decision by the Attorney General under this section} regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.\textsuperscript{272}

The amicus argued that “the only plausible reading of [this provision] is that Congress intended to prohibit federal courts from ‘set[ting] aside’ the INS’s detention of Mr. Kim and other similarly situated criminal aliens.”\textsuperscript{273}

The Justice Department’s briefs were silent on the potential jurisdictional defect. Instead, the government simply urged the Supreme Court to uphold the statute on the merits.\textsuperscript{274} But, at the oral argument in \textit{Demore}, Justice Scalia brought up the jurisdictional issue in questioning Solicitor General Ted Olson:

General Olson, do—do we have authority to entertain this challenge? As you know, an amicus has raised a jurisdictional question…. The problem is section 1226(e) …. Now, is that provision, number one, inapplicable or, number two, unconstitutional? And if neither of those, why doesn’t it mean that we have no authority to entertain this case?\textsuperscript{275}

The question led to the following exchange:

\begin{quote}
MR. OLSON: Justice Scalia, it’s the Government’s position … that that provision does not apply to a habeas corpus challenge to the constitutionality of the statute itself….  
QUESTION: And—and you’re relying on what language to—  
MR. OLSON: Well, we’re relying on the language that [] refers to … administrative actions[] by the Attorney General or immigration … officials, and this Court’s construction of statutes against precluding constitutional challenges to other statutes.
\end{quote}

\begin{footnotes}
\footnote{8 U.S.C. § 1226(e) (emphasis added).}{272}
\footnote{Amicus Brief at 8.}{273}
\footnote{See Brief for the Petitioner, at 9, 8-50, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491) (arguing that Congress reasonably concluded that “mandatory detention … is necessary to implement its immigration policies”). The DOJ’s only apparent reference to the jurisdictional issue was the following statement in its reply brief: “The government does not dispute the availability of judicial review for compliance with the Due Process Clause in this case.” Reply Brief for the Petitioner, at 6, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491).}{274}
\end{footnotes}
QUESTION: Oh, but all of those other statutes had some wiggle room I think, even St. Cyr, and there just is no wiggle room here…. It simply says, no court may set aside any action by the Attorney General under this section….  
MR. OLSON: …[W]hile it would be in the Government’s interest to preclude this challenge at all, we think a fair reading of the Court’s decisions … would be to construe that statute as not to preclude this action in this case. Of course, … your construction would lead to a—a victory on behalf of the Government in this case, but we’ve carefully examined it, and … we’re not advocating that position here today.  

Justice O’Connor later asked Kim’s counsel about the jurisdictional issue, noting that the Court could address the matter, “despite the Government’s failure to raise it…. [W]hy doesn’t section 1226 tell the courts to keep hands off?” Kim’s counsel responded: “We agree with the Solicitor General’s explanation.” Justice O’Connor replied (provoking laughter from the audience): “I have to tell you I don’t understand it. I thought maybe you’d enlighten me there.”

Ultimately, by a 6-3 majority, the Supreme Court held that it had jurisdiction over the case. The Court emphasized that “where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.” Under that standard, Section 1226(e) did “not bar [Kim’s] constitutional challenge.” The Court then, by a different 5-4 majority, went on to uphold the statute on the merits. (Justice O’Connor, in a separate opinion joined by Justices Scalia and Thomas, dissented from the jurisdictional holding, but concurred in the judgment on the merits.)

As these examples illustrate, on a number of occasions, the Justice Department has encouraged the federal courts to follow the approach suggested years ago by Professor Hart. In his Dialogue, Professor Hart

\[276\] Id. at 4-6.  
\[277\] Id. at 27-28.  
\[278\] Id. at 28.  
\[279\] Id. at 28. Kim’s counsel stated that, because “[t]he statute contains no express language that repeals habeas jurisdiction,” the federal court retained such jurisdiction. Id. at 28.  
\[281\] Id. at 517.  
\[282\] Id.  
\[283\] See id. at 513 (“holding] that Congress, justifiably concerned that deportable criminal aliens … fail to appear for their removal hearings in large numbers, may require” mandatory detention). Justices Stevens, Souter, Ginsburg and Breyer dissented from the Court’s holding on the merits. See id. at 40-41, 576-77.  
\[284\] Id. at 533 (O’Connor, J., concurring in part and concurring in the judgment) (stating that “a majority having determined there is jurisdiction, I agree with the Court’s resolution … on the merits,” but also asserting that the statute “unequivocally deprives federal courts of jurisdiction to set aside ‘any action or decision’ by the Attorney General in detaining criminal aliens under § 1226(c) ….. That is precisely the nature of the action before us”).
argued that the judiciary should “use every possible resource of [statutory] construction to avoid” the conclusion that Congress stripped federal jurisdiction over constitutional claims. The DOJ has not, of course, adopted this approach in every case. But, in recent years, the Solicitor General has consistently done so, even in the face of “categorical [statutory] language,” strong evidence in the legislative history, and (as Demore illustrates) even when some members of the Supreme Court expressly invite a “jurisdiction-stripping” claim.

The federal judiciary has generally proven quite receptive to these arguments. Thus, with some executive encouragement, the courts appear to have adopted the super-strong clear-statement rule advocated by Professor Hart: “If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably.”

V. The Scope and Limits of Article II Safeguards

As we have seen, the executive branch has repeatedly sought to protect the scope of federal jurisdiction. That has been particularly true with respect to the Supreme Court’s appellate jurisdiction and federal jurisdiction over constitutional claims. Attorneys General of both parties have condemned jurisdiction-stripping bills in decisive terms, stating that “[m]atters of constitutional interpretation and adjudication are ... pre-eminently within the province of the Federal judiciary,” and that “[f]ull and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government.” Furthermore, even when jurisdiction-stripping statutes have been enacted, the executive branch has urged the federal courts to construe such laws narrowly in order to preserve the Court’s appellate review power and federal jurisdiction over constitutional claims.

These Article II safeguards are not, however, absolute. The executive branch’s repeated efforts to protect the judiciary, along with the counter-examples, raise questions about the scope and limitations of the Article II safeguards of federal jurisdiction.

A. The Possible Divergence of Presidential and DOJ Incentives

My discussion of these Article II safeguards has, for the most part, treated the executive branch as a single entity. But, of course, there may be

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285 Hart, supra note 19, at 1399.
287 Hart, supra note 19, at 1399.
important ways in which the institutional incentives of a particular President and his Department of Justice differ. Given that the DOJ’s primary function is to litigate cases in federal court, the Justice Department may be even more inclined than the President to protect the scope of federal jurisdiction. These agency-specific incentives may help explain why the executive branch has been so consistent in defending the federal courts.

1. The Existence of “Agency Slack”

A number of scholars have examined the relationship between the Attorney General and the Solicitor General and the President, analyzing how much influence the President has—or should have—over his chief law enforcement officers. The approach taken by scholars generally turns on whether they view the executive branch as a hierarchical “unitary executive.”

I do not seek to enter this debate. I assume, for purposes of this analysis, that the President has the power to order his Attorney General to testify in favor of jurisdiction-stripping bills in Congress. Likewise, I assume that the President could direct his Solicitor General to advocate a broader construction of jurisdiction-stripping laws. As Matthew Stephenson has observed, even scholars who argue for strong political control of the bureaucracy (either by Congress or the President) acknowledge

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291 See sources cited supra note 290.

that agencies are, as a practical matter, somewhat insulated from their political superiors.\textsuperscript{293} Political actors lack the resources, expertise, and sometimes the political will to direct all the actions of their administrative subordinates.\textsuperscript{294} Furthermore, as scholars have emphasized in the context of the Solicitor General, it may be in the best interest of the President (and the executive branch more broadly) to give the chief Supreme Court advocate some room to maneuver, absent political oversight. If the Supreme Court views the Solicitor General as an independent and impartial advocate, the government may be far more likely to win its cases before the Court.\textsuperscript{295}

Thus, even under the assumption that the President could direct the actions of the Attorney General and the Solicitor General, there is good reason to believe that he will not always do so. These executive officials will thus often have some leeway in expressing their views on matters pertaining to federal jurisdiction. These officials can use this “agency slack” to offer more emphatic defenses of the judiciary than the President himself might be inclined to do.

2. Agency Slack in the Legislative Process

Although the willingness of the Roosevelt and Reagan Administrations to defend the scope of federal jurisdiction may at first glance seem the most surprising, those examples on reflection may in fact make the most sense. Both President Roosevelt and President Reagan were “reconstructive” leaders who sought to change the constitutional and political landscape.\textsuperscript{296} These leaders recognized that, in order to have a long-term impact on the development of federal law, they needed to remake the federal judiciary, and particularly the Supreme Court. Accordingly, they sought to appoint judges who were likely to implement their constitutional vision in future federal court decisions. These Presidents thus had an incentive to preserve federal jurisdiction over constitutional claims, so that this more “friendly” judiciary could “fix” what the leaders saw as the constitutional errors of the past. Both leaders likewise had reason to protect the Supreme Court’s appellate jurisdiction, because its “decisions would establish the legal and ideological framework within which [the lower courts] … [would] operat[e].”\textsuperscript{297} In sum, Presidents who seek to “reconstruct” the constitutional order have a strong incentive to preserve the scope of federal jurisdiction.

Thus, there is good reason to believe that Roosevelt’s Attorney General Homer Cummings and Regan’s Attorneys General William French

\textsuperscript{294} See id.
\textsuperscript{296} See supra Parts III(A), (D).
\textsuperscript{297} Gillman, supra note 71, at 518.
Smith and Ed Meese were acting in accordance with their leaders’ wishes when they opposed efforts to strip jurisdiction. Moreover, that assumption is consistent with the way in which these Attorneys General usually interacted with their presidents. Social scientists have described Cummings, Smith, and Meese as “advocate” attorneys general who were personally close to the President and who saw it as their job to fulfill the political and legal aspirations of that elected leader. 298 These Attorneys General were thus unlikely to take positions on jurisdictional issues that were contrary to the President’s views. 299

Presidents Eisenhower and Carter, by contrast, did not seek to “reconstruct” the constitutional order. These presidents, of course (like all leaders), had an opportunity to shape the judiciary through their appointments. But there is little evidence that these leaders had a particular vision that they sought to advance through the federal courts. 300 In fact, both Presidents largely deferred legal matters to their Attorneys General. 301 Both Eisenhower’s Attorney General William Rogers and Carter’s Attorney General Griffin Bell used this “agency slack” to defend the scope of federal jurisdiction. 302 Thus, although Presidents Eisenhower and Carter refused to either endorse or criticize federal court decisions, their Attorneys General argued emphatically that “[m]atters of constitutional interpretation and adjudication are ... pre-eminently within the province of the Federal

298 BAKER, supra note 156, at 35, 77, 95, 170 (arguing that such “advocate” Attorneys General “tend to be more responsive to the desires of … the president than to the niceties of the rule of law”). Indeed, Meese has been called Reagan’s ideological “alter ego.” Id. at 97.

299 Indeed, President Roosevelt was personally involved in the discussions leading up to the Court-packing plan. See SITESOL, supra note 78, at 203-04, 259-62. Thus, if Roosevelt had viewed jurisdiction stripping as a better alternative, he likely would have said so.

300 President Carter’s primary goal was to diversify the judiciary by appointing more women and minorities. See Joan Biskupic, Obama’s Push for Court Diversity Hits Snag, USA TODAY, June 15, 2010.

301 See BAKER, supra note 156, at 155-56 (noting that President Carter encouraged Attorney General Griffin Bell to maintain the independence of his office); WHITTINGTON, supra note 42, at 147, 219 (describing how Eisenhower entrusted legal matters, including Supreme Court appointments, to his Attorneys General). This does not mean that these Presidents gave their Attorneys General free reign. President Carter, for example, intervened in some cases litigated by the DOJ during his presidency and expressly overruled one of Bell’s decisions. See BAKER, supra note 156, at 156-60 (describing conflicts between Carter and Bell). But these Attorneys General were more independent of presidential control than their counterparts in the Reagan and Roosevelt administrations.

302 See supra Parts III(B),(C). The Eisenhower Justice Department may have taken advantage of this “agency slack” to protect the Supreme Court’s civil rights jurisprudence. Although the DOJ did not support the Court’s “subversive activity” decisions, it did endorse the Court’s racial equality rulings (more so than did the President himself). See BAKER, supra note 156, at 68; PACELLE, supra note 61, at 74-75. Thus, the Eisenhower Justice Department had an incentive—separate and apart from the President’s incentives—to defend the Supreme Court’s appellate jurisdiction to ensure that the Court could continue to play a role in civil rights cases.
judiciary.  

The consistency of the Attorney General’s approach to jurisdiction-stripping proposals may also reflect the importance of precedent within the Department of Justice. As Trevor Morrison has recently recounted, the Attorney General has traditionally treated the legal opinions of his predecessors as “precedents” that must be accorded considerable weight in the future. That has been equally true of the DOJ’s approach to jurisdictional restrictions. Indeed, Attorney General Smith expressly invoked precedent in support of his view that any limitation on the Supreme Court’s appellate jurisdiction would be both unwise and unconstitutional.

Moreover, Attorney General Smith solidified this precedent by publishing his own strong defense of the federal judiciary as an official Office of Legal Counsel opinion. As Professor Morrison explains, the executive branch does not often depart from such precedents. The DOJ seems particularly unlikely to depart from an approach to jurisdiction stripping that has been repeatedly accepted by both Democratic and Republican administrations. Thus, the Justice Department’s institutional interest in protecting its power and influence over the development of federal law, combined with its institutional respect for stare decisis, give the Attorney General strong reasons to continue to oppose jurisdiction-stripping proposals in Congress.

3. Agency Slack in the Litigation Process

The Solicitor General also has independent institutional reasons to advocate a narrow construction of jurisdiction-stripping laws. The Solicitor General serves as the executive branch’s sole conduit to the Supreme Court.

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303 125 CONG. REC. 7637 (1979) (letter from Attorney General Griffin Bell).
306 See 128 CONG. REC. 9094 n.1 (1982) (letter from Attorney General William French Smith) (observing that “[t]he Department of Justice, in previous Administrations, has consistently opposed proposals to restrict Supreme Court jurisdiction,” and citing congressional testimony by DOJ officials as well as internal DOJ memos dating from the 1950s to the 1980s).
307 Morrison, supra note 305, at 1457-58 (asserting, based on an empirical analysis of Office of Legal Counsel precedents from the Carter through the Obama Administrations, that “OLC does not often overrule itself”).
308 The executive branch does not appear to have issued any public statements about jurisdiction-stripping proposals since the 1980s. There were legislative proposals in 2004 and 2006 to strip federal jurisdiction over constitutional challenges to the Defense of Marriage Act and to the use of “under God” in the Pledge of Allegiance. See Grove, supra note 33, at 911-16. But the OLC has informed me that there are no public documents pertaining to this legislation. Nevertheless, given the executive branch’s longstanding opposition to jurisdiction stripping, it seems unlikely that the DOJ endorsed these measures.
Thus, “[o]nce cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law” and can have a substantial “impact upon the establishment of constitutional and other [legal] principles.”

This advocacy position seems likely to have two important effects on the Solicitor General’s approach to jurisdiction-stripping legislation. First, the Solicitor General should be especially wary of any effort to restrict the Supreme Court’s appellate review power, such as the provision at issue in *Felker v. Turpin*; any such restriction undermines the Solicitor General’s own influence over the development of federal law. Second, the Solicitor General is likely to take cues from Supreme Court precedent in determining how to construe any jurisdictional provision. As the quintessential “repeat player” before the Court, the Solicitor General has a strong interest in maintaining a good reputation with the Justices. Accordingly, the Solicitor General may be especially inclined to advocate a narrow construction of jurisdiction-stripping legislation, if such a construction will be a winning argument before the Court (or if a contrary argument would harm the Solicitor General’s reputation with the Court).

This “repeat player” dynamic helps explain why the Justice Department has been increasingly resistant to jurisdiction-stripping laws. After the Supreme Court handed down *Webster v. Doe* and similar decisions, stating that it would construe statutes narrowly in order to preserve federal court review of constitutional claims, the Solicitor General had a strong incentive to adopt such a narrow construction of future federal laws.

This observation, of course, raises the question whether the Solicitor General’s arguments have driven the Supreme Court’s narrow construction of jurisdiction-stripping laws, or vice-versa. But I do not see the two possibilities as mutually exclusive. As the Vietnam War era examples illustrate, the Solicitor General was resistant to jurisdictional restrictions, even before the Supreme Court adopted its clear-statement rule regarding constitutional claims. Moreover, even when the Solicitor General did argue that a statute precluded jurisdiction over constitutional claims, he made that argument in very narrow terms. For example, in *Webster*, Solicitor General Fried emphasized that “the national security context” of that case “distinguish[ed] [it] from the far broader and much debated issue of legislative restriction of federal court jurisdiction,” and further declared that “whether a particular preclusion of review is constitutional is itself a

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309 Days, supra note 61, at 680.
310 *E.g.*, SALOKAR, supra note 155, at 3 (describing the Solicitor General as “the ideal ‘Repeat Player’”).
311 See supra notes 213-228 and accompanying text.
constitutional question, review of which may not be precluded.” It thus
does not appear that the Solicitor General’s approach was entirely caused by
Supreme Court precedent.

But, once the Supreme Court issued its clear-statement rule, that
precedent undoubtedly encouraged the Solicitor General to take a more
definitive stance on jurisdictional restrictions. As Solicitor General Olson
acknowledged in Demore v. Kim, it is often in a government client’s best
interest for the DOI to argue that the court has no jurisdiction over the
case. The Solicitor General can more easily justify a jurisdictional
argument that is adverse to his client’s interests if that argument seems
virtually “compelled” by Supreme Court precedent.

Accordingly, I assert that the Supreme Court’s decisions, and the
Solicitor General’s corresponding arguments, have been mutually beneficial
and complementary. The Court’s jurisprudence makes it easier for the
Solicitor General to advocate a narrow construction of jurisdiction-stripping
laws; and the DOJ’s arguments, in turn, provide the federal courts with
reassurance that such a narrow construction will have the support of a co-
equal branch of the federal government.

B. The Limits of Article II Safeguards:
Executive Acquiescence in Jurisdiction Stripping

The executive branch has repeatedly defended the federal judiciary,
seeking to protect the Supreme Court’s appellate jurisdiction and federal
jurisdiction over constitutional claims. But these Article II safeguards have
not been absolute. The counter-examples raise the question of when, and
under what circumstances, the executive branch is less likely to oppose
jurisdiction stripping. Although I do not seek to solve this difficult analytical
puzzle here, I suggest two factors that seem to influence the executive
branch’s approach.

In prior work, I have argued that jurisdiction-stripping measures are
more likely to be enacted when there is a major historical event that creates
overwhelming political support for limitations on federal jurisdiction.

The same was true of the Justice Department’s arguments in Johnson v. Robison, 415 U.S.
314 See supra note 276 and accompanying text.
315 See Grove, supra note 33, at 916-20. This theory helps explain the enactment of several
jurisdiction-stripping laws, including those that do not interfere with the executive branch’s
interests in preserving Supreme Court review and federal jurisdiction over constitutional
claims. For example, jurisdictional restrictions were enacted in the wake of the stock market
crash of 1929 and the ensuing Great Depression, see Norris-LaGuardia Act, 47 Stat. 70 (1932)
(codified at 29 U.S.C. § 101) (restricting the federal courts’ authority to issue injunctions in
labor disputes); during World War II, see Emergency Price Control Act of 1942, 56 Stat. 23
(allowing only the Supreme Court, and not any lower federal or state court, to review certain
This factor seems to partly explain the President’s support for measures that appeared (on their face) to eliminate the Supreme Court’s appellate jurisdiction or federal jurisdiction over constitutional claims. For example, although members of Congress had sought for years to enact habeas reform, they did not assemble sufficient political support for AEDPA and IIRIRA—nor did they have the strong backing of President Clinton—until after the Oklahoma City bombing in 1995.\footnote{316}

But another factor (aside from such historical “triggering events”) also seems to influence the President’s recent willingness to sign jurisdiction-stripping legislation.\footnote{317} As discussed in Part III, the executive branch has repeatedly opposed jurisdiction-stripping proposals that were considered as stand-alone measures. More recent jurisdiction-stripping provisions, by contrast, have been part of omnibus legislation.

As social scientists have observed, Presidents are less likely to veto any measure—even one that they strongly oppose on either constitutional or policy grounds—when it is part of an omnibus bill, the bulk of which the President strongly supports.\footnote{318} Presidents instead often respond to such omnibus legislation by issuing signing statements, declaring that they will interpret and enforce the problematic provision in a manner that accords with the Constitution.\footnote{319} This same dynamic may help explain the President’s


317 Indeed, the concept of “triggering events” seems an insufficient explanation for the President’s approach. After all, in the wake of one major historical event (the Civil War), President Andrew Johnson vetoed the 1868 legislation that sought to restrict the Supreme Court’s appellate jurisdiction over habeas cases. See supra note 67.

318 See, e.g., Glen S. Krutz, Tactical Maneuvering on Omnibus Bills in Congress, 45 AM. J. POL. SCI. 210, 212 (2001) (asserting that “Congressional leaders may include measures that the president opposes in omnibus bills in order to avert a veto” and that “the power of the presidential veto is [thereby] diluted”).

319 See Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power, 23 CONST. COMMENT. 307, 341 (2006) (arguing that “as a political matter [presidents] will not be able to veto [omnibus legislation] simply because of constitutional concerns about a particular provision,” and that the President can better oppose such bills by issuing signing statements); Paul T. Stepnowsky, Deference to Presidential Signing Statements in Administrative Law, 78 GEO. WASH. L. REV. 1086, 1090 (2010) (asserting that “the size and complexity of omnibus legislation has incentivized the use of signing statements when the Executive seeks to challenge a narrow portion of a statute without using his veto authority”).}
willingness to sign recent jurisdiction-stripping legislation. AEDPA and IIRIRA were complex statutes that contained many provisions other than the jurisdiction-stripping provisions discussed here. Likewise, the provision in Demore v. Kim was part of the Immigration and Nationality Act, an enormous piece of legislation that governs numerous aspects of immigration and naturalization. Just as Presidents have been inclined in recent years to sign large omnibus legislation, and yet “oppose” certain provisions via signing statements, Presidents may be willing to sign such legislation, and yet permit the Department of Justice to “oppose” the jurisdiction-stripping provisions via litigation.

Thus, the executive branch seems most likely to consent to jurisdictional restrictions (1) following a major historical event; and (2) when the jurisdictional restriction is integrated into an expansive statute, the bulk of which the President supports. These factors also appear to explain the enactment of recent jurisdiction-stripping laws in response to the “war on terror.”\footnote{The Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA) were designed to eliminate federal habeas jurisdiction over the claims of alleged enemy combatants in the war on terror. See DTA § 1005(e), 119 Stat. at 2742; MCA § 7, 120 Stat. at 2635–36 (amending 28 U.S.C. § 2241(e)(1)). Those claims were instead routed to a military tribunal (either a combatant status review tribunal or a military commission) followed by judicial review in the D.C. Circuit and the Supreme Court. See DTA, 119 Stat. at 2742; MCA, 120 Stat. at 2622–24. Although the DTA gives the D.C. Circuit “exclusive” jurisdiction to review decisions of combatant status review tribunals, such “exclusivity” provisions are generally construed so as to preserve Supreme Court review. See, e.g., Administrative Orders Review Act, 28 U.S.C. § 2342 (2006) (providing that “[t]he court of appeals . . . has exclusive jurisdiction” to review “final orders” from certain federal agencies); Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 750–51 (2002) (reviewing court of appeals decision in a case brought under 28 U.S.C. § 2342).}

Notably, these statutes largely preserved the Supreme Court’s appellate jurisdiction and federal jurisdiction over constitutional claims\footnote{See supra note 320 (explaining that the provisions preserved Supreme Court review).} and thus did not interfere with the executive branch’s principal concerns about federal jurisdiction. But one provision of the Military Commissions Act of 2006 does purport to eliminate federal jurisdiction over a detainee’s challenge to his “conditions of confinement” during his detention.\footnote{See 28 U.S.C. § 2241(e)(2); infra Part V(C)(2).} It does not appear that the second Bush Administration made any public statements
about this provision during the legislative process. But the executive branch’s acceptance of this jurisdiction-stripping measure does accord with the analysis here. The MCA was enacted in the wake of a major historical event: the attacks of September 11, 2001 and the ensuing war on terror. Moreover, the MCA was an expansive statute, the bulk of which the President supported. Under these circumstances, the executive branch did not contest the “conditions of confinement” provision in the legislative process. But the DOJ could oppose this provision via litigation— a possibility I explore below.

Notably, Congress’s reliance on omnibus and similarly expansive legislation has largely coincided with the Solicitor General’s increased willingness to argue for narrow constructions of jurisdiction-stripping laws. Since the Supreme Court issued its clear-statement rule in *Webster* and related cases, the Solicitor General has not (to my knowledge) argued in any Supreme Court case that a federal statute eliminates federal court review of constitutional claims. Nor has the Solicitor General argued that a statute cuts off all avenues to the Supreme Court. Accordingly, even as the Article II safeguards in the legislative process have weakened, the Article II safeguards in litigation seem to have grown more robust.

C. Implications

Scholars have long overlooked the important role that the executive branch has played in the jurisdictional struggles between Congress and the

323 President Bush did not issue a signing statement with this legislation. Nor have I been able to uncover any other public statements about this provision.

324 There are examples of such arguments in the lower courts. For example, the government argued in lower court proceedings that the statute in *Demore v. Kim* cut off all federal jurisdiction. See Transcript of Oral Argument at 4-5, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1491.pdf. The Solicitor General reversed that position once the case reached the Supreme Court. See id. at 5. Notably, the Solicitor General does not oversee all lower court litigation, not even at the appellate level. For that reason, the Solicitor General cannot ensure consistent DOJ arguments in every case.

325 The government’s approach in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), is consistent with this claim. The DOJ (through Solicitor General Paul Clement) asserted that the Detainee Treatment Act, as originally enacted, applied to pending habeas corpus cases and thus prevented the Supreme Court from reviewing the pending appeal in *Hamdan*. Respondents’ Motion to Dismiss for Lack of Jurisdiction, at 9-15, Hamdan v. Rumsfeld, 548 U.S. 557 (2006). But the government emphasized that the statute did not thereby “leave [Hamdan] without any avenue of judicial review.” Id. at 3. He could “seek review in the [D.C.] Circuit” and further “review in [the Supreme] Court.” Id. Under the DOJ’s view, therefore, the statute preserved Supreme Court review (and thus likewise preserved the Solicitor General’s influence over the development of federal law in terrorism cases). Ultimately, the *Hamdan* Court held that the DTA’s jurisdiction-stripping provision did not apply to pending cases. 548 U.S. at 581-84. The Military Commissions Act effectively overruled *Hamdan* by expressly extending the habeas restrictions to pending cases. See MCA § 7, 120 Stat. at 2635-36.
judiciary. The primary goal of this Article is to correct that omission and to demonstrate that the executive branch has repeatedly used the structural tools of Article II to protect the Article III courts. But the analysis here may also have broader implications for constitutional scholarship and for future litigation in the war on terror.

1. Theoretical Implications: Separation of Powers, Not Parties

Daryl Levinson and Richard Pildes have offered a powerful challenge to the traditional conception of separation of powers. Under traditional Madisonian theory, each branch of government has institutional incentives that lead it to “check” the other branches to ensure that they do not infringe on constitutional values.\(^{326}\) Professors Levinson and Pildes argue that this scheme is unlikely to work during periods of unified government.\(^ {327}\) Instead, when the President and Congress are controlled by the same political party, they are likely to cooperate rather than compete.\(^{328}\)

This concept of “separation of parties, not powers” has gained increasing acceptance among scholars and has encouraged scholars to refine prior understandings of our constitutional system.\(^ {329}\) The analysis offered by Professors Pildes and Levinson does not, however, explain the way in which the branches operate in relation to the judiciary.

As the above historical survey demonstrates, the executive branch has opposed jurisdiction-stripping measures, even during periods of unified government, and even when the measures were sponsored by members of the President’s own party. For example, the Roosevelt Administration rejected proposals by legislators in the Democratic Party to eliminate the Supreme Court’s appellate jurisdiction over constitutional claims—even during a period of unified government, when the Democrats had overwhelming

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326 See The Federalist No. 51 (James Madison).
327 Levinson & Pildes, supra note 7, at 2385 (“From nearly the start of the American republic, the separation of powers as the Framers understood it, and as contemporary constitutional law continues to understand it, had ceased to exist.”).
328 Id. at 2316 (arguing that “[t]he greatest threat to constitutional law’s conventional understanding of, and normative goals for, separation of powers comes when government is unified”).
329 See, e.g., Bruce Ackerman, 2006 Oliver Wendell Holmes Lectures—The Living Constitution, 120 Harv. L. Rev. 1737, 1809 n.222 (2007) (agreeing with Professors Levinson and Pildes that “the branches operate very differently depending on whether they are all controlled by the same party”); Devins & Lewis, supra note 59, at 479 (same); Goodwin Liu, The Bush Administration and Civil Rights: Lessons Learned, 4 Duke J. Const. L. & Pub. Pol’y 77, 87 (2009) (same). Other scholars have, however, have asserted that the “separation of parties” argument may be somewhat overstated. See Eric A. Posner & Adrian Vermeule, Constitutional Showdowns, 156 U. Pa. L. Rev. 991, 1036 (2008) (arguing that “the American constitutional system … displays both separation of powers and parties in a complicated interaction”).
majorsities in both chambers of Congress. Likewise, the Reagan Administration strongly opposed the school prayer proposal championed by President Reagan’s fellow Republican Senator Jesse Helms.

This dynamic can be largely explained by the different institutional incentives of Congress and the executive branch. The executive branch is in “close contact” with the judiciary—not only because the President plays a leading role in judicial appointments, but also because he can “[t]hrough control over the Justice Department … exercise significant influence over … what arguments are presented” to the courts. These institutional powers enable the President to influence the development of federal law through the judiciary—an authority that many leaders have used to advance their constitutional philosophy. The President’s institutional position thus gives him a strong incentive to defend the scope of federal jurisdiction.

Congress, by contrast, has few ways to directly affect the course of judicial decisions. Congress may, of course, seek to influence the courts by changing the size of the judiciary, declining to increase judicial pay, or even modifying the scope of federal jurisdiction. But Congress rarely speaks directly to the courts in litigation and thus has far less influence over the development of federal law. Indeed, that may be why an all-Democratic Congress balked at Roosevelt’s Court-packing proposal. Given the executive branch’s influence with the judiciary in normal times, legislators found “abhorrent” “the idea of giving [the] president … the [additional] authority to remake the Supreme Court virtually overnight.”

Thus, with respect to the judiciary, Congress and the President have competing institutional incentives that lead them to approach jurisdiction-stripping (and other court-curbing) proposals differently. As Madisonian theory might predict, the executive branch’s institutional incentives—its “ambition” to have greater influence over the development of federal law—lead it to “resist” congressional encroachments on federal jurisdiction during periods of both unified and divided government. The analysis here thus offers an important correction to the view that the checks and balances scheme envisioned by Madison depends upon the “separation of parties.” The federal judiciary has historically been protected by the separation of powers, not parties.

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330 See 5 Historical Statistics of the United States, Millennial Edition Online 5-201 (Susan B. Carter et al. eds., 2006) (showing that the Democrats controlled the House 331-89 and the Senate 76-16); supra Part III(A).
331 See supra note 142 and accompanying text; Part III(D).
332 Whitington, supra note 42, at 196.
334 Sheehol, supra note 78, at 316.
335 The Federalist No. 51 (James Madison).
2. Practical Implications: The War on Terror

This history of executive branch support for the judiciary may have implications not only for constitutional scholarship but also for future litigation in the war on terror. A provision of the Military Commissions Act of 2006, in terms reminiscent of AEDPA and IIRIRA, purports to cut off all federal jurisdiction over certain claims:

[N]o court, justice, or judge shall have jurisdiction to hear or consider any [] 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.336

This provision seems to foreclose any challenge to a detainee’s “conditions of confinement” in any court. The legislative history supports that construction. For example, Senator Lindsay Graham, one of the sponsors of the jurisdiction-stripping provision, declared that it would “take … conditions of confinement lawsuits off the table.”337 Likewise, Senator Jesse Bingaman asserted that the legislation “eliminates the ability of aliens … to bring … claims related to their detention or their treatment or their conditions of confinement.”338

The Supreme Court has not ruled on the validity of this provision.339 But several scholars have declared that the “conditions of confinement” provision is unconstitutional insofar as it precludes federal jurisdiction over constitutional claims. Thus, Professor Alexander has urged that “the complete denial of judicial review of constitutional claims is beyond Congress’s power under the Exceptions […] Clause,” because it deprives the Supreme Court of its “essential role.”340 Professors Fallon and Meltzer have likewise criticized this “total preclusion of review,” stating that “[i]n the end, the individual’s substantive constitutional claim … may not prevail, but the foreclosure of jurisdiction cannot, by itself, bar all courts” from even considering the issue.341

This provision of the MCA, like AEDPA and IIRIRA, seems to raise much-mooted questions about the outer boundaries of Congress’s power over

338 Id. at S10260 (statement of Sen. Jesse Bingaman) (Democrat) (New Mexico).
339 In Boumediene v. Bush, 553 U.S. 723 (2008), the Court struck down the MCA’s habeas restrictions on Suspension Clause grounds, concluding that the alternative review process (in a military tribunal followed by federal court review) did not provide an adequate substitute for habeas corpus. Id. at 792. The Court then declined to “discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.” Id.
340 See Alexander, supra note 32, at 1208, 1239.
341 Fallon & Meltzer, supra note 31, at 2063.
federal jurisdiction. But I argue that, once again, the federal courts may be able to avoid those troubling questions. The executive branch could urge the courts to construe this provision narrowly in order to preserve federal jurisdiction over federal constitutional claims.

The Justice Department has thus far had few occasions to address the scope of the MCA’s “conditions of confinement” provision. But the approach of the Bush Justice Department in *Rasul v. Myers* 342 may be instructive. *Rasul* involved a group of British citizens who were captured in Afghanistan and then detained at Guantanamo Bay from 2002 until 2004 (when they were released and returned to the United Kingdom). 343 The plaintiffs claimed that they were “systematically and repeatedly tortured throughout their two-year detention at Guantanamo” and that high-level government officials knew about this “torture and mistreatment.” 344 They brought a *Bivens* claim, asserting that the interrogation tactics used against them “constituted cruel and unusual punishment in violation of the Eighth Amendment” and that “the cruel, inhuman or degrading conditions at Guantanamo” violated the Due Process Clause of the Fifth Amendment. 345

The suit in *Rasul* would seem on its face to be an “action against the United States or its agents relating to … [the] conditions of confinement” of alleged enemy combatants, thus triggering the jurisdictional bar in the MCA. 346 The case therefore should have raised serious questions about the scope of Congress’s power over federal jurisdiction.

But the Justice Department never raised the jurisdictional issue. Instead, the DOJ urged the court to dismiss the constitutional and other claims on the merits, arguing in part that the government officials were entitled to qualified immunity. 347 Nor did the courts question their jurisdiction over the action, but instead simply ruled in the government’s favor on the merits. 348 Thus, although the plaintiffs’ constitutional claims

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342 512 F.3d 644 (D.C. Cir. 2008); see Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009).
343 See *Rasul*, 512 F.3d at 649-50.
344 Id. at 650.
345 Id. at 663 (internal quotation marks omitted); see *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
“[i]n the end ... [did] not prevail,” the federal courts were not prevented from considering the issue.

It is not yet clear what approach the Obama Justice Department will take with respect to the “conditions of confinement” provision. But I suggest that, as it contemplates its approach, it should consider how prior administrations have dealt with similar statutes.

The DOJ could draw upon the practice of the Clinton and Bush Administrations in the litigation over AEDPA and IIRIRA. There, in the face of equally broad jurisdiction-stripping language, the Justice Department urged the federal courts to construe the statutes narrowly in order to preserve jurisdiction over constitutional claims. Likewise, the Obama Justice Department could argue: “Notwithstanding [the MCA]’s categorical language, neither the text nor the legislative history ... advert[s] specifically to preclusion of review of constitutional claims.” Accordingly, the federal courts “retain authority to consider such claims.”

Such an approach would help ensure that many of the questions about Congress’s power over federal jurisdiction would go unresolved. And there is much to be said for this “avoidance” approach. As Barry Friedman has asserted, there are reasons to leave the lines of congressional authority over federal jurisdiction in doubt. “Uncertainty breeds caution,” deterring Congress from advancing policies through jurisdictional restrictions, without removing the possibility that Congress could rely on that authority at some

349 Fallon & Meltzer, supra note 31, at 2063.
350 The Obama Administration maintained the same position as the Bush Justice Department in Rasul, declining to question jurisdiction and seeking a favorable decision on the merits. See Brief for Respondents in Opposition, Rasul v. Myers 130 S. Ct. 1013 (2009) (No. 09-227). But, in a recent “conditions of confinement” case in federal district court, which also involved Bivens claims, the Obama Justice Department did raise the jurisdictional bar. See Memorandum of Points and Authorities in Support of the Individual Defendants’ Motion to Dismiss Plaintiffs’ Constitutional Claims, at 4. Al-Zahrani v. Rumsfeld, 684 F.Supp.2d 103 (D.D.C. 2010) (No. 1:09-CV-00028 (ESH)). Yet, after the plaintiffs challenged the constitutionality of the jurisdictional bar, see Plaintiffs’ Memorandum in Opposition to Individual Defendants’ and United States’ Motions to Dismiss and United States’ Motion to Substitute, at 10-22, Al-Zahrani v. Rumsfeld, 684 F.Supp.2d 103 (D.D.C. 2010) (No. 09-cv-00028 (ESH)), the DOJ made little effort to defend the statute and instead invited the district court to rule on the Bivens claims on the merits. See Reply Memorandum in Support of the Individual Defendants’ Motion to Dismiss Plaintiffs’ Constitutional Claims, at 4-6 & n.3, Al-Zahrani v. Rumsfeld, 684 F.Supp.2d 103 (D.D.C. 2010) (No. 09-cv-00028 (ESH)). The district court accepted that invitation. See Al-Zahrani, 684 F. Supp. 2d at 110-12 (deciding to decide the jurisdictional issue and dismissing the Bivens claims on the merits). Notably, the Solicitor General does not typically supervise federal district court litigation. Accordingly, it is impossible to tell whether the Solicitor General would adopt the same approach in later stages of this case or future cases.
352 Id.
The executive branch could encourage the courts to leave the issue unresolved by again insisting that “[i]f Congress wants to frustrate the judicial check,” it must “say so unmistakably.”

VI. Conclusion

Jurisdiction stripping has long been treated as a battle between Congress and the federal courts. Scholars have thus overlooked the important (and surprising) role that the executive branch has played in these jurisdictional struggles. The President and the Department of Justice have strong institutional incentives to defend the scope of federal jurisdiction. Because of their “close contact” with the federal judiciary, these executive officials can use litigation to have a substantial impact upon “the development of American law” and “the establishment of constitutional … principles.”

For this reason, the executive branch has repeatedly opposed jurisdiction-stripping legislation in Congress (even when the President otherwise strongly disagreed with the federal courts’ jurisprudence). Likewise, the Justice Department has repeatedly urged the courts to construe jurisdiction-stripping laws narrowly. The executive branch has thus proven to be an important ally for the federal courts, using the structural tools of Article II to ensure that Congress complies not only with the letter but also with “the structure and spirit of the [Constitution].”

354 Hart, supra note 19, at 1399.
355 Whittington, supra note 42, at 196.
356 Days, supra note 61, at 680.
357 Bator, supra note 4, at 1039.