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SUMMARY

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The Exceptions Clause and Congressional Control over Supreme Court Jurisdiction

Article III, Section 2, clause 1, of the Constitution grants the federal courts jurisdiction to consider certain types of "Cases" and "Controversies," defined based on the legal issues presented or the identity of the litigants. Article III, Section 2, clause 2, then provides that the Supreme Court shall have original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party" and that in all other cases subject to federal court jurisdiction, "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The grant of Supreme Court original jurisdiction over cases affecting ambassadors and cases where a state is a party means that those types of cases may be commenced in the Supreme Court in the first instance. All other cases reach the Supreme Court, if at all, on appeal. The second sentence of Article III, Section 2, Clause 2, known as the Exceptions Clause, grants the High Court appellate jurisdiction over those cases subject to "such Exceptions, and … Regulations as the Congress shall make." Courts and commentators have interpreted the Exceptions Clause to give Congress significant control over the Supreme Court's appellate jurisdiction. However, existing caselaw does not clearly define the scope of Congress's authority in this area, and scholars have debated whether and how the Constitution restricts Congress's ability to make exceptions to Supreme Court appellate jurisdiction. Some commentators argue that the power is nearly plenary, while others contend that Congress may not strip the High Court of jurisdiction in ways that would undermine the Court's essential role as final arbiter of significant constitutional questions. Even commentators who take a broad view of Congress's Exceptions Clause power generally accept that Congress may not exercise its authority in ways that violate other constitutional provisions, such as the Due Process Clause. Some commentators also acknowledge practical or political limitations on the power.

This report provides an overview of congressional control over Supreme Court jurisdiction. It first briefly discusses the constitutional grant of Supreme Court original jurisdiction. It then turns to the Exceptions Clause and Congress's ability to regulate the Court's appellate jurisdiction, covering key cases interpreting the Exceptions Clause and selected legal scholarship in the area. The report closes with considerations for Congress related to regulating Supreme Court jurisdiction.

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Article III of the Constitution establishes the federal judiciary, vests judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,"[1] and sets the outer bounds of the federal courts' *jurisdiction*—their power to issue decisions on specific legal matters. Article III, Section 2, clause 1, of the Constitution grants the federal courts jurisdiction to consider certain types of "Cases" and "Controversies," defined based on the legal issues presented or the identity of the litigants.[2]

Article III, Section 2, Clause 2, grants the Supreme Court *original jurisdiction* over some matters and *appellate jurisdiction* over others. The first sentence of the clause provides: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." That grant of original jurisdiction means that cases affecting ambassadors and cases where a state is a party may be commenced in the Supreme Court and decided by that Court in the first instance.[3] All other cases reach the Supreme Court, if at all, on appeal from other tribunals.[4] The second sentence of Article III, Section 2, Clause 2, provides: "In all the other Cases before mentioned"—that is, all other cases within the constitutional limits of federal court jurisdiction—"the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The second sentence of Article III, Section 2, Clause 2, is known as the Exceptions Clause. Courts and commentators have interpreted the clause to give Congress significant control over the Supreme Court's appellate jurisdiction. However, Supreme Court caselaw interpreting the Exceptions Clause is fairly limited. Existing cases do not precisely define the scope of Congress's authority in this area, and scholars debate the extent to which the Constitution restricts Congress's ability to make exceptions to Supreme Court appellate jurisdiction.

This CRS Report provides an overview of congressional control over Supreme Court jurisdiction. It first briefly discusses the constitutional grant of Supreme Court original jurisdiction.[5] It then turns to the Exceptions Clause and Congress's ability to regulate the Court's appellate jurisdiction, covering key cases interpreting the Exceptions Clause and selected legal scholarship

[1] U.S. CONST. art. III, § 1.

[2] U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *see also* Cong. Rsch. Serv., *Overview of Cases or Controversies*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00013375/ (last visited Oct. 11, 2024).

[3] *Original jurisdiction*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A court's power to hear and decide a matter before any other court can review the matter."). Congress has provided by statute that in some cases the Supreme Court's original jurisdiction is exclusive, meaning such cases *must* be commenced in the High Court. *See* 28 U.S.C. § 1251(a).

[4] Federal statutory law distinguishes between cases that the Supreme Court reviews on direct appeal (which the Court must consider) and those that the Court may hear via a discretionary petition for a writ of certiorari. *Compare* 28 U.S.C. §§ 1254, 1257 *with id.* § 1253. As a constitutional matter, both direct appeal and certiorari are considered to be exercises of the Court's appellate jurisdiction.

[5] *See infra* "Supreme Court Original Jurisdiction."

in the area.[6] The report closes with considerations for Congress related to regulating Supreme Court jurisdiction.[7]

Supreme Court Original Jurisdiction

When the Supreme Court has original jurisdiction over a case, that means that a party may (and in some cases must) commence litigation in the Supreme Court in the first instance rather than the case reaching the High Court on appeal from a state court or a lower federal court.[8] The Constitution grants the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[9] Congress has enacted legislation giving the Supreme Court "original and exclusive jurisdiction of all controversies between two or more States."[10] Another provision of the same statute grants the Court

> original but not exclusive jurisdiction of:
>
> (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;
>
> (2) All controversies between the United States and a State;
>
> (3) All actions or proceedings by a State against the citizens of another State or against aliens.[11]

When the Supreme Court has original and exclusive jurisdiction over a case, the case cannot be filed in any other court. It must be filed in the High Court. When the Court has original but *not* exclusive jurisdiction, a case may be commenced directly in the Supreme Court or may be filed in a lower court and potentially reach the High Court on appeal.

The Supreme Court has held that its original jurisdiction flows directly from the Constitution and is self-executing without further action by Congress.[12] Congress cannot enlarge or limit original jurisdiction through legislation.[13] Thus, in *Marbury v. Madison*, the Court struck down a statute that purported to grant it original jurisdiction to issue writs of mandamus, which fell outside the constitutional grant of original jurisdiction.[14]

While Congress cannot alter the types of cases that fall within the Supreme Court's original jurisdiction, it can grant other courts concurrent jurisdiction over cases subject to original Supreme Court jurisdiction.[15] If a case subject to concurrent Supreme Court and lower court jurisdiction commences in a lower court, the Supreme Court has the option to review the lower

[6] *See infra* "Supreme Court Appellate Jurisdiction."

[7] *See infra* "Considerations for Congress."

[8] *Original jurisdiction*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[9] U.S. CONST. art. III, § 2, cl. 2.

[10] 28 U.S.C. § 1251(a).

[11] *Id.* § 1251(b).

[12] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

[13] *See, e.g.*, California v. Arizona, 440 U.S. 59, 65 (1979) (noting that if Congress were to "withdraw the original jurisdiction of this Court ... a grave constitutional question would immediately arise"); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[14] *Marbury*, 5 U.S. (1 Cranch) at 175–79.

[15] Concurrent jurisdiction may lie in lower federal courts or in state courts. *See, e.g.*, Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449, 463–65 (1884); Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379 (1930).

court's decisions if the parties file a petition for a writ of certiorari.[16] The Court has asserted discretion to decline to exercise original jurisdiction in these cases and instead require that they first proceed through the lower courts.[17] The Court has held that its original jurisdiction "should be invoked sparingly," and original jurisdiction cases make up a small fraction of its docket.[18]

Supreme Court Appellate Jurisdiction

In contrast to the well-defined grant of original jurisdiction, the Constitution does not precisely define the Supreme Court's appellate jurisdiction, instead leaving to Congress at least some discretion over the question. Article III sets the outer bounds of Supreme Court appellate jurisdiction: The High Court, like any other federal court, cannot hear matters that fall outside the enumerated categories of cases and controversies that are subject to federal court jurisdiction.[19] There are open questions, however, as to whether the Constitution requires that the Court possess some minimum amount of appellate jurisdiction. The Supreme Court has interpreted the Exceptions Clause to give Congress significant power to curtail its appellate jurisdiction, but the existing cases do not squarely address the possible limits to this power.[20] Legal scholars also continue to debate the scope of Congress's authority to legislate in this area.[21]

Cases Interpreting the Exceptions Clause

The Supreme Court has stated that it "possesses no appellate power in any case, unless conferred upon it by act of Congress."[22] The Court has explained that, in theory, the constitutional grant of appellate jurisdiction is self-executing—that is, even absent action by Congress, the Court possesses appellate jurisdiction over all covered cases.[23] In practice, however, since the first Judiciary Act of 1789, Congress has enacted legislation that grants the Supreme Court appellate jurisdiction over a subset of covered cases rather than providing (or assuming) that the Court can hear all such cases and carving out discrete exceptions.[24] The Supreme Court has interpreted this practice to mean that, by granting the Court appellate jurisdiction over certain categories of cases, Congress has implicitly created exceptions to the Court's appellate jurisdiction with respect to cases that fall outside the statutory grant.[25]

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[16] 28 U.S.C. §§ 1254, 1257.

[17] *See, e.g.*, Wyandotte Chems. Corp., 401 U.S. 493; Georgia v. Penn. R.R., 324 U.S. 439 (1945); Massachusetts v. Missouri, 308 U.S. 1 (1939).

[18] Utah v. United States, 394 U.S. 89, 95 (1968); *see also, e.g.*, Jay D. Wexler & David Hatton, *The First Ever (Maybe) Original Jurisdiction Standings*, 1 J. LEGAL METRICS 19, 20 (2012).

[19] U.S. CONST. art. III, § 2, cl. 1.

[20] *See infra* "Cases Interpreting the Exceptions Clause."

[21] *See infra* "Academic Debate over the Exceptions Clause."

[22] Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847); *see also* Daniels v. R. Co., 70 U.S. (3 Wall.) 250, 254 (1865); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799).

[23] *See* Durousseau v. United States, 10 U.S. 307, 314 (1810) ("The appellate powers of this Court are not given by the Judicial Act. They are given by the Constitution. But they are limited and regulated by the judicial and by such other acts as have been passed on the subject.").

[24] Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81.

[25] *See Durousseau*, 10 U.S. at 314 ("When the first legislature of the union proceeded to carry the third article of the Constitution into effect, it must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. It has not, indeed, made these exceptions in express terms. It has not declared that the appellate power of the Court shall not extend to certain cases, but it has described affirmatively its (continued...)

As a general matter, Congress has never provided for federal court jurisdiction over all cases that fall within the constitutional grant in Article III,[26] nor has it historically granted the Supreme Court jurisdiction over all the cases it might hear on appeal.[27] Under current law, Congress has granted the Supreme Court jurisdiction to review judgments of the federal appeals courts and the highest court of each state via discretionary petitions for writs of certiorari.[28] Congress has also provided for direct appeals (skipping the federal courts of appeals) to the Supreme Court of certain decisions of three-judge district courts.[29] The current jurisdictional statutes grant the Supreme Court appellate jurisdiction over broad categories of cases.

Against the background of these affirmative grants of jurisdiction, Congress has at times enacted legislation carving out narrower classes of cases from Supreme Court appellate jurisdiction. Laws that limit the Supreme Court's jurisdiction may take two forms: laws that limit the jurisdiction of all federal courts, including the Supreme Court, and laws that limit only the Supreme Court's jurisdiction. These two types of laws may raise distinct legal questions. Another CRS Report discusses in detail Congress's ability to limit the jurisdiction of federal courts generally, sometimes called *jurisdiction stripping*.[30] While there is some uncertainty about the power's exact scope, Congress has significant authority to limit the jurisdiction of federal courts, including in ways that affect the outcome of specific pending cases. Congress cannot enact legislation, including jurisdiction-stripping legislation, to "prescribe a rule for the decision of a cause in a particular way."[31] It also cannot interfere with the finality of judgments by requiring courts to reopen finally decided lawsuits.[32] However, the Supreme Court has upheld federal court jurisdictional limitations that do not violate those prohibitions.[33]

Valid Uses of the Exceptions Clause

In cases looking specifically at legislation that limited the appellate jurisdiction of the Supreme Court, the Court has at times upheld such limitations as valid exercises of congressional authority under the Exceptions Clause. For instance, several cases upheld limitations on Supreme Court review of decisions of the now-defunct Court of Claims.[34]

jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.").

[26] *See, e.g.*, 28 U.S.C. § 1332 (limiting district court diversity jurisdiction to matters where the amount in controversy exceeds $75,000). *See generally* Cong. Research Serv., *Historical Background on Federal Question Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-11-2/ALDE_00013327/ (last visited Oct. 11, 2024).

[27] *See, e.g.*, Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85 (granting the Supreme Court jurisdiction to review a decision of a state's highest court only when the state court decision was "against [the] validity" of a federal law); *see also* Presidential Comm'n on the Supreme Ct. of the United States, Final Report 155 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [hereinafter, *SCOTUS Commission Report*] ("The 1789 Judiciary Act, for example, made no provision for Supreme Court review of criminal cases tried in the lower federal courts.").

[28] 28 U.S.C. §§ 1254, 1257.

[29] 28 U.S.C. § 1253. *See also* CRS In Focus IF12746, *Three-Judge District Courts*, by Joanna R. Lampe (2024).

[30] CRS Report R44967, *Congress's Power over Court Decisions: Jurisdiction Stripping and the Rule of Klein*, by Joanna R. Lampe (2024).

[31] United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872).

[32] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225–32 (1995).

[33] *See, e.g.*, Patchak v. Zinke, 583 U.S. 244 (2018); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); *see also* Mountain Valley Pipeline, LLC v. Wilderness Soc'y, 144 S. Ct. 42 (2023) (Mem).

[34] United States v. Young, 94 U.S. 258 (1876); District of Columbia v. Eslin, 183 U.S. 62 (1901); Luckenbuch S. S. Co. (continued...)

As another example, in the 1863 case *Ex parte Vallandigham*, the Supreme Court considered a petition for a writ of certiorari filed by a man who had been tried by a military commission and imprisoned for committing "acts for the benefit of the enemies of our country" after making speeches denouncing the Civil War.[35] The defendant asserted that he had been arrested without due process and that the military commission lacked jurisdiction to try him.[36] The Supreme Court declined to exercise jurisdiction over the case because it had not been granted the power to review decisions of the military commission. The Court explained:

> The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress. In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court.[37]

In 1882, in *The Francis Wright*, the Supreme Court held that the Exceptions Clause allowed Congress to grant the Court appellate jurisdiction over questions of law in admiralty cases while disallowing review of lower court factual findings.[38] In so holding, the Court expressed an expansive view of the Exceptions Clause, stating that the Court's appellate jurisdiction and the extent to which it is exercised "are, and always have been, proper subjects of legislative control…. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not."[39]

In the 1908 case *United States v. Bitty*, the Supreme Court considered a constitutional challenge to a law that allowed the government to appeal the dismissal of a criminal indictment but did not allow the defendant to immediately appeal a denial of dismissal.[40] The Court upheld the statute, holding that "[s]urely such an exception or regulation is in the discretion of Congress to prescribe, and does not violate any constitutional right of the accused."[41]

In each of the foregoing cases, the Supreme Court upheld an exception to its appellate jurisdiction. None of the exceptions fully prevented the Court from considering constitutional questions it would otherwise have been able to resolve, however. The Court of Claims was established to hear cases against the government, which would have been barred by sovereign immunity absent waiver by Congress.[42] *The Francis Wright* involved a limitation that applied only to factual review and did not limit the Supreme Court's ability to consider legal questions. *Bitty* involved a statute that did not allow an interlocutory appeal[43] by the defendant "before the final determination of the case against him"[44] but did not affect his ability to challenge a final

v. United States, 272 U.S. 533 (1926). Congress abolished the Court of Claims in 1982 and replaced it with the Court of Federal Claims. *See* Federal Courts Improvement Act of 1982, Pub. L. 97-164, Section 105(a), §§ 171–77, 96 Stat. 25, 27–28.

[35] 68 U.S. (1 Wall.) 243, 244 (1863).

[36] *Id.* at 246.

[37] *Id.* at 251 (footnote omitted).

[38] 105 U.S. 381, 385–386 (1882).

[39] *Id.* at 386.

[40] 208 U.S. 393 (1908).

[41] *Id.* at 400; *see also* Am. Constr. Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 378–79 (1893) (under the Exceptions Clause, Congress had validly declined to grant jurisdiction over appeals from certain interlocutory circuit court orders).

[42] *See* 17 FED. PRAC. & PROC. JURIS. § 4101 (3d ed. 2024).

[43] An interlocutory appeal is "an appeal that occurs before the trial court's final ruling on the entire case." *Interlocutory appeal*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[44] *The Francis Wright*, 105 U.S. at 400.

conviction. The one possible outlier is *Vallandingham*, in which the Supreme Court held that it did not have jurisdiction to consider the defendant's challenge to his military commission trial. By the time the Supreme Court issued its opinion in *Vallandigham*, however, the question presented was largely academic. The defendant's sentence of imprisonment had been commuted and the defendant "put beyond our military lines"—essentially freed and deported to the Confederacy—so he was no longer in federal custody.[45] In a subsequent case brought by a person in federal custody that reached the Court via a petition for a writ of habeas corpus rather than a petition for a writ of certiorari, the Supreme Court reached the merits of the constitutionality of trying civilians before military commissions.[46]

Invalid Use of the Exceptions Clause: *United States v. Klein*

In contrast with the foregoing cases, the Supreme Court has occasionally struck down limits on its appellate jurisdiction. One prominent example is the Reconstruction-era case *United States v. Klein*.[47] The plaintiff in *Klein* was the estate of a deceased former Confederate soldier seeking compensation for property seized during the Civil War. Under the Abandoned and Captured Property Act of 1863, individuals who had not "given any aid and comfort" to the rebellion could obtain the proceeds from captured property.[48] Several presidential proclamations declared that a person could become eligible to receive the proceeds of his property after receiving a full presidential pardon and taking an oath of loyalty to the United States, which the decedent had done. However, Congress enacted legislation seeking to make a presidential pardon ineffective in establishing a right to the proceeds of seized property by stripping the Court of Claims of jurisdiction over cases where a pardon was introduced. The same law further provided that in all cases where the Court of Claims had rendered a favorable judgment for a claimant based solely on a presidential pardon, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."[49]

The Supreme Court struck down the jurisdictional limitations. With respect to the limit on its appellate jurisdiction, the Supreme Court held that if the law "simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."[50] However, the Court explained, "the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end," and "the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress."[51] In essence, the Court concluded that Congress enacted the statute to require the courts to reach a specific outcome in certain cases. Such a law, the Court said, "is not an exercise of the acknowledged power of Congress to make

[45] Ex parte Vallandigham, 68 U.S. (1 Wall.) 243, 248 (1863).

[46] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). A writ of habeas corpus is a "writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." *Habeas corpus*, BLACK'S LAW DICTIONARY (12th ed. 2024). A writ of certiorari is now the procedural mechanism that gives the Supreme Court discretion whether to review most cases presented to it on appeal, but it was originally "an extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." *Certiorari*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[47] 80 U.S. (13 Wall.) 128 (1872). For discussion of additional cases in which the Court interpreted narrowly or struck down statutes limiting its jurisdiction, see *infra* "Narrow Interpretations and Limits: Habeas Corpus Cases."

[48] *Id.* at 131.

[49] *Id.* at 134.

[50] *Id.* at 145.

[51] *Id.* at 146.

exceptions and prescribe regulations to the appellate power," and, in enacting the law, "Congress has inadvertently passed the limit which separates the legislative from the judicial power."[52] The Court also expressed that the law's "great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have … thus infringing the constitutional power of the Executive."[53] The Court found that the intrusions on judicial and executive power both weighed against the validity of the jurisdictional limitation.

Subsequent Supreme Court decisions have cited *Klein* as precedent but have applied its ruling narrowly, and commentators debate the import of *Klein* with respect to jurisdiction stripping generally.[54] As it relates to the Exceptions Clause in particular, *Klein* indicates that the clause does not exist in a vacuum, and other constitutional provisions or principles such as separation of powers may limit Congress's power to make exceptions to the Court's appellate jurisdiction.

Narrow Interpretations and Limits: Habeas Corpus Cases

The principle that other constitutional provisions or norms may constrain Congress's power under the Exceptions Clause is also visible in a line of Supreme Court cases considering legislation that limited the Court's jurisdiction over petitions for writs of habeas corpus.[55] Several of the habeas cases expressly mention the Exceptions Clause, while others do not. Considered together, they indicate that the Supreme Court may not accept limits on its appellate jurisdiction that fully remove its ability to consider constitutional questions.

The first of the habeas cases, the 1868 decision *Ex parte McCardle*, concerned the Supreme Court's ability to hear appeals of habeas decisions of the federal circuit courts after Congress had granted, but subsequently repealed, appellate jurisdiction over such decisions.[56] Congress had enacted a statute granting such appellate jurisdiction in 1867, then repealed the grant in 1868, while McCardle's case was pending before the Court. The Supreme Court dismissed the appeal for want of jurisdiction and thus upheld Congress's limitation on its jurisdiction, stating, "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[57] The Court emphasized, however, that its holding did not mean that "the whole appellate power of the court, in cases of habeas corpus, is denied."[58] This was because "[t]he act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."[59]

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[52] *Id.* at 146, 147.

[53] *Id.* at 145, 147.

[54] *See generally* CRS Report R44967, *Congress's Power over Court Decisions: Jurisdiction Stripping and the Rule of Klein*, by Joanna R. Lampe.

[55] A writ of habeas corpus is a "writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." *Habeas corpus*, BLACK'S LAW DICTIONARY (12th ed. 2024). The Constitution's Suspension Clause protects the right to seek habeas relief. U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see generally* Cong. Rsch. Serv., *Suspension Clause and Writ of Habeas Corpus*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S9-C2-1/ALDE_00001087/ (last visited Oct. 17, 2024).

[56] 74 U.S. (7 Wall.) 506 (1868).

[57] *Id.* at 514.

[58] *Id.*

[59] *Id.*

The "jurisdiction which was previously exercised" referred to the power of the Supreme Court to consider an original petition for a writ of habeas corpus filed directly in the High Court. Notwithstanding the name, an "original" petition for a writ of habeas corpus is considered an exercise of the Supreme Court's appellate jurisdiction, not its original jurisdiction.[60] Congress granted the Supreme Court jurisdiction over original habeas petitions in the Judiciary Act of 1789.[61] In *Ex parte Yerger*, decided the year after *McCardle*, the Supreme Court confirmed that the 1868 legislation at issue in *McCardle* had not affected its jurisdiction over original habeas petitions under the 1789 act.[62] The Court held in part:

> We are not aware of anything in any act of Congress, except the act of 1868, which indicates any intention to withhold appellate jurisdiction in habeas corpus cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction.[63]

Thus, while acknowledging the power of Congress to make exceptions to its appellate jurisdiction, the Court wrote that the possibility that prisoners might be "wholly without remedy unless it be found in the appellate jurisdiction of this court" led it to construe such exceptions narrowly.[64] While the *Yerger* Court followed the reasoning of *McCardle*, the different procedural postures in the two cases meant that their outcomes differed. Because McCardle's case had come to the Supreme Court on direct appeal, and the statute authorizing such appeals had been repealed, the Court dismissed that case. By contrast, because Yerger's case was brought as an original petition, which the Court determined was not abrogated by Congress's 1868 act, the Court held that it had jurisdiction to consider the matter.[65]

More than a century later, in *Felker v. Turpin*, the Supreme Court again adopted a narrow interpretation of a statute that limited its appellate jurisdiction.[66] *Felker* involved a constitutional challenge to limits on the ability of a state prisoner to file a second or successive petition for a writ of habeas corpus in federal court. Congress enacted the challenged limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which, among other things, created new substantive requirements that must be satisfied before federal courts could consider a second or successive habeas petition.[67] AEDPA also provided that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."[68] A

[60] *See* Ex parte Bollman and Swartwout, 8 U.S. 75, 101 (1807) ("The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.").

[61] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

[62] 75 U.S. (8 Wall.) 85, 106 (1869) ("Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of habeas corpus, were repealed by the act of that year, and that the repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867.").

[63] *Id.* at 102–03.

[64] *Id.* at 102.

[65] The decision in *Yerger* was limited to the question of the Supreme Court's jurisdiction and did not reach the merits of the habeas petition.

[66] 518 U.S. 651 (1996).

[67] Pub. L. 104-132, § 106, 110 Stat. 1217, 1220, codified at 28 U.S.C. § 2244(b).

[68] 28 U.S.C. § 2244(b)(3)(E).

state death row inmate challenged the statute, arguing in part that it unconstitutionally restricted the Supreme Court's jurisdiction.[69] A unanimous Supreme Court rejected the constitutional challenge, holding that AEDPA modified the legal standards governing habeas relief but "has not repealed our authority to entertain original habeas petitions, for reasons similar to those stated in *Yerger*."[70] The Court concluded that the continuing availability of habeas relief via an original petition to the Supreme Court "obviates any claim by petitioner under the Exceptions Clause."[71] Justice Souter concurred, writing "only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."[72]

In the early 2000s, the Supreme Court decided cases involving limits on its jurisdiction to consider habeas petitions from aliens deemed to be enemy combatants detained at the U.S. Naval Station at Guantanamo Bay, Cuba. In *Hamdan v. Rumsfeld*, a detainee filed petitions for writs of habeas corpus and mandamus to challenge his trial by a military commission.[73] While the case was pending before the lower courts, Congress enacted the Detainee Treatment Act of 2005 (DTA), providing that, subject to limited exceptions, "no court, justice, or judge shall have jurisdiction to hear or consider" a habeas petition filed by an alien detained at Guantanamo Bay.[74] Before the Supreme Court, the federal government moved to dismiss the case for lack of jurisdiction under the DTA. The Supreme Court denied the motion. The Court avoided considering constitutional challenges to the jurisdiction stripping statute by construing the statute narrowly, holding that "[o]rdinary principles of statutory construction suffice" to support a conclusion that the DTA did not apply to cases pending at the time of its enactment.[75] The *Hamdan* majority did not discuss the Exceptions Clause, but Justice Scalia filed a dissent in which he argued in part that the clause "explicitly permits exactly what Congress has done here."[76]

Following the decision in *Hamdan*, Congress enacted the Military Commissions Act of 2006 (MCA), which provided that limitations on jurisdiction over habeas actions by detained aliens determined to be enemy combatants "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date."[77] In the 2008 case *Boumediene v. Bush*, a group of Guantanamo Bay detainees challenged the relevant section of the MCA as an unconstitutional suspension of the writ of habeas corpus.[78] Based on the language of the statute and legislative history indicating that "the MCA was a direct response to *Hamdan*'s holding," the Court held that, if valid, "the MCA deprives the federal courts of jurisdiction to

[69] The petitioner also argued that the law violated the Suspension Clause, which limits Congress's ability to suspend the writ of habeas corpus. *Felker*, 518 U.S. at 658. The Court held that the statute did not amount to a suspension of the writ. *Id.* at 664.

[70] *Id.* at 660.

[71] *Id.* at 654. Having disposed of the constitutional claim, the Court denied the habeas petition on the merits. *Id.* at 665.

[72] *Id.* at 667 (Souter, J. concurring).

[73] 548 U.S. 557 (2006).

[74] Pub. L. 109–148, div. A, title X, § 1005(e)(1), 119 Stat. 2739, 2741, codified at 28 U.S.C. § 2241(e)(2).

[75] *Hamdan*, 548 U.S. at 575–76. Reaching the merits, the Court held that "the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions." *Id.* at 567.

[76] *Id.* at 672.

[77] Pub. L. 109–366, § 7(a), 120 Stat. 2635.

[78] 553 U.S. 723 (2008). *See also* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see generally* Cong. Rsch. Serv., *Suspension Clause and Writ of Habeas Corpus*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S9-C2-1/ALDE_00001087/ (last visited Oct. 17, 2024).

entertain the habeas corpus actions now before us."[79] Having so held, the Court proceeded to consider the detainees' constitutional challenge to the jurisdictional limitation and concluded that the MCA effected an unconstitutional suspension of the writ of habeas corpus.[80]

The provision of the MCA at issue in *Boumediene* applied to all federal courts and did not specifically name the Supreme Court, and the Court's opinion in the case rested on the Constitution's Suspension Clause and did not cite the Exceptions Clause. Taken together, however, the foregoing cases show two key patterns. First, when possible, the Supreme Court has read statutes narrowly to avoid finding that Congress has stripped it of all jurisdiction over certain claims.[81] Second, when such an interpretation is not available, the Court has at times struck down limits on its jurisdiction, notwithstanding the grant of power in the Exceptions Clause.[82]

Academic Debate over the Exceptions Clause

Supreme Court cases on the Exceptions Clause are relatively sparse, leaving ample room for debate by legal scholars. A comprehensive review of the scholarship is outside the scope of this report, but a brief survey may be informative to lawmakers considering legislation in this area. At a high level, some commentators argue that Congress has plenary, or nearly plenary, power to create exceptions to the Supreme Court's appellate jurisdiction. Others contend that other provisions of Article III or general separation of powers norms do or should limit Congress's power under the Exceptions Clause. Even among scholars who favor a broad view of the Exceptions Clause itself, there appears to be general agreement that Congress may not create exceptions to Supreme Court jurisdiction in ways that infringe on other constitutional rights.

A foundational article on the Exceptions Clause was published in 1953 by federal courts scholar Henry M. Hart Jr.[83] Although it was written before several of the cases discussed above were decided, the article remains widely cited today. The piece takes the form of an imagined dialogue, with an unnamed questioner and answerer discussing the power of Congress to regulate the jurisdiction of the federal courts. While the article is intended "not to proffer final answers but to ventilate the questions," it suggests certain limitations on the Exceptions Clause power.[84] Early in the piece, the questioner asserts that "it is so impossible to lay down any measure" of what appellate jurisdiction Congress cannot strip from the Court "that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress."[85] The answerer responds, "The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[86] When asked whether there is any Supreme Court caselaw supporting that rule, the answerer quips that the Supreme Court has never had the occasion to issue a holding to that effect because "Congress so far has never tried to destroy the Constitution."[87] The questioner later suggests that "the power to regulate jurisdiction is actually a power to regulate rights—rights to judicial process, whatever those are, and substantive rights

[79] *Hamdan*, 553 U.S. at 738–39.

[80] *Id.* at 792.

[81] *See* Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869); Felker v. Turkin, 518 U.S. 651 (1996); *Hamdan*, 548 U.S. 557.

[82] United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); *Boumediene*, 553 U.S. 723.

[83] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[84] *Id.* at 1363.

[85] *Id.* at 1364.

[86] *Id.* at 1365.

[87] *Id.*

generally."[88] The answerer calls that a "monstrous illogic," contending that the power to regulate jurisdiction is "subject in whole" to the other provisions of the Constitution, such as the Due Process Clause and separation of powers requirements inherent in Article III.[89]

Other scholars have also embraced a limited view of Congress's power under the Exceptions Clause, arguing that denying the Supreme Court jurisdiction over key constitutional claims would likely raise constitutional questions.[90] A minority go further, arguing that the clause does not actually allow Congress to remove cases from the Supreme Court's jurisdiction at all but only to move cases from the Court's appellate jurisdiction to its original jurisdiction.[91]

Professor Hart's sometime-collaborator Herbert Wechsler took a much broader view of Congress's power under the Exceptions Clause, writing:

> There is, to be sure, a school of thought that argues that "exceptions" has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy clause or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts.[92]

[88] *Id.* at 1371.

[89] *Id.* at 1371–72.

[90] Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 67 (2019) ("[I]f faced with such a jurisdiction-stripping statute, I believe that a majority of the Court would invalidate a limitation on the Court's subject-matter jurisdiction where a substantial purpose of such legislation is to foreclose its consideration of a properly presented constitutional question."); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 873 (1994) ("Article III's supreme-inferior court distinction not only powerfully supports a duty to obey Supreme Court precedents, but, when coupled with historical and consequentialist arguments, offers strong support for the claim that Congress cannot strip the Court of its 'essential function': providing general leadership in defining federal law."); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960) ("[L]egislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment on the Court's essential functions.... The exceptions and regulations clause does not give Congress power thus to negate the essential functions of the Supreme Court."); *cf.* Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1039 (1982) ("A statute depriving the Supreme Court of appellate jurisdiction over [an important] category of constitutional litigation would ... violate the spirit of the Constitution, even if it would not violate its letter."); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1050 (2010) ("[W]hen substantive constitutional rights exist, the Constitution requires that some court have jurisdiction to provide sufficient remedies to prevent those rights from becoming practical nullities."); Akhil Reed Amar, *The Two-tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) (arguing that there are come categories of cases over which some federal court must have jurisdiction).

[91] Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 61, 64 (2007) ("If the judicial Power is to be vested in only *one* supreme Court and is to extend to the matters listed in Article III, then the 'one supreme Court' must have ultimate power to decide the issues arising in all Article III matters.... Congress can never use the Exceptions power to remove from the Supreme Court the ability to have ultimate judgment of Article III matters."); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1047 (2007) ("Congress can determine whether the Supreme Court will have original or appellate jurisdiction over federal cases, but it cannot determine whether the Supreme Court will have jurisdiction at all."). Professors Calabresi and Lawson acknowledge that their conclusion "flies in the face of Marbury v. Madison's holding that the Constitution's grants of original jurisdiction to the Supreme Court are exclusive" and argue that part of *Marbury* was wrongly decided. *Id.* at 1008.

[92] Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1005 (1965); *see also id.* at 1006 ("Federal courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land.").

Other commentators have also adopted broad views of the Exceptions Clause, stating that the clause grants Congress "plenary" power to regulate Supreme Court appellate jurisdiction.[93]

Even those who take a broad view of Congress's Exceptions Clause power acknowledge some legal and practical limits.[94] One key example of a legal limitation is the Due Process Clause of the Fifth Amendment, which requires certain procedural safeguards before the government can deprive a person of life, liberty, or property.[95] In addition, in its review of jurisdiction stripping proposals, the Presidential Commission on the Supreme Court of the United States wrote in its 2021 report that "it should be uncontroversial to say that a statute stripping jurisdiction over suits brought by racial minorities or adherents of a particular religion or political party would violate constitutional guarantees against discrimination."[96] Thus, the key point of disagreement among commentators is not whether Congress's power under the Exceptions Clause is truly unlimited but rather whether the Constitution requires that the Supreme Court have some ability to be the final arbiter of certain constitutional questions.

Considerations for Congress

Proposed and enacted legislation limiting the Supreme Court's jurisdiction has a long history and has taken many forms. As described, since the Judiciary Act of 1789, Congress has never granted the federal courts the full scope of jurisdiction authorized by Article III of the Constitution, nor has it granted the Supreme Court the maximum possible scope of appellate jurisdiction.[97] The

[93] William Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 229, 260 (1973) ("The power to make exceptions to Supreme Court appellate jurisdiction is a plenary power. It is given in express terms and without limitation, regardless of the more modest uses that might have been anticipated and, hopefully, generally to be respected by Congress as a matter of enlightened policy once the power was granted, as it was, to the fullest extent."); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990) ("[T]he inescapable implication of the text [of the Exceptions Clause and other constitutional provisions] is that Congress possesses broad power to curb the jurisdiction of both the lower courts and the Supreme Court."); *cf.* David. E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 122 (1999) ("By far the predominant view ... is that 'Congress has plenary power to confer or withhold appellate jurisdiction.'") (quoting Yakus v. United States, 321 U.S. 414, 472–73 (1944) (Rutledge, J., dissenting on other grounds)).

[94] *See, e.g.*, Wechsler, *supra* note 92, at 1006 ("The difficulty with legislative withdrawal of jurisdiction is not one of constitutional dimension," but "government cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law. Within that area, the opportunity for litigating constitutional defenses is built in and cannot be foreclosed."); Caminker, *supra* note 90, at 873 ("[E]ven if Congress could strip the Court of revisory jurisdiction, established precedents would still bind lower courts (albeit less rigidly), thus reducing the incentive for such congressional action."); Van Alsyne, *supra* note 93, at 268 ("[S]uch 'exceptions' as Congress shall deem necessary and proper to make within its authorized power are nonetheless fully subject to review under article I, section 9, the Bill of Rights and other constitutional provisions uniformly applicable to all acts of Congress."); *cf.* Laurence Henry Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 152–53 (1981) ("Whatever a court might say as to some of the measures analyzed in this statement, the members of Congress surely can have no doubt that all of the jurisdictional restrictions now pending before them are designed, obviously and transparently, to circumvent constitutional rulings of the Supreme Court by a method markedly less onerous than the amendment procedure set forth in article V. Doubtless aware of this forbidden aim, Congress should regard itself as duty-bound to reject the pending measures—whatever its predictions as to how a court might rule on each of them."); Fallon, *supra* note 90, at 1133 ("*Boumediene*, which rested on Article I's Suspension Clause, serves as a reminder that provisions of the Constitution besides Article III bear crucially on Congress's power to control judicial jurisdiction.").

[95] *See, e.g.*, Van Alsytne, *supra* note 93, at 265 ("Nothing in the plenitude of the exceptions clause itself, moreover, nor in combination with any other provision in article ill, implies that Congress could fashion a law enabling the government to deprive any person of life, liberty or property without due process[.]"); Redish, *supra* note 93, at 1648.

[96] *SCOTUS Commission Report*, supra note 27, at 165.

[97] *See supra* notes 26–27.

Supreme Court has held that legislation granting the High Court jurisdiction over classes of cases that are narrower than the constitutional maximum is an implicit invocation of the Exceptions Clause.[98] Since the late 19th century, Congress has regulated the Supreme Court's appellate jurisdiction by increasingly providing for the Court to review decisions of lower federal courts and state courts via petitions for a writ of certiorari, which give the Supreme Court discretion whether to hear most appeals.[99] Regulations such as the procedural mechanism of certiorari and the amount-in-controversy requirement for federal diversity suits[100] are well-established features of the current federal judiciary.

Proposals that would expressly carve certain classes of cases out of the Supreme Court's appellate jurisdiction also date back to at least the early 19th century. An unenacted proposal reported by the House Judiciary Committee in 1831 would have removed the Court's jurisdiction to review the decisions of state high courts.[101] During the Reconstruction Era, Congress enacted the jurisdiction-stripping law that was struck down in *Klein* and the statute that was interpreted narrowly and upheld in *McCardle* and *Yerger*.[102]

The 20th and 21st centuries saw numerous proposals that would have limited Supreme Court jurisdiction over particular cases. The proposals—some of which would have applied to all federal courts, including the Supreme Court—covered topics including abortion,[103] busing,[104] gender discrimination in military service,[105] offshore oil and gas leases,[106] the Pledge of Allegiance,[107] religious symbols on war memorials,[108] same-sex marriage,[109] school prayer,[110] speeches in state legislatures,[111] state regulation of pornography,[112] and state laws related to the free exercise or establishment of religion.[113] None of those proposals was enacted. In the 1990s, Congress enacted AEDPA, which contained certain substantive and procedural rules related to petitions for writs of habeas corpus, though the Supreme Court construed that statute narrowly so

[98] *See* Durousseau v. United States, 10 U.S. 307, 314 (1810).

[99] *See* 28 U.S.C. §§ 1254, 1257; *see also* Judiciary Act of 1891, 26 Stat. 826.

[100] *See* 28 U.S.C. § 1332.

[101] *See* Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 99 (2009).

[102] *See generally* United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869).

[103] *See, e.g.*, H.R. 867, 97th Cong. (1981).

[104] *See, e.g.*, H.R. 761, 97th Cong. (1981); H.R. 869, 97th Cong. (1981).

[105] *See, e.g.*, H.R. 2365, 97th Cong. (1981); H.R. 2791, 97th Cong. (1981); S. 2600, 114th Cong. (2016).

[106] H.R. 5231, 109th Cong. (2006).

[107] *See, e.g.*, H.R. 2389, 109th Cong. (2005); H.R. 699, 110th Cong. (2007).

[108] H.R. 2229, 109th Cong. (2005).

[109] *See, e.g.*, H.R. 3313, 108th Cong. (2004); H.R. 4379, 109th Cong. (2005); H.R. 875, 112th Cong. (2011); S. 1080, 114th Cong. (2015); H.R. 1968, 114th Cong. (2015).

[110] *See, e.g.*, H.R. 72, 97th Cong. (1981); H.R. 326, 97th Cong. (1981); S. 1742, 97th Cong. (1981); H.R. 4364, 109th Cong. (2005).

[111] H.R. 4776, 109th Cong. (2006).

[112] *See, e.g.*, H.R. 5528, 109th Cong. (2006); H.R. 5514, 110th Cong. (2008).

[113] *See, e.g.*, H.R. 4379, 109th Cong. (2005).

that it did not deprive the Court of jurisdiction over habeas petitions.[114] Congress also enacted jurisdictional limits on habeas petitions from Guantanamo Bay detainees in the DTA and MCA.[115]

Proposals to limit the Supreme Court's jurisdiction have prompted significant discussion by commentators, and concerns that these proposals could undermine the Court led some to support a constitutional amendment eliminating the power of Congress to make exceptions to the Court's appellate jurisdiction.[116] However, while many jurisdiction-stripping bills have been introduced, few have been enacted. A 2013 article surveyed past legislative practice and asserted that "Congress has not generally sought to curtail the Supreme Court's appellate jurisdiction but instead has steadily expanded it—precisely so that the Court could settle disputed federal questions."[117] The author cited the Court's increasing discretion over petitions for certiorari as a key way in which Congress has legislated under the Exceptions Clause, characterizing the expansion of certiorari as a way of streamlining the Court's workload and allowing the Court to focus its finite resources on the legal questions it considers to be most important.[118] Thus, she concluded, "Congress has largely used its power over the Supreme Court's appellate jurisdiction to safeguard, not to undermine, the Court's constitutional role. In other words, Congress has made 'exceptions' and 'regulations' that facilitate the Court's role in providing a definitive and uniform resolution of federal questions."[119]

Legislative proposals from the 118th Congress have sought to invoke the Exceptions Clause in novel ways. One such bill, the Supreme Court Biennial Appointments and Term Limits Act of 2023, would impose a system akin to term limits for Supreme Court justices by regulating how the Court hears appellate cases.[120] The proposal would allow the President to appoint one Supreme Court justice in each odd-numbered year so that each President would appoint two justices in a four-year term. Because Supreme Court justices are generally understood to enjoy life tenure unless impeached, this process would mean that the Court could expand to include more than nine justices.[121] Under the bill, the full Court would continue to "preside over original jurisdiction cases, and may … continue to exercise all other official powers, duties, or responsibilities of a justice of the Supreme Court required by law." In appellate jurisdiction cases, by contrast, "[o]nly the 9 most recently appointed justices of the Supreme Court of the United States who are not unavailable due to a temporary absence" would preside. Because the vast majority of the Supreme Court's cases fall within the Court's appellate jurisdiction, the bill would preclude any more senior justices from participating in most of the Court's docket.

Another proposal, the No Kings Act, would create exceptions to Supreme Court jurisdiction in cases involving presidential immunity.[122] The act seeks to address the holding in *Trump v. United States*, in which the Supreme Court held that Presidents enjoy some immunity from criminal

[114] Pub. L. 104-132, § 106, 110 Stat. 1217, 1220, codified at 28 U.S.C. § 2244(b). *See generally* Felker v. Turpin, 518 U.S. 651 (1996).

[115] As discussed above, the Supreme Court subsequently construed the limitation in the DTA narrowly in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), then struck down the limitation in the MCA in *Boumediene v. Bush*, 553 U.S. 723 (2008).

[116] *See* Wechsler, *supra* note 92, at 1005.

[117] Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 931 (2013).

[118] *See id.* at 978–82.

[119] *Id.* at 931.

[120] S. 3096, 118th Cong. (2023).

[121] For discussion of life tenure during good behavior, see the "Changes to Supreme Court Justices' Tenure" section of CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe (2023).

[122] S. 4973, 118th Cong. (2024).

prosecution for acts taken while in office.[123] The act would provide: "A President, former President, Vice President, or former Vice President shall not be entitled to any form of immunity … from criminal prosecution for alleged violations of the criminal laws of the United States unless specified by Congress." It would further bar federal courts from considering "whether an alleged violation of the criminal laws of the United States committed by a President or Vice President was within the conclusive or preclusive constitutional authority of a President or Vice President or was related to the official duties of a President or Vice President unless directed by Congress." With respect to the Supreme Court specifically, the act would provide that the Court "shall have no appellate jurisdiction, on the basis that an alleged criminal act was within the conclusive or preclusive constitutional authority of a President or Vice President or on the basis that an alleged criminal act was related to the official duties of a President or Vice President," to issue specified forms of relief, including dismissing a criminal case or granting a writ of habeas corpus. The act would also prohibit the Supreme Court from considering the constitutionality of the act itself, instead leaving the final word on any such constitutional questions to the U.S. Court of Appeals for the D.C. Circuit.

Proposals that would limit Supreme Court jurisdiction may raise various legal questions. Measures that would limit the jurisdiction of courts generally, including the Supreme Court, may raise due process concerns, though due process analysis would depend heavily on the specifics of the proposal.[124] Proposals that would allow cases to go forward in lower courts but prohibit Supreme Court review of lower court decisions might be challenged as undermining the essential role of the Supreme Court in the United States' constitutional system, in which the constitutionally mandated "one supreme Court" is generally understood to be the final arbiter of constitutional questions.[125] Certain proposals might raise more specific constitutional questions. For instance, a proposal that would limit the Supreme Court's jurisdiction while seeking to require federal courts to reach specific outcomes in certain cases might violate *United States v. Klein*'s prohibition on "prescrib[ing] a rule for the decision of a cause in a particular way."[126] A bill that would invoke the Exceptions Clause to impose de facto term limits for justices might raise questions under Article III's Good Behavior Clause,[127] and proposals that would limit jurisdiction based on a party's viewpoint or membership in a protected class might be challenged under relevant provisions of the Bill of Rights.[128] The Supreme Court itself would almost certainly have the last word on any of these constitutional questions. Legislation limiting federal courts' jurisdiction is subject to judicial review like any other statute, so Congress could likely not

[123] 144 S. Ct. 2312 (2024). For discussion of *Trump v. United States*, see CRS Legal Sidebar LSB11194, *Presidential Immunity from Criminal Prosecution in Trump v. United States*, by Todd Garvey (2024).

[124] *See generally, e.g.*, Fallon, *supra* note 90.

[125] *See, e.g.*, Caminker & Ratner, *supra* note 90; Cooper v. Aaron, 358 U.S. 1, 18 (1958) (*Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."); *but see, e.g.*, Wechsler, *supra* note 92.

[126] 80 U.S. (13 Wall.) 128, 146 (1872).

[127] U.S. CONST. art. III, § 1. See also "Changes to Supreme Court Justices' Tenure" section of CRS Report R47382, *Congressional Control over the Supreme Court*, by Joanna R. Lampe (2023).

[128] *See, e.g.*, *SCOTUS Commission Report*, *supra* note 27, at 155. Unlike the Fourteenth Amendment, which applies to the states, the Fifth Amendment, which applies to the federal government, does not expressly guarantee equal protection. Nonetheless, the Supreme Court has held that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976); *see also* Bolling v. Sharpe, 347 U.S. 497 (1954).

evade possible constitutional questions around such legislation by seeking to preclude court review of the jurisdiction-stripping legislation itself.[129]

In addition to legal considerations, proposals to limit Supreme Court jurisdiction may raise practical questions. For instance, some attempts to limit Supreme Court jurisdiction may not achieve their full intended effect.[130] As discussed above, the Supreme has at times interpreted statutes narrowly to avoid finding that Congress has divested it of all jurisdiction over certain matters.[131] While Congress may be able to avoid such narrow interpretations through careful legislative drafting, another possible obstacle remains: The Exceptions Clause applies only to the High Court's appellate jurisdiction, and Congress cannot legislate to limit the Supreme Court's original jurisdiction.[132] The grant of original jurisdiction includes cases where a state is a party. To the extent cases excepted from the Court's appellate jurisdiction could be brought by states, states might still be able to litigate those matters by filing original cases in the Supreme Court.[133]

Even if Congress were able to effectively limit Supreme Court jurisdiction over certain cases, that would not prevent those matters from being litigated. Unless Congress imposed additional limits, cases would still be able to proceed in the lower federal courts or in state courts.[134] Bound by the Supremacy Clause to treat the Constitution and federal law as the supreme law of the land, those courts would presumably continue to apply any existing Supreme Court precedents. Moreover, without appellate jurisdiction, the Court would be unable to modify or clarify existing precedents or to review the application of those precedents to new cases.

Relatedly, a key role that the Supreme Court currently plays is creating uniform legal interpretations for the lower courts to apply. One factor the Court evaluates when deciding which cases to hear is whether the issue presented has created a circuit split, where two or more federal appeals courts disagree on a legal question, or a similar division among state courts interpreting the Constitution or federal law.[135] Circuit splits can lead to different interpretations of federal law in different parts of the country. These differences can complicate efforts to comply with federal law when a person or entity is subject to the jurisdiction of multiple federal courts and may also lead to "forum shopping" by litigants seeking to benefit from a more favorable interpretation of law.[136] This situation exists to some extent under current law, because the Supreme Court is not asked to resolve all circuit splits and does not accept all circuit split cases. However, the Court currently has significant discretion to resolve these divergences, and restrictions on its appellate jurisdiction could limit its ability to do so.

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[129] *See* United States v. Ruiz, 536 U.S. 622, 628, (2002) ("[A] federal court always has jurisdiction to determine its own jurisdiction."). The usual procedural posture in these cases is for a party to bring a substantive claim that is facially barred by a jurisdictional statute, challenging the validity of the jurisdictional limit while also seeking to litigate the substantive claim. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 736 (2008).

[130] For further discussion of the practical effect of jurisdiction-stripping laws, see *SCOTUS Commission Report*, supra note 27 at 159–62.

[131] *See, e.g.*, Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869); Felker v. Turpin, 518 U.S. 651 (1996).

[132] *See, e.g.*, California v. Arizona, 440 U.S. 59, 65 (1979).

[133] Whether a state has standing to sue depends on the facts of the case. *See* Cong. Rsch. Serv., *States and Parens Patriae*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-3/ALDE_00013005/ (last visited Oct. 17, 2024).

[134] Legislation leaving no judicial forum in which to raise certain constitutional claims might raise legal issues. *See generally, e.g.*, Fallon, *supra* note 90.

[135] *See* Sup. Ct. R. 10 (listing circuit splits as one factor in the decision whether to grant certiorari); *see also, e.g.*, CRS Legal Sidebar LSB11238, *Congressional Court Watcher: Circuit Splits from September 2024*, by Michael John Garcia.

[136] *See* CRS Legal Sidebar LSB10856, *Where a Suit Can Proceed: Court Selection and Forum Shopping*, by Joanna R. Lampe (2024).

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