

Surely You Didn't Mean "No" Jurisdiction: Why the Supreme Court's Selective Hearing in *Hamdan* Is Good for Democracy

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INTRODUCTION

Usually, only legal scholars routinely consider federal court jurisdiction-stripping a hot topic. Although Congress periodically considers bills stripping federal courts of jurisdiction in one way or another,¹ such attempts almost always fail, and so debate outside the academy focuses much more on *how* the federal courts ought to decide cases than *if* they may decide them at all. Even in academia, where the body of scholarly literature about Congress's power to deprive federal courts of constitutionally acceptable jurisdiction is "choking on redundancy,"² the debate has proceeded in something of a vacuum given the dearth of enacted legislation that directly strips federal courts of their traditionally exercised jurisdiction.

Enter the Detainee Treatment Act of 2005 ("DTA").³ Congress at last appeared to make real that much-debated but largely hypothetical creature of Federal Courts class discussions, the full-fledged, unambiguous jurisdiction strip, and declared that "no court, justice, or judge shall have jurisdiction to hear or consider" habeas or any other action filed by Guantanamo Bay detainees.⁴ The Supreme Court's decision in *Hamdan v. Rumsfeld*,⁵ however, rendered the debates academic once again—at least for the moment. As with other recent litigation involving legislation that arguably (though perhaps less directly) limited the scope of federal courts' jurisdiction to hear habeas petitions, the Supreme Court did not perceive the same thing the executive branch perceived: an unambiguous jurisdiction strip. Instead, the Court ruled that the DTA's jurisdiction-stripping lan-

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¹ See generally Robert B. McKay, *Court, Congress, and Reapportionment*, 63 MICH. L. REV. 255 (1964) (collecting bills introduced in 1964 to eliminate jurisdiction in reapportionment cases); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483 (2002) (examining failed bills to eliminate Supreme Court review over cases involving, inter alia, state anti-subversion laws).

² Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984) (quoting William Van Alstyne).

³ Pub. L. No. 109-148, 119 Stat. 2739.

⁴ *Id.* § 1005(e).

⁵ 126 S. Ct. 2749 (2006).

guage did not apply to—and therefore did not deprive the Court of its asserted jurisdiction in—the pending *Hamdan* case.⁶

In this Essay, I argue that such apparent judicial deafness is, counter-intuitively, good for democracy. In Part I, I trace the Court's reluctance to hear what the executive branch insisted was unambiguous legislation depriving the federal courts of jurisdiction over certain habeas petitions, immigration cases and, most recently, all Guantanamo detainee challenges. In Part II, I examine why the Supreme Court seems to require what Justice Scalia has sarcastically referred to as a "superclear statement" before deciding that Congress *really* intended to deprive federal courts of jurisdiction.⁷ I argue that requiring "superclarity"⁸ enhances the democratic process by avoiding unnecessary constitutional questions, confirming that Congress—and the public more generally—is aware of and supports any jurisdiction strip, and hedging against rights-underenforcement born of inertia.

I. THE SUPREME COURT'S SELECTIVE HEARING

Congress has periodically introduced legislation that arguably cuts back traditional federal court jurisdiction, and the Court has evidenced its selective hearing regarding habeas jurisdiction strips several times before. In *Lindh v. Murphy*,⁹ the Court held that it was not sufficiently clear that Congress had intended that the Antiterrorism and Effective Death Penalty Act's (AEDPA)¹⁰ limitations on the ability to file habeas petitions should apply to pending cases,¹¹ despite Chief Justice Rehnquist's dissent that the Court's interpretation was "somewhat tortured" and a "backhanded way" to prevent the jurisdiction strip in such cases.¹² In *INS v. St. Cyr*, the Court rejected the Immigration and Naturalization Service's argument that the combination of AEDPA and the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹³ deprived federal courts of jurisdiction over the petitioner's habeas challenge to his deportation.¹⁴

⁶ See *id.* at 2764.

⁷ *INS v. St. Cyr*, 533 U.S. 289, 327 (2001) (Scalia, J., dissenting).

⁸ Despite the obvious sarcasm with which Justice Scalia coined the term "superclarity," I use it in this Article as a fair assessment of the standard the Court has in recent years demanded before ceding its jurisdiction.

⁹ 521 U.S. 320 (1997).

¹⁰ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections 8, 18, 22, 28, 40, & 42 U.S.C.).

¹¹ See *Lindh*, 521 U.S. at 336–37.

¹² *Id.* at 339 (Rehnquist, C.J., dissenting). Commentators have also postulated that similar clear statement and avoidance considerations underlie the Court's unanimous decision in *Felker v. Turpin*, 518 U.S. 651, 661 (1996) (holding that despite a statute repealing the Supreme Court's certiorari jurisdiction in some habeas cases, it retained jurisdiction in the instant habeas case through 18 U.S.C. § 2241's grant of authority to hear *original* habeas petitions). See, e.g., RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 341 (5th ed. 2003).

¹³ Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹⁴ See 533 U.S. at 314.

The Court concluded that the statutes did not deprive the courts of habeas jurisdiction, despite the presence of a section entitled “Elimination of Custody Review By Habeas Corpus”¹⁵ and provisions providing that, “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed” certain enumerated criminal offenses.¹⁶

In finding jurisdiction, the *St. Cyr* Court stated that “Congress must articulate specific and unambiguous statutory directives to effect a repeal” of habeas jurisdiction and concluded that the legislation at issue was not specific enough to do so.¹⁷ In an energetic dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justices O’Connor and Thomas, claimed that “[t]he Court today finds ambiguity in the utterly clear language of a statute that forbids [federal courts] . . . to entertain the claims of aliens . . . who have been found deportable It fabricates a superclear statement, ‘magic words’ requirement for the congressional expression of such an intent”¹⁸

Most recently, the *Hamdan* Court differed from the executive branch in its interpretation of the DTA’s jurisdictional provisions. While most of the public debate about the enactment of the DTA focused on the long and well-publicized clash between President George W. Bush and Senator John McCain over provisions relating to the treatment and interrogation of detainees¹⁹—including those held at Guantanamo Bay²⁰—the DTA also included a section eliminating much of the Guantanamo Bay detainees’ access to courts,²¹ leaving them with no way to enforce the very anti-torture provisions the DTA trumpeted in earlier sections.

¹⁵ *Id.* at 308 (discussing § 401(e) of AEDPA).

¹⁶ *Id.* at 311–12 (discussing IIRIRA’s amendments to 8 U.S.C. § 1251(a)(2)(C)).

¹⁷ *Id.* at 299.

¹⁸ *Id.* at 326–27.

¹⁹ *See, e.g.,* Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. TIMES, Dec. 15, 2005, at A3.

²⁰ *See* Rick Klein & Charlie Savage, *Bush Accedes to McCain in Backing Ban on Torture*, BOSTON GLOBE, December 16, 2005, at A1 (discussing McCain’s efforts to implement a legislative ban on torture in response to, inter alia, reports of abuse at Guantanamo).

²¹ Section 1005(e)(1) amends 28 U.S.C. § 2241—which grants federal courts broad powers to grant writs of habeas corpus—to include the following exceptions:

- (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
 - (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
 - (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
 - (A) is currently in military custody; or
 - (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

The DTA granted the D.C. Circuit exclusive jurisdiction over the circumscribed challenges detainees were allowed to launch. This jurisdiction was limited to determining whether the Combatant Status Review Tribunal or military commission complied with the “standards and procedures specified” by the Secretary of Defense or military order, respectively,²² and “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.”²³ For detainees contesting the final decision of a military commission, review in the D.C. Circuit was available as of right only for those detainees sentenced to death or more than ten years imprisonment.²⁴ Other than this limited review mechanism, detainees were not permitted to bring any challenge in any court. Thus, despite the long-touted political restraints on “chopping off segments” of federal court jurisdiction,²⁵ the DTA’s language seemed to chop off a considerable, controversial segment of federal court jurisdiction with little Congressional or public discussion.²⁶ What little discussion occurred included disagreement about the exact effects of the jurisdiction-stripping clauses on pending cases, notably *Hamdan*,²⁷ even among the sponsors of the jurisdiction-stripping provision.²⁸ The executive branch, however, had no such ambivalence about the effect of the DTA on the Supreme Court’s jurisdiction in *Hamdan*. The Solicitor General

²² Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1005(e)(2)(C)(i), 1005(e)(3)(D)(i), 119 Stat. 2739, 2742–43.

²³ *Id.* §§ 1005(e)(2)(C)(ii), 1005(e)(3)(D)(ii).

²⁴ *Id.* § 1005(e)(3)(B)(i).

²⁵ See Gunther, *supra* note 2, at 910 (arguing that the restraints on congressional control of Supreme Court jurisdiction do not lie in the Constitution, but rather in the fact that invocation of the exceptions clause might be “unseemly” and an impractical way of expressing dissatisfaction with the Court); see also Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. REV. 1, 2–3 (1990) (arguing that the “contours of federal jurisdiction are resolved as the result of an interactive process between Congress and the Court on the appropriate uses and bounds of the federal judicial power.”).

²⁶ Public discussion of the DTA focused on Senator McCain’s political battle with President Bush about a statutory ban on torture, not on the strip of habeas jurisdiction. See *supra* notes 15–16 and accompanying text; see also Ellyn Ferguson, *Levin Tries to Revamp Detainee System*, DETROIT FREE PRESS, Dec. 14, 2005, at 6 (“Opponents say the proposal [offered by Senators Levin and Graham, which became § 1005(e)] appears to offer safeguards but could leave prisoners in a legal black hole. It has been overshadowed by an amendment offered by Sen. John McCain . . . to ban the use of torture . . . and the Bush administration’s opposition to it.”).

²⁷ Before the Senate vote on the provision that would become § 1005(e) of the DTA, Senator Levin stated that it “will not strip the courts of jurisdiction over those cases [pending before the Court]. For instance, the Supreme Court jurisdiction in *Hamdan* is not affected.” 151 CONG. REC. S12, 755 (daily ed. Nov. 14, 2005) (statement of Sen. Levin). In contrast, after the bill had passed, Senator Kyl suggested that the DTA removed jurisdiction over the *Hamdan* case. See CONG. REC. S14, 264 (daily ed. Dec. 21, 2005) (statement of Sen. Kyl).

²⁸ See Frank Davies, *Big Changes Loom for Captives’ Rights*, MIAMI HERALD, December 17, 2005, at A3 (noting the disagreement between Senators Graham and Levin over the effect of the provision on pending habeas cases).

promptly filed a motion to dismiss the case for lack of jurisdiction, arguing that the DTA “in plain terms removes the Court’s jurisdiction to hear this action”²⁹

The *Hamdan* Court ultimately rejected this argument. Writing for the majority, Justice Stevens found that “[o]rdinary principles of statutory construction suffice to rebut the Government’s theory—at least insofar as this case, which was pending at the time the DTA was enacted, is concerned.”³⁰ A jurisdiction-stripping statute, he explained, does not affect substantive rights, but merely “changes the tribunal that is to hear the case,” and thus there is usually no retroactivity problem in applying the jurisdiction strip to pending cases since such legislation does not impair rights, increase liability, or impose new duties with respect to past actions.³¹ Justice Stevens reasoned that the lack of a retroactivity problem, however, did “not mean . . . that all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment,”³² but rather that “[n]ormal rules of construction,’ including a contextual reading of the statutory language, may dictate otherwise.”³³ The provisions in the DTA that specifically stripped jurisdiction for certain pending cases—and what the Court viewed as a deliberate omission of any such language applying to pending petitions for habeas relief—supported the petitioner’s assertion that Congress had not intended to strip the Court’s jurisdiction over pending habeas petitions.³⁴ Citing *St. Cyr*, the Court specifically reserved the question about “the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the DTA.”³⁵

Justice Scalia, joined by Justices Thomas and Alito, vehemently disagreed with the majority’s conclusion. He considered the DTA to have “unambiguously provide[d] that, as of that date, ‘no court, justice, or judge’ shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee,” and he excoriated the Court for violating what he considered a “venerable rule that statutes ousting jurisdiction terminate jurisdiction in pending cases.”³⁶

²⁹ Respondents’ Motion to Dismiss for Lack of Jurisdiction at 3, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 77694.

³⁰ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006).

³¹ *Id.* at 2765 (citing *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).

³² *Id.*

³³ *Id.* (quoting *Lindh*, 521 U.S. at 326).

³⁴ *Id.* at 2765–69. The Court expressly reserved the question of whether there may be “habeas cases that were pending in the lower courts at the time the DTA was enacted that do qualify as challenges to ‘final decisions’ within the meaning of subsection (e)(2) or (e)(3).” *Id.* at 2769 n.14.

³⁵ *Id.* at 2769 n.15.

³⁶ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2810 (Scalia, J., dissenting).

II. THE SUPERCLARITY REGIME AND DEMOCRACY

Certainly, the conservative members of the Court are on firm footing when they suggest that the majority's construction of statutes purporting to strip habeas jurisdiction sets the bar for congressional clarity higher than usual. What such criticism fails to appreciate, however, is why a higher bar might be appropriate.

The easy, cynical explanation for the heightened clarity standard is that the *Hamdan* majority is simply results-oriented. Even those who agree with the Court's results may be tempted to see its jurisdiction jurisprudence as a matter of convenience—a means to an end that liberals would be sorry to see recreated if political motivations for jurisdiction strips were reversed. But there are several more principled justifications for the *Hamdan* majority's scrutiny of jurisdiction strips, all of which demonstrate that the Court's approach to superficially "unambiguous" legislation is democracy-reinforcing.

A. Confirmation Function

First, the superclarity approach serves a confirmation function by ensuring that federal courts are not deprived of jurisdiction—and, more importantly, that people are not deprived of a forum in which to vindicate rights—unless Congress itself has actually decided upon just such a deprivation. By refusing to cede jurisdiction when faced with a first-instance, arguably ambiguous jurisdiction strip, the Court forces Congress to confirm that it actually intended the strip. The tangled legislative history of the DTA, recounted by the *Hamdan* majority as secondary support for their refusal to dismiss for lack of jurisdiction,³⁷ illustrates a lack of true legislative consensus to strip the Court of already-asserted jurisdiction in a high-profile, seminal case. Indeed, such a jurisdiction strip has only happened once in the nation's history,³⁸ and before the Senate voted on the DTA, one of the bill's sponsors proclaimed that, in its final iteration, the DTA "preserve[d] comity between the judicial and legislative branches" and "avoid[ed] repeating the unfortunate precedent in *Ex parte McCardle*, in which Congress intervened to strip the Supreme Court of jurisdiction over a case which was pending before that Court."³⁹ If an ostensible jurisdiction strip is actually the result of "legislators . . . find[ing] themselves incapable of resolving a particularly contentious issue" thus causing them to "put the question off by avoiding any precise resolution of

³⁷ See *Hamdan*, 126 S. Ct. at 2766 n.10. As the majority noted, the dissent took a different view of the legislative history. Regardless of whose interpretation is correct, to the extent that reasonable people can differ about legislative intent based on the legislative history, the confirmation function retains its value.

³⁸ *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

³⁹ 151 CONG. REC. S14, 257 (daily ed. Dec. 21, 2005) (statement of Sen. Levin).

the problem in the statutory language,⁴⁰ the Court's demand for superclarity is necessary to ensure the sort of true legislative agreement on which jurists like Justice Scalia would base their abdication of jurisdiction. Congress, of course, remains capable of responding to a Court decision it finds disagreeable by passing new legislation.⁴¹ Indeed, Congress recently answered the *Hamdan* Court in this manner with the passage of the Military Commissions Act of 2006,⁴² which approved President Bush's military commissions plan and implemented a habeas jurisdiction strip substantially similar to the DTA's.⁴³

Even though the *Hamdan* Court explicitly refused to address "the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the DTA,"⁴⁴ or to rule on the petitioner's arguments that a lack of jurisdiction was tantamount to the suspension of the writ of habeas,⁴⁵ the Court's refusal to dismiss for lack of jurisdiction and its invalidation of the military commission schemes referenced in the DTA forced Congress and the President to retool the DTA. At least the second instance of Congressional lawmaking action included some public attention focused on the issue of jurisdiction stripping.⁴⁶ The Court's decision forced a second Congressional go-around, and thus served not only to confirm that Congress actually intended to cut federal courts out of the picture, but also to confirm that the electorate actually supported—or at least knew about—such a strip.⁴⁷

The political context in which the first iteration of the DTA was made law highlights the importance of the confirmation function. After the horrifying abuses at Abu Ghraib came to light, Senator John McCain enjoyed broad public support during his fight with the White House to outlaw "cruel, inhuman, or degrading treatment or punishment" as applied to

⁴⁰ Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1597 (2000).

⁴¹ See *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). Whether the Court heeds legislative opinions about rights is, of course, a different matter than Congress's institutional willingness to offer contradictory legislation.

⁴² Pub. L. No. 109-366, 120 Stat. 2600.

⁴³ See *id.* sec. 3(a)(1), § 950j(b), 120 Stat. at 2623–24.

⁴⁴ *Hamdan*, 126 S. Ct. at 2769 n.15.

⁴⁵ *Id.* at 2764.

⁴⁶ See, e.g., Editorial, *Stampeding Congress*, N.Y. TIMES, Sept. 15, 2006, at A24 (criticizing the Administration's efforts "to strip the federal courts of any power to review the detentions of the prisoners in Guantanamo Bay"); Bruce Fein, Commentary, *Cripple the Great Writ?*, WASH. TIMES, Sept. 19, 2006, at A16 ("President Bush is trying to frighten Congress into crippling the Great Writ of habeas corpus, the best shield ever invented against arbitrary executive detentions."). The Military Commissions Act's elimination of habeas corpus was even lampooned on a satirical "fake news" show. See *The Daily Show with Jon Stewart* (Comedy Central television broadcast Oct. 3, 2006) (noting that "one of the bills more radical steps is removing the detainees' right to habeas corpus, the right to challenge your detainment").

⁴⁷ In this sense, superclarity's confirmation function is akin to Bruce Ackerman's criteria for a constitutional moment born of broad and deep political support. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

all individuals within the “custody or under the physical control of the United States Government, regardless of nationality or physical location” and without “any geographical limitation.”⁴⁸ McCain ultimately prevailed when the President signed these provisions into law as part of the DTA’s third section. But the DTA is a sort of legislative shell game; the force of its provisions disappears when one searches for it. In its fifth section, which was less publicized during its passage,⁴⁹ the DTA bars all but very limited judicial review of any claim arising from aliens detained by the Department of Defense at Guantanamo Bay⁵⁰ despite Guantanamo’s public prominence as the site of potential detainee abuse. The government has already moved to dismiss claims of torture brought under the DTA’s section 1003 provisions precluding judicial review of actions brought by detainees at Guantanamo.⁵¹ The DTA’s substantive ban on detainee abuse may be judicially enforceable for those held outside Guantanamo Bay, but given that most detainees who have allegedly been abused are held outside the United States’ territorial control,⁵² it is unclear that such detainees would have the right to petition for a writ of habeas corpus in any case. Thus, the very proposition for which there was such broad public support—a ban on the use of torture against and inhumane treatment of those militarily detained—was rendered largely toothless by a much less—publicized jurisdiction provision.

Unenforceable laws may, of course, have symbolic value and help influence behavior by shaping public norms.⁵³ Yet because much of the behavior that the substantive provisions of the DTA sought to govern is publicly invisible, and so geographically isolated from the society embodying the relevant public norms, an enforcement model relying on those norms seems ineffective at best and disingenuous at worst. In passing the substantive provisions of the DTA but attempting to limit its enforcement, legislators reaped the benefits of taking a moral stand against detainee

⁴⁸ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a) & (b), 119 Stat. 2739, 2739.

⁴⁹ Accounts of the torture ban generally did not include a discussion the limitations on its enforcement. *See, e.g.*, Klein & Savage, *supra* note 20 (“Bush agreed to sign a measure outlawing ‘cruel, inhuman, or degrading treatment or punishment’ of detainees anywhere in the world.”).

⁵⁰ *See supra* note 21.

⁵¹ Josh White & Carol D. Leonnig, *U.S. Cites Exception in Torture Ban; McCain Law May Not Apply to Cuba Prison*, WASH. POST, Mar. 3, 2006, at A04 (“Bush administration lawyers, fighting a claim of torture by a Guantanamo Bay detainee, yesterday argued that the new law that bans cruel, inhuman or degrading treatment of detainees in U.S. custody does not apply to people held at the military prison.”).

⁵² *See, e.g.*, ‘Sadistic, Blatant and Wanton Criminal Abuses’ Reported at Abu Ghraib, L.A. TIMES, May 3, 2004, at A8 (excerpting an Army investigative report about alleged abuses at U.S. military prisons in Iraq).

⁵³ *See, e.g.*, Elizabeth A. Heaney, *Pennsylvania’s Doctrine of Necessities: An Anachronism Demanding Abolishment*, 101 DICK. L. REV. 233, 259 (1996) (asserting that “some unenforceable laws serve symbolic functions; the effectiveness of symbolic laws depends on public affirmation rather than legal enforcement.”).

abuse without having to worry about the practical effects of their legislation in the form of either judicial enforcement or an executive veto based on concerns about those practical effects. Although this legislative bob-and-weave might be within Congress's "sheer legal authority,"⁵⁴ at least the second time around there has been some public discussion of the undesirability of this method of legislation.⁵⁵ The force of law should not evaporate when one reaches for it. The *Hamdan* Court's refusal to cede jurisdiction has, if nothing else, refocused public attention on the issue of court enforcement of the norms that the DTA announced and forced Congress to confirm its debatable intention to strip federal courts of the power to hear detainees' claims. The resounding silence that met the DTA's jurisdiction-stripping provisions the first time around was replaced with some public debate about the wisdom of preserving or scuttling the Great Writ in the new legislation Congress passed post-*Hamdan*.⁵⁶ No matter what this debate yielded, at least it happened—Congress's attempts to deny Guantanamo detainees habeas attracted some degree of public scrutiny.

B. Constitutional Avoidance

A second justification for superclarity was announced by the Court itself in *St. Cyr*: the doctrine of constitutional avoidance.⁵⁷ This doctrine counsels that courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."⁵⁸ In *St. Cyr*, Justice Stevens proclaimed that "[t]he necessity of resolving such a serious and difficult constitutional issue [as determining the outer boundaries of the Suspension Clause]—and the desirability of avoiding that necessity—simply reinforce the reasons for requiring a clear and unambiguous statement of constitutional intent" to deprive federal courts of jurisdiction.⁵⁹ Despite this doctrine's entrenchment in the canon of statutory construction, critics claim it is problematic in two ways.⁶⁰ First, some consider the doctrine disingenuous in its assumption that Congress would prefer not to push constitutional boundaries.⁶¹ Second, critics complain that the doctrine effects

⁵⁴ Gunther, *supra* note 2, at 898.

⁵⁵ See, e.g., Robyn E. Blumner, *We Americans Really Ought to Be Ashamed*, ST. PETERSBURG TIMES, Oct. 8, 2006, at 5P (criticizing Congress harshly).

⁵⁶ See, e.g., Julian E. Barnes & Richard B. Schmitt, *Tribunal Bill Sets Up an Ironic Legal Limbo*, L.A. TIMES, Sept. 30, 2006, at 14; Editorial, *Guilty Until Confirmed Guilty*, N.Y. TIMES, Oct. 15, 2006, at 411; William Neikirk & Andrew Zajac, *Tribunal Bill OK'd by Senate; Bush's Legislative Victory Comes Amid Concerns*, CHIC. TRIB., Sept. 29, 2006, at 1.

⁵⁷ See *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001).

⁵⁸ *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944).

⁵⁹ *St. Cyr*, 533 U.S. at 305.

⁶⁰ See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (laying out in seven parts a "series of rules" developed by the Court for avoiding constitutional questions).

⁶¹ See, e.g., Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Mo-*

an unwarranted expansion of constitutional rights into a “judge-made constitutional ‘penumbra’ that has much the same prohibitory effect” as do clearer constitutional mandates.⁶²

Constitutional avoidance, however, has strong democratic roots. Ernest Young argues that constitutional avoidance serves as a “normative canon . . . designed to push interpretations in directions that reflect enduring public values . . . [which] are simply those [values] embodied in the underlying constitutional provisions that create the constitutional ‘doubt.’”⁶³ The “enduring public values” one might find supporting decisions like *St. Cyr* and *Hamdan* inhere in the Suspension Clause and the Due Process Clause, both of which serve to protect individuals against the tyranny of the majority.⁶⁴ Surely it is no coincidence that the three most recent examples of jurisdiction strips have limited the rights of populations made extremely vulnerable by their inability to participate—much less capture a majority—in the political process: felons, aliens, and non-citizen detainees within a legal “black hole.” While superclarity is not “representation-reinforcing” in the usual sense of the term,⁶⁵ it at least highlights the plight of those otherwise invisible to the political process by allowing them a voice in court.

Moreover, an avoidance decision starts a democratic dialogue about the proper bounds of federal court jurisdiction among the branches of our government.⁶⁶ Whether openly doubting the constitutionality of a legislative jurisdiction strip, as in *St. Cyr*,⁶⁷ or highlighting but refusing to weigh

nopoly on Constitutional Interpretation, 66 CHI.-KENT L. REV. 481, 489 (1990) (“the fact that Congress was conscious of constitutional difficulties, yet opted to enact a statute that seemingly tested the constitutional limitations, tends to confirm that Congress would want its enactment tested for *constitutionality*; not for a determination of whether it raises a *difficult constitutional question*.”).

⁶² Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

⁶³ Young, *supra* note 40, at 1551.

⁶⁴ See, e.g., Robert D. Sloane, *AEDPA’S “Adjudication on the Merits” Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN’S L. REV. 615, 648–49 (2004) (“Habeas corpus, as a legal device, also should not be analyzed in isolation from the political system in which it operates. The Constitution[’s] . . . structure seeks to protect individuals against the ‘tyranny of the majority’ threatened by unmitigated majoritarian rule, against which John Stuart Mill famously warned.”).

⁶⁵ John Hart Ely famously described a “participation-oriented, representation-reinforcing approach to judicial review” that focuses on “clearing the channels of political change” and “facilitating the representation of minorities” who cannot participate in the “pluralist wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests.” JOHN HART ELY, *DEMOCRACY AND DISTRUST* 74, 87, 135, 151 (1980). The superclarity philosophy as described here does not quite fit into Ely’s representation-reinforcement model, since it only demands that the legislature restate an ambiguously couched preference rather than subjecting the substance of that preference to any heightened form of judicial review to see if “widespread vilification” played a role in its formation. *Id.* at 153–54.

⁶⁶ See Friedman, *supra* note 25.

⁶⁷ *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (pointing to the Suspension Clause and concluding that “a construction of the amendments at issue that would entirely preclude

in on the matter, as in *Hamdan*,⁶⁸ the Court indicates to Congress that the legislative branch is approaching “the outer limits of [its] power.”⁶⁹ Congress can then decide to test those limits if it can muster the political will,⁷⁰ as it did with the recent passage of the Military Commissions Act of 2006, a development in the Court’s dialogue with Congress that has as yet uncertain ramifications.

C. Hedging Against Inertia

Finally, superclarity appears democratically attractive in light of the impact of Congress’s well-documented inertia.⁷¹ Legislative inertia not only makes it hard to pass a jurisdiction strip when the electorate favors one,⁷² but also presumably makes it hard to repeal a jurisdiction strip once it has been enacted, even when the electorate favors repeal. Superclarity almost certainly exacerbates the tension with democratic will in the former situation, because it functionally increases the anti-strip inertia. However, superclarity reduces the likelihood of “close call” jurisdiction strips, and therefore decreases the likelihood of enacting a jurisdiction strip that will survive longer than the political will to keep it.

On balance, it is hard to say if superclarity’s consonance with democratic will is likely to outweigh its dissonance. This balancing act seems much less important, however, once each scenario’s democratic costs are taken into account. In the first scenario, where the Court has asserted jurisdiction in a politically controversial manner, the Court exercises extreme caution in overriding executive or legislative determinations in these areas.⁷³ In contrast, in the second scenario of an unwanted jurisdiction strip, there is no possible check. The only way to remedy the inconsistency with democratic will is for Congress itself to act and reestablish federal courts’ jurisdiction, which legislative inertia will make difficult.

review of a pure question of law by any court would give rise to substantial constitutional questions”).

⁶⁸ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2763–64 (2006).

⁶⁹ *St. Cyr*, 533 U.S. at 299.

⁷⁰ As discussed above, Congress has in the past proven itself capable of answering back to the Court. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁷¹ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (detailing inertia within the legislative process); see also Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592–93 (1987) (detailing the legislative process and concluding that “[a]s a general matter, Congress is far more likely not to act than to act with respect to any particular issue presented for its attention” (internal citations omitted)).

⁷² Note, however, that a successful passage may be much easier to obtain if not all legislators believe it is truly a jurisdiction strip, as was arguably the case with the passage of the DTA, as discussed above in Section I.

⁷³ Consider, for example, the Court’s deference to legislative findings in seminal racial discrimination cases such as *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252–53 (1964) (noting the “voluminous testimony”—including that of the Under Secretary of Commerce—that “exclusionary practices were found to be nationwide”).

III. CONCLUSION

Superclarity does not, of course, solve the knotty constitutional problems to be faced in the event that legislative push comes to legislative shove, with Congress reaffirming its commitment to jurisdiction-stripping statutes. The judiciary cannot in good faith continue to ask Congress to “speak up” after an unambiguous affirmation of “unambiguous” statutory language attempting to dislodge jurisdiction; should such affirmation come, federal courts will be forced to opine on the much-deferred, much-debated question of Congress’s power to lop off parts of federal court jurisdiction, as well as any other constitutional issues raised by a particular jurisdiction strip. Indeed, the days of the Court’s selective hearing may be drawing to a close very soon. The Military Commissions Act of 2006 stamps President Bush’s military commissions with long-absent legislative assent and reaffirms the DTA’s earlier jurisdiction strip for many detainees’ habeas claims. But if—or more likely, when—federal courts face the Suspension Clause and Due Process issues raised by this latest jurisdiction strip, they will do so against the backdrop of at least some public awareness and debate of the gravity of downsizing the Great Writ, and with the rather cold comfort that, yes, Congress really did mean “no” jurisdiction.