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# THE YALE LAW JOURNAL

## COMMENT

### Suspending the Writ at Guantánamo: Take III?

While the popular media and legal community have fixated on trying and releasing Guantánamo detainees in the United States,<sup>1</sup> a constitutionally suspect law governing transfer to third countries has gone largely unnoted. In June 2009, Congress buried in a supplemental appropriations bill<sup>2</sup> what, at first glance, appears to be an innocuous notification requirement. Under the provision, the President may not use appropriated funds to release or transfer a detainee from Guantánamo to a foreign country until fifteen days after he submits a classified report to Congress detailing the risks of transferring the detainee, the plans for mitigating those risks, and the terms governing the third country's agreement to accept him.<sup>3</sup>

As currently applied, however, the provision raises serious questions under the Suspension Clause<sup>4</sup> and the separation of powers principles that the Clause protects. There are two processes by which a detainee may be transferred from Guantánamo. The vast majority of transfers are the product of discretionary

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1. See, e.g., Adam Liptak, *Justices To Hear Appeal from Uighurs Held at Guantánamo*, N.Y. TIMES, Oct. 21, 2009, at A14, available at <http://www.nytimes.com/2009/10/21/us/21scotus.html>; Editorial, *Guantanamo Fever: Congress's Continued Delirium over Detainees*, WASH. POST, Oct. 9, 2009, at A22, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/08/AR2009100803579.html>.
  2. Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(e), 123 Stat. 1859, 1921.
  3. *Id.* On October 28, 2009, the President signed two laws extending the notification provision. See Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 552(e), 123 Stat. 2142, 2178 (2009); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454-55 (2009). While the former is limited to Department of Defense funds, the latter prevents the use of *any* appropriated funds to effect release without notification.
  4. The Suspension Clause provides: "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." U.S. CONST. art. I, § 9, cl. 2.

executive action following administrative review.<sup>5</sup> A much smaller portion of detainees—to date, nineteen—are transferred pursuant to a court order granting the detainee’s petition for a writ of habeas corpus.<sup>6</sup> Although the executive has complied with the notification law in both types of transfer,<sup>7</sup> the law is likely an invalid suspension of the writ as applied to successful habeas petitioners and a violation of the separation of powers.

In *Boumediene v. Bush*, the Supreme Court held that noncitizens detained at Guantánamo as enemy combatants “are entitled to the privilege of habeas corpus to challenge the legality of their detention.”<sup>8</sup> Habeas, at its core, expresses a simple proposition: where there is no legal basis to hold a prisoner, he must be released as soon as possible.<sup>9</sup> The notification provision defies this command, and it does so in a manner doubly suspect under the separation of powers. By freezing appropriated funds, the provision purposefully disables the executive from enforcing a court-ordered habeas remedy, requiring the President to retain custody of a detainee possibly for more than a month after his legal authority to do so has expired.<sup>10</sup> In effect, the notification law creates a mandatory minimum of fifteen days’ extrajudicial detention that is

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5. In late February 2009, the Attorney General announced the creation of a new task force to triage detainee cases and determine which detainees were eligible for release. William Glaberson, *Pentagon Finds Guantánamo Follows Geneva Conventions*, N.Y. TIMES, Feb. 21, 2009, at A11. Of the 779 detainees who have been held at Guantánamo, more than 550 have been transferred without judicial disposition of their habeas petitions. See *The Guantánamo Docket: The Detainees*, N.Y. TIMES, <http://projects.nytimes.com/Guantanamo> (last visited Dec. 2, 2009).
  6. Of the thirty-nine habeas cases decided, thirty-one have resulted in orders for release. As of December 2, 2009, twelve detainees with successful habeas petitions were still at Guantánamo. Center for Constitutional Rights, *Guantanamo Bay Habeas Decision Scorecard*, [http://ccrjustice.org/GTMO\\_habeas\\_scorecard](http://ccrjustice.org/GTMO_habeas_scorecard) (last visited Dec. 8, 2009).
  7. See, e.g., Memorandum in Support of Respondents’ Proposed Order for Resolution of this Action at 4, *Al-Hamandy v. Obama*, No. 05-2385 (D.D.C. July 29, 2009) (arguing that the notification law applies to successful habeas petitioners).
  8. 128 S. Ct. 2229, 2262 (2008).
  9. See *Wingo v. Wedding*, 418 U.S. 461, 468 (1974) (“[I]f the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.”) (emphasis added); *Price v. Johnston*, 334 U.S. 266, 283 (1948) (“The most important result of [a writ of habeas corpus] has been to afford a *swift* and imperative remedy in all cases of illegal restraint upon personal liberty.”) (emphasis added); RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1153 (6th ed. 2009).
  10. Although the appropriations clock takes fifteen days to run, in reality the added delay is greater. The clock starts only upon delivery of the classified report to Congress, but finalizing that report may take weeks. William Glaberson, *Judge Orders a Detainee To Be Freed in August*, N.Y. TIMES, July 31, 2009, at A14.

unreviewable by courts and unalterable by the executive. For that duration, the detainee ceases to be a victim of arbitrary executive detention and effectively becomes a congressional prisoner.

Part I of this Comment details how the notification provision contravenes the Suspension Clause and the separation of powers and why the issue pending before the Court in *Kiyemba v. Obama*<sup>11</sup> is inapposite to the notification law's constitutional infirmities. Part II explains why, if successful habeas petitioners launched as-applied challenges to the provision, courts would likely invoke the canon of constitutional avoidance and the clear-statement rule to adopt a construction of the law that applies only to discretionary, non-habeas releases.

## I. CONSTITUTIONAL OBJECTIONS TO THE NOTIFICATION LAW

After six years of litigation, the Supreme Court declared in *Boumediene* that the Suspension Clause had “full effect at Guantanamo Bay.”<sup>12</sup> Responding to the Court's conclusion in *Rasul v. Bush*<sup>13</sup> that the habeas statute, 28 U.S.C. § 2241, was operative at Guantánamo, Congress had twice amended that statute to strip courts of their jurisdiction over detainees' habeas claims.<sup>14</sup> In invalidating those amendments, the *Boumediene* Court emphasized the centrality of habeas as an instrument in policing the separation of powers and guarding against abuses by the political branches.<sup>15</sup> Because habeas serves a structural function, the Court admonished, “[t]he test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.”<sup>16</sup> *Boumediene* also reiterated two elemental principles of habeas jurisprudence. First, no one may be held absent a legitimate basis in law. Each detainee must be afforded an opportunity to challenge the lawfulness of his detention. When challenges are successful, the courts must possess the authority to issue “an order directing the [detainee's]

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11. 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 130 S. Ct. 458 (2009) (considering whether the Suspension Clause accords a right to release in the United States).

12. 128 S. Ct. at 2262.

13. 542 U.S. 466 (2004).

14. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (amending 28 U.S.C. § 2241); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (amending 28 U.S.C. § 2241).

15. See 128 S. Ct. at 2246-47.

16. *Id.* at 2259.

release.”<sup>17</sup> Second, meaningful habeas review requires haste. The Court has repeatedly characterized habeas as a speedy remedy, emphasizing that its purpose is to ensure that if one “is unlawfully restrained of his liberty it may be given to him as speedily as possible.”<sup>18</sup> The *Boumediene* majority underscored this point, remarking that “six years have elapsed without the judicial oversight required by habeas corpus . . . . [T]he costs of delay can no longer be borne by those who are held in custody.”<sup>19</sup>

The Court’s judgment in *Boumediene* raises serious doubts about the constitutionality of the notification law as applied to successful habeas petitioners. Most suspension claims have involved statutes that divest courts of their authority to hear the petition.<sup>20</sup> In this case, however, the courts retain authority to entertain the petition, and upon deciding there are no legal grounds for continued detention, they can order immediate relief. Here, the offense against the Suspension Clause—and the separation of powers—is that the law immobilizes the President from *executing* that relief.<sup>21</sup> The additional weeks of confinement that the notification law compels are weeks of effectively unreviewable detention without basis in law. The law, in short, appears to effect a minimum fifteen-day suspension of the writ.

One might counter that the notification law itself is the legal basis authorizing the additional period of detention.<sup>22</sup> That argument might have traction if the law furthered some important interest that was incidental to transfer. For example, a law decreeing that the President may not transfer a long-term hunger striker until base physicians are satisfied, after fifteen days of monitoring, that he is fit to fly may be constitutionally unobjectionable, delay notwithstanding. Similarly, a law requiring the executive to wring diplomatic assurances of humane treatment before transferring a detainee to a country

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17. *Id.* at 2271; *see also id.* at 2283 (Roberts, C.J., dissenting) (“[T]he writ requires most fundamentally [that] an Article III court be able to hear the prisoner’s claims and, when necessary, order release.”).
  18. *Storti v. Massachusetts*, 183 U.S. 138, 143 (1901); *see also Wingo v. Wedding*, 418 U.S. 461, 468 (1974) (“[I]f the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his *immediate* release.”) (emphasis added).
  19. 128 S. Ct. at 2275.
  20. *See, e.g., Boumediene*, 128 S. Ct. 2229; *Felker v. Turpin*, 518 U.S. 651 (1996); *Swain v. Pressley*, 430 U.S. 372 (1977).
  21. *Cf. Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (holding that the separation of powers requires that “Congress . . . not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II”).
  22. *Cf. Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806) (“The question [in habeas] is, what authority has the jailor to detain him?”).

with a record of human rights abuses may be consistent with the Suspension Clause. In the case of the notification law, however, there is no equivalent interest. The legislative history is silent as to Congress's motive in enacting the provision, but it is not difficult to reconstruct one. If the motive were ensuring the flow of timely information on the Administration's handling of Guantánamo's closure, Congress could have required notification concomitant with transfer. The more likely explanation for the funding freeze is that members of Congress wanted a fifteen-day window in which to review transfers and exert political pressure to halt those they deemed objectionable. A court might credit that motive with respect to discretionary transfers, but not for successful habeas petitioners—it would be blatantly improper for Congress to badger the President into flouting a granted habeas petition.

In the absence of a valid interest, treating the provision as an affirmative authorization—or in this case, mandate—to detain only adds to the law's constitutional infirmities. Among them is susceptibility to substantive due process and bill of attainder challenges.<sup>23</sup> If the notification requirement does authorize detention, it does so by making a detainee's mere presence at Guantánamo cause for extending that detention. With perverse circularity, this would turn incarceration at Guantánamo Bay into a legal basis for incarcerating someone at Guantánamo Bay. Because the law implicates physical liberty, a fundamental interest,<sup>24</sup> it would likely trigger strict scrutiny, and in the absence of a compelling governmental interest, it is doubtful the law could survive such a challenge.<sup>25</sup> The law may also be vulnerable to a bill of attainder challenge because it singles out Guantánamo detainees for what is arguably punishment without trial.<sup>26</sup> Of course, one might dispute whether the law inflicts a "punishment" in the traditional sense of the word, but the Court has found that where "legitimate [nonpunitive] legislative purposes do not appear," it will *presume* that "punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers."<sup>27</sup>

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23. See U.S. CONST. art. I, § 9, cl. 3.

24. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987))).

25. See *Salerno*, 481 U.S. at 748-49 (requiring a compelling interest to justify restraints on physical liberty).

26. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867) (defining a bill of attainder as a congressionally imposed punishment without trial).

27. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 475-76 (1977). The detainees are purportedly held in preventative detention, a scheme that is nonpunitive under *Salerno*. 481 U.S. at 747.

Another defense of the law is that, under the circumstances, a few weeks of delay in effecting release is too brief an imposition to implicate the Suspension Clause. One form of the argument is that the delay is *de minimis*: for someone held at Guantánamo for seven years, the additional period of incarceration is, after all, less than one percent of the total time of confinement. Another is that delay is endemic in Guantánamo cases: release is not as simple as unshackling the detainee and opening the prison gates. The logistical considerations of transferring someone once labeled the “worst of the worst” from an island-bound military base to a third country—from finalizing diplomatic arrangements to chartering military craft—render immediate release unrealistic. In fact, in a majority of cases where courts have ordered release, diplomatic obstacles have prevented the executive from transferring the petitioners from custody in a timely fashion.<sup>28</sup>

Neither of these defenses is availing. The *de minimis* argument might command common sense appeal but it lacks legal force.<sup>29</sup> One struggles to find any other context where a multiple-week deprivation of liberty without legitimate legal justification is of no constitutional moment.<sup>30</sup> To deem it *de minimis* here because the duration is a drop in the proverbial bucket of total confinement is perverse. The protracted nature of the unlawful detention cannot provide constitutional cover for Congress to prolong it further yet. Were it otherwise, the longer the detention, the more leeway Congress would enjoy in postponing the enforcement of release orders. Furthermore, Congress could just as easily have chosen to impose a funding freeze for one month, or six months, or a year.<sup>31</sup> To call fifteen days *de minimis* engenders unnecessary

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But once a court has granted a detainee's writ and negated his status as an enemy combatant, the nonpunitive, preventative rationale for holding him vanishes.

28. See Liptak, *supra* note 1.

29. In fact, at least three Justices in *INS v. St. Cyr* thought that the Suspension Clause *only* prohibited temporary suspensions of the writ. 533 U.S. 289, 338 (2001) (Scalia, J., joined by O'Connor and Thomas, JJ., dissenting).

30. The Court has deemed constitutionally cognizable deprivations of physical liberty that are substantially more fleeting. In the Fourth Amendment context, detention for more than forty-eight hours without a probable cause hearing is unconstitutional. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991). In the Sixth Amendment context, the Court has found that “*any amount* of actual jail time has Sixth Amendment significance.” *Glover v. United States*, 531 U.S. 198, 203 (2001) (emphasis added).

31. In fact, several attempts have been made to extend the funding freeze to thirty days. See 155 CONG. REC. S10,374 (daily ed. Oct. 13, 2009) (amendment 2676 of Sen. Chambliss to H.R. 2847); 155 CONG. REC. H6939 (daily ed. June 17, 2009); 155 CONG. REC. H5616 (daily ed. May 14, 2009).

and vexing line-drawing challenges that the courts could avoid by adopting the position that each day in unlawful confinement has constitutional significance.

The argument that immediate release is impractical for those detained at Guantánamo is equally unavailing. Courts have already accommodated the practical obstacles attending transfers from Guantánamo by ordering the government to “take all necessary and appropriate diplomatic steps to facilitate [the detainee’s] release forthwith,” rather than requiring release by a certain date.<sup>32</sup> Moreover, because the executive cannot even submit the report until he has finalized the plan of transfer, the delay only kicks in after the diplomatic obstacles have been bounded. At any rate, it is one thing for the executive to hold a successful petitioner because a foreign government, over whom U.S. courts have no authority, refuses to receive a detainee. It is an entirely different matter for Congress to erect gratuitous legal barriers that prolong unlawful detention longer than circumstances require or law permits. The unfortunate reality of the former is not license for Congress to engage in the latter.

The D.C. Circuit’s decision in *Kiyemba v. Obama*,<sup>33</sup> the appeal of which is presently pending before the Supreme Court, does little to lessen doubts about the notification law’s constitutionality. The issue in *Kiyemba* is whether a court may order a detainee released into the United States where no other country is willing to accept him and where the alternative to such an order is indefinite confinement at Guantánamo. The court of appeals’s conclusion that the courts lack this power hinged on the idea that the political branches possess plenary power over admission into the United States. Thus, the question in *Kiyemba* arguably pits two near-absolute constitutional values against each other: habeas’s guarantee of discharge from unlawful confinement versus the sovereign’s exclusive prerogative in regulating entry into the United States.<sup>34</sup> Given the issues at play, a finding by the Court that the latter trumps would not save the notification provision. The provision mandates delay even where a third country is ready and willing to receive the detainee. Whatever Congress’s level of control over entry into the United States, Congress has no claim to plenary power over transfers that occur entirely abroad. Unlike *Kiyemba*’s battle of absolutes, the notification law pits the Suspension Clause against the appropriations power—a patent mismatch given the well-

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32. See, e.g., *Alla Ali Bin Ali Ahmed v. Obama*, 613 F. Supp. 2d 51, 66 (D.D.C. 2009).

33. 555 F.3d 1022 (D.C. Cir. 2009).

34. *Id.* at 1027-28.

established rule that Congress may not use its appropriations power to trench on substantive constitutional rights.<sup>35</sup>

## II. CHALLENGING THE LAW

These doubts about the law's consistency with the Supremacy Clause and the separation of powers suggest that a habeas-cleared detainee would have a high probability of success in an as-applied challenge to the notification provision.<sup>36</sup> Drawing on two canons of statutory interpretation—the canon of constitutional avoidance and the “super-clear statement rule”—the courts are likely to adopt a construction of the law that applies only to discretionary executive releases.

The canon of constitutional avoidance requires that, where possible, a statute be construed not only to avoid the conclusion that it is unconstitutional, but also to avoid significant questions about its constitutionality.<sup>37</sup> The canon is premised in part on a “reasonable presumption” that Congress does not intend its legislative acts to “raise[] serious constitutional doubts” and in part

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35. *See, e.g.*, *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (Free Speech Clause); *United States v. Will*, 449 U.S. 200 (1980) (Compensation Clause); *Flast v. Cohen*, 392 U.S. 83 (1968) (Establishment Clause); *United States v. Lovett*, 328 U.S. 303 (1946) (Bill of Attainder Clause).
36. While the short duration of the funding freeze should not alter the constitutional analysis, it makes the law exceedingly difficult to challenge in court. The price of success at the district court could be yet greater delay: if the government appeals and the court stays the release order pending resolution in the court of appeals, the petitioner's initial victory may purchase additional *months* of detention. One way to avoid this prospect is for the successful petitioner to propose that the district court adopt a tiered, conditional order, providing that (1) the notification law may not be constitutionally applied to the petitioner, who must be released as soon as diplomatic arrangements can be made, and (2) in the event that the first order is appealed, the executive will submit its report to Congress, wait the fifteen days, and release as soon as diplomatic arrangements can be made. Although the petitioner would likely be repatriated before the resolution of the appeal, his transfer would not moot the appeal. Under the capable-of-repetition-yet-evading-review exception to the mootness doctrine, *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911), the appeal would constitute a live controversy until the final detainee was transferred from Guantánamo. So while the first detainee to challenge the law may not benefit from a finding that the law does not apply to successful habeas petitioners, detainees subsequently ordered released would benefit.
37. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”); *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (“[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions.”).

on the idea that judicial restraint requires the courts to eschew constitutional decisionmaking to the greatest extent possible.<sup>38</sup> For that reason, courts will often invoke the canon without resolving whether the alternative construction of the statute is indeed unconstitutional. All things being equal, the more formidable the constitutional question, the more likely the court is to resort to the canon.<sup>39</sup> Thus, given the number and complexity of the constitutional questions a court would have to resolve in this case—e.g., how much congressionally imposed delay the Suspension Clause tolerates, or whether a law incidentally prolonging an otherwise unauthorized detention in the absence of a weighty interest is a bill of attainder—courts may resort to a narrowing construction of the provision rather than conclusively resolve these issues.

The strongest counter to the constitutional avoidance doctrine (apart from vigorously defending the provision's constitutionality) is that the statute nowhere suggests a distinction between discretionary and habeas releases. One might argue that reading in this distinction is outside the sweep of the canon, which does not license wholesale rewriting of statutes in a manner that is "plainly contrary to the intent of Congress."<sup>40</sup> But the provision's failure to note any distinction between those types of releases—and, specifically, its failure to explicitly require compliance with its terms in habeas cases—only highlights the provision's susceptibility to a narrowing construction under the second canon, which Professors Eskridge and Frickey have dubbed the "super-clear statement rule."<sup>41</sup>

The super-clear statement rule is a derivative of the canon of constitutional avoidance. In the handful of substantive areas of law where this rule operates,<sup>42</sup> Congress's signaling of intent must be explicit and unambiguous before the

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38. *Clark*, 534 U.S. at 381; see *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

39. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001) ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by [adopting the government's construction of the law].").

40. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (internal citation omitted).

41. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 629-30 (1992).

42. Apart from habeas, those areas include, inter alia: the application of federal statutes to state and local political processes, *id.* at 626-28; congressional abrogation of state sovereign immunity, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); and imposing conditions on federal funds to states, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

Court will adopt a statutory construction that is in the constitutional danger zone. Where a law purports to limit habeas rights, the super-clear statement requirement is unusually exacting. While the Court held over one hundred years ago that “repeals [of habeas] by implication are not favored,”<sup>43</sup> in the last decade, the Court has adopted a more severe rule that it will not even credit Congress with intent to repeal habeas rights absent a most plain and precise incantation.

The best illustration of the lengths to which the Court will go to avoid reading a statute to repeal habeas jurisdiction is *INS v. St. Cyr*.<sup>44</sup> There the Court insisted it retained jurisdiction despite clarion statutory language to the contrary.<sup>45</sup> Only where the law references the habeas statute itself will the Court credit Congress with the intent to repeal.<sup>46</sup> The majority’s analysis prompted a vigorous dissent by Justice Scalia, who accused the majority of finding “ambiguity in the utterly clear language”<sup>47</sup> and “fabricat[ing] a superclear statement, ‘magic words’ requirement for the congressional expression of such an intent, unjustified in law and unparalleled in any other area of our jurisprudence.”<sup>48</sup> But, in fact, subsequent decisions by the Supreme Court and lower courts have adopted the dissent’s “magic words” language to describe the clarity with which Congress must speak to limit habeas review.<sup>49</sup> The “magic words” rule should prove fatal to the government’s attempts to apply the notification provision to successful Guantánamo petitioners, given that the provision is devoid of language evincing an express intent to alter habeas rights.

There is, of course, a distinction: the Court has required a super-clear statement where a law purports to constrain habeas *jurisdiction*. The provision at issue, however, leaves the courts’ jurisdiction untouched—instead, it subverts the remedy. But this would seem a distinction without a difference.

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43. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868).

44. 533 U.S. 289.

45. *See id.* at 312-13. For example, the title of one provision the government cited as divesting the court of jurisdiction read: “Elimination of Custody Review by Habeas Corpus.” Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 401(e), 110 Stat. 1214, 1268.

46. *See St. Cyr*, 533 U.S. at 312-13.

47. *Id.* at 326 (Scalia, J., dissenting).

48. *Id.* at 327.

49. *See Demore v. Kim*, 538 U.S. 510, 516 (2003); *Auguste v. Ridge*, 395 F.3d 123, 138 n.13 (3d Cir. 2005); *Wang v. Ashcroft*, 320 F.3d 130, 141 (2d Cir. 2003) (“[A] statute must, at a minimum, explicitly mention either ‘habeas corpus’ or ‘28 U.S.C. § 2241’ in order to limit or restrict § 2241 jurisdiction.”).

The purpose of habeas review is not to secure advisory opinions on the legality of confinement but to secure release where that confinement is deemed unlawful. Habeas is, after all, an “equitable *remedy*.”<sup>50</sup> The earliest decisions affirming judicial authority to hear habeas petitions focused on the need to protect the “*efficacy* of the writ,” not jurisdiction for jurisdiction’s sake.<sup>51</sup> The *Boumediene* Court was equally clear when it proclaimed that “the writ must be effective.”<sup>52</sup> It would make little sense for the courts jealously to guard their authority to hear habeas claims by deploying canons like the super-clear statement rule, yet give Congress wide berth to thwart court-ordered relief. Thus, there is a high likelihood that courts would apply the canon to the notification law just as they did to the provisions challenged in *St. Cyr*.

## CONCLUSION

Congress’s authority under the appropriations power is broad, but Congress may not wield that power to diminish the efficacy of habeas corpus, especially by disabling the President from executing a judicial order. Even though the hindrance is short-lived, the Suspension Clause takes cognizance of each day of legally unjustified detention. In light of the significant doubts surrounding the provision’s constitutionality as applied to victorious habeas petitioners, the constitutional avoidance canon, and the super-clear statement rule, a detainee who manages to launch an as-applied challenge to the provision faces a high likelihood of success.

JOSEPH PACE

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50. *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (emphasis added); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 n.329 (1987) (“[T]he non-suspension clause is the original Constitution’s most explicit reference to remedies.”).

51. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1868) (emphasis added).

52. *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008).

