Seton Hall Law Review

Volume 43 | Issue 1 Article 2

1-23-2013

Beyond Congress's Reach: Constitutional Aspects of Inherent Power

Dustin B. Benham

Follow this and additional works at: http://erepository.law.shu.edu/shlr

Recommended Citation

Benham, Dustin B. (2013) "Beyond Congress's Reach: Constitutional Aspects of Inherent Power," *Seton Hall Law Review*: Vol. 43: Iss. 1, Article 2.
Available at: http://erepository.law.shu.edu/shlr/vol43/iss1/2

This Article is brought to you for free and open access by Seton Hall Law eRepository. It has been accepted for inclusion in Seton Hall Law Review by an authorized administrator of Seton Hall Law eRepository. For more information, please contact lawlibdigital@shu.edu.

Beyond Congress's Reach: Constitutional Aspects of Inherent Power

Dustin B. Benham[*]

I. INTRODUCTION 76
II. WHEN CONGRESS CREATES LOWER FEDERAL COURTS, ARTICLE III ENDOWS THOSE COURTS WITH IRREDUCIBLE JUDICIAL POWER 77
A. Features of Federal "Judicial Power" 81
B. The Constitution Does Not Grant Congress the Power to Abridge the Full Exercise of Judicial Power 86
III. ARTICLE III'S GRANT OF CORE JUDICIAL POWER IMPLIES OTHER INDEPENDENT COURT POWERS THAT SUPPORT THE EXERCISE OF JUDICIAL POWER 90
A. Congress May Not Prevent the Full Exercise of Judicial Power by Regulating or Eliminating Independent Court Powers Necessary for the Exercise of Judicial Power 91
B. Congress Has the Plenary Authority to Regulate or Eliminate Non-Essential Independent Judicial Power 98
IV. CONGRESS CANNOT PRECLUDE THE EXERCISE OF THE TRADITIONAL INDEPENDENT POWER TO VACATE JUDGMENTS FOR FRAUD ON THE COURT 103
A. The History of the Fraud on the Court Power Suggests That It Is Essential to the Exercise of Article III Judicial Power 104
B. The Power to Vacate Judgments for Fraud on the

[*] Assistant Dean for Strategic Initiatives and Assistant Professor of Legal Practice, Texas Tech University School of Law. This Article would not have been possible without the intellectual contributions of many people. Among others, I would like to thank William R. Casto, Samuel P. Jordan, Scott Dodson, Rory Ryan, Richard Murphy, Elizabeth Caulfield, Nicholas Arledge, Natalie Tarenko, and Howard Wasserman. Additionally, I would like to thank those who participated in the discussion when I presented on this subject matter at the Southeastern Association of Law School's 2011 Annual Conference. Stephen Higdon, my research assistant, deserves special recognition for his contributions to the substance and the form of this work. All errors and omissions are my own.

Court Is Essential to the Full Exercise of Judicial Power 108
C. The Supreme Court Inadvertently Creates a Constitutional Dilemma with *Gonzalez v. Crosby* 112
D. Because of the Uncertainty Created by *Gonzalez*, Lower Courts Have Interpreted AEDPA to Preempt Their Independent Power to Vacate Judgments for Fraud on the Court 118
E. 28 U.S.C. § 2244 Prevents the Full Exercise of Judicial Power by Impairing the Essential Independent Power to Vacate Judgments for Fraud on the Court 120
V. CONCLUSION 125

I. INTRODUCTION

Congress believes it has plenary authority to limit the inherent power of federal courts to police their own final judgments for fraud by a court officer. Surprisingly, some lower courts agree and have recently interpreted a federal statute in a way that restricts traditionally inherent judgment-relief powers.[1] Both Congress and the courts are wrong. Their error stems from confusion about the scope of Article III "judicial power" and the so-called inherent powers necessary to support it.[2] The resulting ill-considered abrogation of federal court power sheds light on broader questions regarding the scope of judicial power and Congress's ability to limit it.

The propriety of any congressional restriction on a so-called inherent power should be analyzed through a two-step framework.[3] First, courts should determine whether the court activity at issue is absolutely essential to the exercise of the core, or irreducible nucleus, of Article III judicial power.[4] If the power is not essential to support

[1] *See, e.g.*, Johnson v. Bell, 605 F.3d 333, 335 (6th Cir. 2010) (holding that federal courts' inherent power to vacate judgments for fraud on the court is subject to congressional abrogation).

[2] *See* Robert J. Pushaw, *The Inherent Powers of the Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 739–40 (2001) (noting a dearth of legal scholarship addressing inherent power and the lack of a comprehensive court-created inherent power framework).

[3] *See, e.g.*, *Ex parte* Robinson, 86 U.S. 505, 509–512 (1873) (holding that regulation of the contempt power may be permissible in circumstances where it does not prevent the function of courts).

[4] *See* U.S. CONST. art. III, § 1 ("The judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish.").

judicial power, Congress has plenary authority to abolish or limit it. Second, assuming the activity is essential, courts should determine whether the statute restricting it prevents the full exercise of core Article III judicial power.[5] If so, Congress has exceeded its authority.

Based on this analysis, several traditional inherent powers are beyond Congress's reach, including the direct contempt power, the power to take evidence and develop a factual record, and the power to vacate judgments for fraud on the court. The fraud on the court power provides courts with an essential tool to remedy litigation wrongs ranging from bribing a federal judge to creating false documents or other evidence.[6] And while the outer parameters of core judicial power are notoriously difficult to locate, some so-called inherent powers are plainly not necessary for courts to exercise even the most expansive view of the power. These include the power to dismiss cases for *forum non conveniens* and the power to dismiss cases for want of prosecution.

This Article proceeds in four parts. Part II examines the contours and extent of core Article III judicial power and limits on Congress's power to tamper with it. Both the historical record surrounding the adoption of Article III and the doctrinal sources that have followed its adoption support an interpretation of "judicial power" that plainly protects at least some court activity from congressional abrogation or interference. Part III examines a number of other independent court powers implied by Article III's grant of judicial power along with the limits on Congress's power to abridge them. Finally, Part IV concludes that the Anti-Terrorism and Effective Death Penalty Act (AEDPA), as interpreted by some lower courts, impermissibly interferes with the traditionally inherent power to vacate judgments for fraud on the court.

II. WHEN CONGRESS CREATES LOWER FEDERAL COURTS, ARTICLE III ENDOWS THOSE COURTS WITH IRREDUCIBLE JUDICIAL POWER

The Constitution created separate, self-executing branches of government that work together to embody the full function of the sovereign while limiting the undue growth and power of any one branch.[7] Indeed, Article III established a judiciary that is

[5] *See Ex parte Robinson*, 86 U.S. at 509–12.

[6] *See, e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944) (holding that attorney's participation in scheme designed to defraud court constituted "fraud on the court").

[7] U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1; *see also* THE FEDERALIST NOS. 47,

independent from the legislative and executive branches of government.[8] But the parameters of the new, stand-alone judiciary were far from a given when the Framers drafted the Constitution.[9] Courts in England were a function of, and largely subsumed by, the executive.[10] Although English monarchs and their courts haltingly acceded to the principle that even the king is subject to at least some law (e.g., the Magna Carta and other charters),[11] pre-revolutionary colonial courts were a step behind and were viewed by the American colonists as merely another tool in the clutches of a tyrannical king.[12] After the Revolution, legislatures dominated the confederate courts that preceded the Constitution in an effort to control the perception of executive-influenced abuses during the colonial era.[13] Legislative

48, at 245–46, 251–52 (James Madison) (Ian Shapiro ed., 2009) (discussing the benefits of separate sovereign powers and the potential limits of such separation).

[8] *See* U.S. CONST. art. I, § 1, art. II, § 1, art. III, § 1; *see also* THE FEDERALIST NOS. 47, 48, *supra* note 7, at 245–46, 251–52 (James Madison); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 81–82 (1999) (noting that while the Constitution vests judicial power in the courts, the inferior courts depend on Congress, through the tribunals clause, to come into existence).

[9] *See, e.g.*, Pushaw, *supra* note 2, at 822–28; THE FEDERALIST NOS. 78, 79, 80, 81, 82, 83, *supra* note 7, at 391–430 (Alexander Hamilton) (making the case for various aspects of the judiciary during ratification).

[10] *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 206 (7th ed. 1991) (noting that the powers of courts were subject to, and derived their existence from, the will of the king). The Glorious Revolution, in 1689, marked a turning point in the English court system. Pushaw, *supra* note 2, at 806–08. The monarchy, facing demands in parliament, accepted its place as subordinate to at least some laws. *See id.* This change was complimented by the Act of Settlement, which provided judges with tenure and guaranteed salary. *See id.*; *see also* HOLDSWORTH, *supra*, at 95.

[11] *See* Pushaw, *supra* note 2, at 807–08.

[12] Indeed, the Declaration of Independence recites that King George "made Judges dependent on his will alone" as one of the grievances animating the revolution. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776); *see also* Pushaw, *supra* note 2, at 819–20.

[13] Thomas Jefferson wrote about the overbearing post-revolutionary Virginia Legislature in *Notes on the State of Virginia*, observing that by concentrating too much power in the hands of one branch—the legislature—Virginia was potentially at the hands of a "despotic government." THOMAS JEFFERSON, WRITINGS: NOTES ON THE STATE OF VIRGINIA 245 (Peterson, ed. 1984). It did not matter, according to Jefferson, that power had been disbursed from the executive to the legislative branch because "173 despots would surely be as oppressive as one. Let those who doubt it turn their eyes to the republic of Venice." *Id.* Jefferson went on to observe that the Assembly had "in many instances, decided rights which should have been left to judiciary controversy." *Id.* at 245–46. In the *Federalist*, Madison quoted liberally from Jefferson's observations and appended anecdotal examples of legislative overreaching from the other former colonies. THE FEDERALIST NO. 48, *supra* note 7, at 253–54 (James Madison); *see also* Pushaw, *supra* note 2, at 820–22.

interference created a distinct set of problems.[14] Of particular note, courts dominated by legislatures tended to act based on political expedience, sometimes at the expense of sound legal reasoning or doctrinal consistency.[15]

While trying to address problems with legislative interference, the Framers also attempted to address fears about an unchecked and too powerful judiciary.[16] Hamilton noted that the same structural separation that protects the judiciary from the intrusion of the other branches also protects the people from judicial abuse.[17] Observing that the judiciary would be the "weakest" of the three branches, Hamilton wrote that the judiciary "can never attack with success either of the other two [branches]; and that all possible care is requisite to enable it to defend itself against their attacks."[18] Thus, at the time of the framing, the historical record reveals conflicting pressures: the pressure to create a judiciary that stood apart from the whims of the executive and legislative branches and the competing pressure to limit the net power of the judiciary. These two forces arguably resulted in a compromise: an independent but markedly weak judicial branch.[19]

The limits of the judicial branch are best understood when viewed in light of the correlative power of Congress.[20] To be sure, Article III vests the courts with certain *dependent* powers.[21] For

---

[14] THE FEDERALIST NO. 48, *supra* note 7, at 253–54 (James Madison).

[15] *See* THE FEDERALIST NO. 48, *supra* note 7, at 251 (James Madison) (arguing that no branch "ought to possess, directly or indirectly, an overruling influence over the other[]" branches); *cf.* JEFFERSON, *supra* note 13, at 245–46.

[16] *See* THE FEDERALIST NO. 48, *supra* note 7, at 392–93 (James Madison).

[17] *See id.* at 392–93, 395.

[18] *See id.* at 392.

[19] *Compare* THE FEDERALIST NO. 48, *supra* note 7, at 251 (James Madison) (no branch "ought to possess, directly or indirectly, an overruling influence over the other[]" branches) *with* THE FEDERALIST NO. 78, *supra* note 7, at 392 (Alexander Hamilton) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous [branch] to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.").

[20] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222 (1995) ("The Legislature would be possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he interpretation of the laws' would be 'the proper and peculiar province of the courts.'") (quoting THE FEDERALIST NO. 78, *supra* note 7, at 394 (Alexander Hamilton)); *see also* Engdahl, *supra* note 8, at 80 ("*Intrinsic* limits [on congressional power to regulate the judiciary] derive from the principle of enumerated powers and the constitutional terms by which a particular 'power' is conferred.") (emphasis in original).

[21] *See* U.S. CONST. art. III, § 1 (granting Congress the power to create, or not, courts from "time to time").

instance, Courts and many scholars agree that the subject matter jurisdiction of the inferior federal courts is primarily a creature of statute, subject to near plenary control by Congress.[22] On the other hand, Article III also vests lower courts with certain *independent*, or self-executing, powers.[23] Often lumped into a broad category called "inherent" powers,[24] these powers are necessarily implied by Article III's vesting of "judicial power" in "courts."[25] A few commentators have nobly ventured into this area and attempted to create a modern, cogent taxonomy to accurately categorize the various independent or "inherent" powers.[26] In a similar vein, and building on the limited work in the area, this Article substitutes the term "independent power" for "inherent power" to avoid the confusing and contradictory lexicon of the courts on the topic and to describe the nature of the power more accurately. Further, the independent powers of courts can be further sub-divided into various categories.[27] Along those lines, independent power can be best understood to comprise three categories: core Article III judicial power, essential

[22] *See* Lockerty v. Phillips, 319 U.S. 182, 186–88 (1943); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868); *see also* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER ch. 1 (2d ed. 1989); William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENT. 89, 96 (1990) (rejecting Professor Amar's two-tier, mandatory theory of Article III jurisdiction but acknowledging "vague" but real limits on Congress's power to interfere with the Supreme Court's jurisdiction); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 255 (1997) (the "Constitution might . . . give[] Congress substantial discretion over the actual jurisdiction of the federal courts"); Michael Lewis Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465, 469 (1991) ("Except [in limited] cases . . . the Court has never challenged Congress's paramount authority over jurisdictional doctrine."). *But see* Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985) (contending that Article III confers mandatory jurisdiction over several categories of cases, including federal questions).

[23] Some of these independent powers are express, most notably the Supreme Court's original jurisdiction.

[24] Judges use the term "inherent" power to describe several distinct powers that are analytically distinct and subject to varying amounts of Congressional interference. *See, e.g.*, Pushaw, *supra* note 2, at 847.

[25] U.S. CONST. art. III, § 1.

[26] *See, e.g.*, Pushaw, *supra* note 2, at 847–48 (describing inherent power as comprising "core 'judicial power,'" "implied indispensable power," and "beneficial powers"); Engdahl, *supra* note 8, at 85–86 (describing various aspects of inherent power as "judicial potency"); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 775–80 (describing both legitimate and illegitimate "strong" along with "weak" inherent power).

[27] *See, e.g.*, Pushaw, *supra* note 2, at 847.

independent power, and non-essential independent power.[28] These distinctions are more than just semantic because it turns out Congress's constitutional ability to regulate core Article III judicial power and essential non-core judicial power is substantially limited when compared with its ability to regulate non-essential independent power.[29]

A. *Features of Federal "Judicial Power"*

Article III vests the "judicial power" to decide cases and controversies in one Supreme Court and in "inferior courts"[30] but, along with the Tribunals Clause in Article I,[31] gives Congress the power to establish the inferior courts "from time to time."[32] Consistent with this language, it is generally accepted that Congress has the power to control the structure, size, and organization of the federal courts.[33] Likewise, most courts and scholars agree that Congress has both the power to endow federal courts with subject matter jurisdiction[34] and near plenary power to rearrange or divest the subject matter jurisdiction of a particular court or set of courts.[35] Both of these powers—the existence and structure of the inferior courts and their power to entertain disputes—are *dependent* upon congressional action.[36]

Once Congress acts to create "courts" (or "tribunals") and vest them with the power to hear certain classes of disputes, however, Article III provides courts with independent core judicial power to decide particular cases or controversies without any further action from Congress.[37] The term "judicial power" is not defined in the Constitution and, indeed, was not added until late in the drafting

[28] *See, e.g.*, Ryan *supra* note 26, at 783–84.
[29] *Cf.* Pushaw, *supra* note 2, at 847–48.
[30] U.S. CONST. art. III, § 1.
[31] U.S. CONST. art. I, § 8.
[32] U.S. CONST. art. III, § 1.
[33] *See, e.g.*, Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("Congress [has] constitutional authority to establish from time to time such inferior tribunals as they may think proper."); Wells, *supra* note 22, at 469.
[34] *See supra* note 14 and accompanying text.
[35] *See, e.g.*, Wells, *supra* note 22, at 465–67.
[36] *See* Engdahl, *supra* note 8, at 83 (noting that certain aspects of Article III judicial power are not self-executing).
[37] U.S. CONST. art. III, § 1; *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995). *Cf.* Engdahl, *supra* note 8, at 84–85 (stating that at least some judicial functions "are so integral that power over them *must* inhere in a body in order for it to be called 'judicial'").

process.[38] As a result, there is no discussion of the term in the records of the Constitutional Convention.[39] But Madison and Hamilton discussed the role of the courts, and by implication, judicial power, in the constitutional system during the ratification era.[40] And the Supreme Court, from its earliest days, has weighed in on the proper function of courts exercising the judicial power vested by Article III.[41]

The judicial power encompasses the power to interpret the law.[42] The Constitution does not expressly address the role of the courts in legal interpretation, but the earliest historical and doctrinal sources do.[43] In 1788, writing in support of the Constitution, Hamilton famously observed that "the interpretation of the laws is peculiarly within the province of courts."[44] Little more than a decade later, Chief Justice Marshall, writing for the Court in *Marbury*, adopted the principle, noting that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[45]

It is important to note that legal interpretation is not exclusively the province of the courts. When crafting legislation, Congress assesses the impact that the proposed law will have on existing law as well as whether the legislation is constitutional. Moreover, the executive branch continually interprets the law when enforcing it. For example, federal prosecutors decide whether probable cause exists to charge an individual with federal crimes. This process necessarily involves legal interpretation and is contemplated by the Constitution's shared power scheme. The difference between the interpretive role played by the executive and legislative branches and the interpretive role assigned to the courts by Article III is largely defined by the *context* in which courts interpret and define law.

The power to interpret and prescribe the law is limited to the context of deciding particular "cases" and "controversies."[46] Although the Constitution is silent on precisely what a case or controversy is, the Supreme Court has interpreted Article III, section 2 to preclude

---

[38] *See, e.g.*, Ryan, *supra* note 26, at 767.

[39] *See id.* at 768.

[40] *See, e.g.*, THE FEDERALIST NO. 78, *supra* note 7, at 394 (Alexander Hamilton); THE FEDERALIST NOS. 47, 48, *supra* note 7, at 245–46, 251–52 (James Madison).

[41] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[42] *See id.*

[43] *Compare id. with* THE FEDERALIST NO. 78, *supra* note 7, at 394 (Alexander Hamilton).

[44] THE FEDERALIST NO. 78, *supra* note 7, at 394 (Alexander Hamilton).

[45] *Marbury*, 5 U.S. at 177.

[46] U.S. CONST. art. III, § 2.

advisory opinions.[47] A few years after the Constitution was adopted, President Washington and his Secretary of State, Thomas Jefferson, were facing vexing legal questions related to the war between France and England.[48] Questions about the United States' ability to remain neutral in the war were at issue because of several treaties between the countries and federal law.[49]

Seeking to resolve these questions, Jefferson sent a letter to the Supreme Court on behalf of President Washington.[50] The letter sought the Supreme Court's legal opinion on whether it would be willing to give advice to the President on legal questions related to the construction of treaties and laws of the United States.[51] The Supreme Court wrote back to Jefferson, declining to answer the questions based on separation of powers concerns.[52] To provide advisory opinions on the questions, the Court announced, would be to decide them "extrajudicially."[53] Ever since, the Court has consistently held that federal courts cannot decide legal questions outside of the context of an actual dispute between parties.[54] When a federal court does decide a legal question in the context of a case or controversy, however, its judgment is final, binding, and not subject to the review of the other branches.[55]

The decision of a particular case or controversy is subject to review only by a superior court in the Article III hierarchy.[56] In *Hayburn's Case*, the Supreme Court rejected a statute that allowed federal courts to review veterans' pension claims and also vested the executive branch with the power to review the courts' decisions.[57] The law violated separation of powers concerns by subjecting the

---

[47] *See* United States v. Johnson, 319 U.S. 302, 305 (1943) ("'the honest and actual antagonistic assertion of rights' to be adjudicated [is] . . . indispensable" to federal court adjudication).

[48] *See* Letter from Thomas Jefferson to Chief Justice John Jay (1793), *reprinted in* RICHARD H. FALLON, JR. ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–51 (6th ed. 2009).

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See* Correspondence of the Justices to Thomas Jefferson, *reprinted in* FALLON, *supra* note 48, at 51–52.

[53] *See id.* at 52.

[54] *See* United States v. Johnson, 319 U.S. 302, 305 (1943); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 52–53 (4th ed. 2011).

[55] *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 409–11 (1792).

[56] *See id.*; *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (holding that Congress cannot overturn final judgments of Article III courts).

[57] *See Hayburn's Case*, 2 U.S. at 409–11.

final judgments of federal courts to review by a political branch.[58] The judicial power includes the power of appellate review and, according to the Court, is vested solely in "courts" by Article III.

In recent decades, the Court has had the opportunity to reaffirm the exclusive role of courts in exercising Article III judicial power. In *Plaut v. Spendthrift Farm, Inc.*, the Court struck down a law of Congress that reinstated securities claims that were dismissed as the result of a previous Supreme Court decision.[59] The Court held that the statute at issue in *Plaut* violated imperative separation of powers principles by subjecting final, dispositive court judgments to review by the legislative branch.[60] Expressly describing the nature of judicial power for the majority, Justice Scalia wrote:

> The record of history shows that the Framers crafted [Article III] with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."[61]

Thus, Article III judicial power is, at the least, the power to decide particular cases or controversies in the form of a final, dispositive judgment, "subject to review only by [a] superior court[] in the Article III hierarchy."[62] This formulation, however, begs the question of what it means to *decide* in the context of judicial power.

In the context of Article III, deciding a case means resolving it on the basis of legal reasons, not political or extra-legal reasons. Indeed, while promoting ratification of the Constitution, Hamilton noted that independence from the Legislature, and the political baggage that comes with it, was necessary in an effective court.[63] Separation from the Legislature was paramount because it protected the decisions of particular cases from political will or extra-legal bias.[64] Courts, by Hamilton's view, were to decide cases based on legal

[58] *See id.* at 410–11.
[59] *Plaut*, 514 U.S. at 217–19.
[60] *See id.*
[61] *Id.* at 218–19 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).
[62] *See id.*
[63] THE FEDERALIST NO. 78, *supra* note 7, at 393–96 (Alexander Hamilton).
[64] *See id.* at 393 ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").

reasons.[65]

The power to adjudicate cases based on legal reasons is so central to the "judicial power" that it might even be referred to as an existential requirement. Without the independent power to decide the merits of a particular case,[66] Hamilton found the appointment of a judiciary, apart from the Legislature, a futile exercise:

> The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from [the Legislature].[67]

The power to decide cases based on legal reasons implies the related power to decide them impartially.[68] Madison responded to concerns that the national judiciary would subsume state interests by noting that "[t]he decision [of a particular case] is to be *impartially* made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this *impartiality*."[69] Pure legal reasoning in the disputed case context is by its nature impartial because, at its essence, legal reasoning is the logical application of general principles to specific facts.

Inappropriate bias, or partiality, in a court proceeding may stem from an extra-legal source, like the self-interest of the decision maker, personal prejudice, or favoritism.[70] Of course, the fundamental requirement that courts have the *power* to decide cases based on legal reasons does not necessarily imply that they will always execute this power perfectly, or at all. But Article III protects their

---

[65] *See id.* at 395 (noting that what properly separates the judiciary function from the legislative is the pure use of "judgment" (i.e., a conclusion based on the law) over the "will").

[66] Hamilton's discussion in the *Federalist* No. 78 highlights the judiciary's role in assessing the constitutionality of statutes and rendering judgment on their validity based upon the law—i.e., the Constitution. THE FEDERALIST NO. 78, *supra* note 7, at 393–95 (Alexander Hamilton).

[67] *Id.* at 395; *see also* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 769 (1998).

[68] *See* THE FEDERALIST NO. 39, *supra* note 7, at 197 (James Madison).

[69] *Id.* at 197 (emphasis added).

[70] The independent nature of the core adjudicatory function is also confirmed by the lifetime tenure and pay requirements of Article III. The "judges" of both the Supreme and inferior "Courts . . . shall hold their Offices during good Behaviour" and without a reduction in pay during their time in office. U.S. CONST. art. III, § 1.

ability to do so from the interference of the other branches.[71]

B. *The Constitution Does Not Grant Congress the Power to Abridge the Full Exercise of Judicial Power*

Once Congress creates lower courts and vests them with jurisdiction to hear particular disputes, those courts have independent judicial power in the particular cases they are empowered to hear.[72] Congress cannot reduce the core characteristics of this power in particular cases. The reason is straightforward: the Constitution enumerates the powers of each branch, and the Constitution simply does not provide Congress the power to abrogate, change, or interfere with judicial power. The utter lack of any enumerated constitutional power to tamper with core judicial power arguably reflects the Framers' desire to protect the independent power of the judiciary from the other branches.[73]

This is not to say that Congress has no power over the judiciary. The Constitution provides Congress near total authority over the structure and jurisdiction of the lower federal courts. The express legislative power that Congress does possess over the judiciary flows from two main sources: the clauses dealing with the creation of tribunals in both Article III and Article I,[74] and the Necessary and Proper Clause.[75] None of these constitutional provisions provide

[71] *See id.* Indeed, if Congress could insert itself into the resolution of every aspect of the case-by-case dispute resolution delegated to the judiciary, it could even resolve doubts about the constitutionality of its own statutes in favor of itself, despite legal reasons to the contrary. In such a system, judicial review of Congressional action would be nothing more than a toothless "constitutional charade." Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2528 (1998).

[72] *Cf.* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995); *see also* Engdahl, *supra* note 8, at 83–84 (noting, however, that the notion of "judicial potency" or independent judicial power is complicated by Congress's role in vesting courts with subject matter jurisdiction in the first place).

[73] Professor David Engdahl, arguing for an expansive version of inherent power and irreducible judicial power, contends that the lack of enumerated congressional power to restrict judicial power implies that Congress's ability to regulate the courts' subject matter jurisdiction and powers is more limited than most courts and commentators acknowledge. *See* Engdahl, *supra* note 8, at 91–93. *But see* Wells, *supra* note 22, at 468–69 (observing the Court's reluctance to challenge Congress's power to regulate jurisdiction and most other court powers).

[74] *See* U.S. CONST. art. I, § 8, cl. 9 (stating that Congress can constitute tribunals); U.S. CONST. art. III, § 1 (stating that Congress may establish inferior courts from "time to time").

[75] Despite nearly a century of debate between scholars about whether the Rules Enabling Act is an unconstitutional intrusion into the judiciary's rulemaking prerogatives, the Supreme Court has not questioned its constitutionality for decades.

Congress with the express power to circumscribe Article III judicial power once operative in a court.

Neither of the clauses addressing the creation of inferior tribunals grants Congress the power to abrogate core judicial power.[76] Article III vests judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[77] Article I grants Congress the correlative power "[t]o constitute Tribunals inferior to the supreme [C]ourt."[78] These clauses have been read together to mean that the "tribunals" that Congress was empowered to create were "courts" endowed with "judicial power."[79] The Constitution describes Congress's power to constitute tribunals in exclusive terms. This precludes its ability to form or reform courts into entities without judicial power because the Constitution simply does not provide Congress the enumerated or implied power to do so.[80]

This is curious considering Congress's plenary power to destroy the tribunals it creates—the so-called "necessary implication" flowing from the power Congress has to create them in the first place.[81] But it does make sense: Congress can create and destroy "courts" vested with judicial power under Article III, but the power to destroy those courts does not confer a power to create or reform a court into an entity other than a court vested with judicial power.[82] Thus, while the Constitution gives Congress plenary power to create or abolish entities inferior to the Supreme Court, the Constitution, having vested the courts with core judicial power, specifies certain minimum features that must inhere in any Article III courts that Congress chooses to create.[83]

See, e.g., Hanna v. Plumer, 380 U.S. 460, 464–65 (1965). Notwithstanding sweeping congressional power over the structure, jurisdiction, and processes of courts, however, some powers still remain exclusively within the province of the judiciary.

[76] *See* Engdahl, *supra* note 8, at 100–07, 118.

[77] U.S. CONST. art. III, § 1.

[78] U.S. CONST. art. I, § 8, cl. 9.

[79] *See, e.g.*, Engdahl, *supra* note 8, at 81–84.

[80] *See id.* at 117–19.

[81] *See* REDISH, *supra* note 22, at 29 ("It has generally been assumed that since Congress need not have created lower federal courts in the first place, it can abolish them once they have been created.").

[82] Professor Redish notes that it has also been assumed that the power to destroy the lower federal courts also implies the lesser power to restrict their jurisdiction. *See id.* at 29 (citing Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850)). *But see* Amar, *supra* note 22, at 206.

[83] *See* REDISH, *supra* note 22, at 8 ("Although the Constitution gives Congress discretion to create lower federal courts, it mandates that if inferior federal courts

Accordingly, the terms "judicial power," "court," and "tribunal" as used in both Article I and Article III are more than simply descriptive. They are also limiting. If Congress chooses to create inferior courts, those entities must indeed be capable of hearing cases and controversies between litigants and rendering final judgments based on legal reasoning—the essence of judicial power.[84] Likewise, if Congress chooses to eliminate inferior courts, it must totally eliminate the existence of the court. But it cannot reform the court into an entity without the key features of judicial power described by Article III.[85] Otherwise, Congress has exceeded its powers.[86]

Congress has long relied on the Necessary and Proper Clause to justify its regulation of lower court practices.[87] But, like the Tribunals Clause, the Necessary and Proper Clause does not provide a means for Congress to frustrate or eliminate the judiciary's core powers either.[88] Indeed, the Necessary and Proper Clause allows Congress to "make all Laws which shall be necessary and proper *for carrying into Execution* . . . all other *Powers vested* by this Constitution in the Government of the United States or in any Department or Officer thereof."[89] Accordingly, Congress may make all laws that carry into

are created, they must have certain attributes.").

[84] Liebman and Ryan, who attempt to track Madison's view of judicial power, describe the power that attaches to any Article III court:

> "[T]he judicial power" means the Article III judge's authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law.

See Liebman & Ryan, *supra* note 67, at 771. This approach includes both a subject matter aspect and a qualitative aspect. Only certain cases are within the Article III courts' purview, but those cases must be decided according to certain principles consistent with the judicial power that Congress vests in them. *See* REDISH, *supra* note 22, at 8.

[85] The Supreme Court has held that, in ordinary circumstances, Congress cannot overturn final judgments through legislation. Doing so violates separation of powers principles. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995).

[86] *Cf.* Engdahl, *supra* note 8, at 104, 106–07 (describing the "[s]pecious '[n]ecessary [i]mplication' of the '[t]ribunals [c]lause.'").

[87] *See, e.g.*, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).

[88] Professor David Engdahl examines the intrinsic limits of Congress's power to regulate the judiciary through an examination of several provisions of the Constitution. *See* Engdahl, *supra* note 8, at 81–83. His position on the indefeasible features of courts is sweeping and includes certain irreducible jurisdictional features. *Id.* at 138. This Article does not take a position on the intrinsic constitutional limits of Congress's power to regulate jurisdiction, rather it addresses the question of what features of judicial power are irreducible once jurisdiction attaches.

[89] U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

execution Article III judicial power.[90]

As discussed above, that power, at the least, includes the ability to create entities and vest them with jurisdiction to decide disputed cases and render final judgments based on legal reasons in addition to prescribing court practices and procedures. On the other hand, any enactment of Congress that thwarts the execution of the exercise of judicial power in properly vested courts cannot flow from the Necessary and Proper Clause because thwarting the judicial power cannot be said to "carry[] [it] into Execution."[91]

Congress cannot abridge courts' power to render final, binding judgments in cases and controversies over which courts have jurisdiction. The modern Supreme Court, in *Plaut v. Spendthrift Farm, Inc.*, rebuffed an attempt by Congress to overturn a case that dismissed late-filed securities actions.[92] The Court, in a previous ruling, held that § 10(b) securities actions had to be filed within three years of the alleged violation of securities laws and within one year of the discovery of the violation.[93] Congress responded with a statute reinstating all dismissed securities fraud cases filed before the decision that would have been considered timely but for the Court's decision.[94] Effectively, Congress attempted to overturn the Supreme Court's decision, abridging its power to render a final, binding judgment.[95] Writing for the Court, Justice Scalia noted that Article III courts have the power "not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy . . . . [The] 'judicial Power' is one to render dispositive

[90] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 432 (1793) (a law prescribing the means and mode of service raised a case "in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority." Indeed, "[beyond the enumerated powers] is this general one: 'To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.'"); *see also* Engdahl, *supra* note 8, at 103; *cf.* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838) ("[C]ongress exercised [its] power, so far as [it] thought it necessary and proper, under the seventeenth clause of the eighth section, first article, for carrying into execution the powers vested by the [C]onstitution in the judicial [department]"); *Ex parte* Royall, 117 U.S. 241, 249 (1886).

[91] Engdahl, *supra* note 8, at 103 (stating that "the Necessary and Proper Clause 'operates like a one-way ratchet,'" and laws that "diminish, curtail, or interfere" with the judicial power are not authorized by the clause).

[92] 514 U.S. 211, 218–19 (1995).

[93] *See id.* at 213 (citing Lampf v. Gilbertson, 501 U.S. 350, 364 (1991)).

[94] *See id.* at 214–15.

[95] *See id.* at 214–15, 240.

judgments."[96]

According to this reasoning, Congress cannot force courts to hear cases contrary to a final, binding judgment dismissing them.[97] The power to bind litigants through a judgment and to revise judgments is an exclusive judicial prerogative.

At a minimum then, core Article III judicial power is the power to decide individual disputes on the basis of impartial legal reasoning by rendering a final, dispositive judgment based on that reasoning. This power is irreducible.[98] Some commentators have suggested a more expansive view of core judicial power and other Article III provisions that would further restrict congressional action, including limiting Congress's power to strip jurisdiction.[99] This Article does not weigh in on that debate and proceeds, *arguendo*, utilizing the minimal and indisputable characterization of core judicial power above.

III. ARTICLE III'S GRANT OF CORE JUDICIAL POWER IMPLIES OTHER INDEPENDENT COURT POWERS THAT SUPPORT THE EXERCISE OF JUDICIAL POWER

Beyond the nucleus, or core, of judicial power that must inhere in any federal tribunal, courts have long recognized other independent or inherent powers necessary or helpful in effectuating the judicial power. These powers comprise two categories: essential independent power and non-essential independent court power.[100] Congress may not prevent the full exercise of Article III judicial power by regulating essential independent power. And while courts may exercise non-essential independent, or beneficial, powers without congressional authorization, Congress has full authority to limit or eliminate these powers.

[96] *Id.* at 218–19 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)); *see also* Miller v. French, 530 U.S. 327, 328 (2000) ("The Constitution prohibits one branch of the Government from encroaching on the central prerogatives of another. Article III gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior Article III courts.").

[97] *See* CHEMERINSKY, *supra* note 54, at 166.

[98] *Cf. Plaut*, 514 U.S. at 218–19.

[99] *See, e.g.*, Engdahl, *supra* note 8, at 103–04; Amar, *supra* note 22, at 206–07.

[100] *Cf.* Pushaw, *supra* note 2, at 847–48.

A. *Congress May Not Prevent the Full Exercise of Judicial Power by Regulating or Eliminating Independent Court Powers Necessary for the Exercise of Judicial Power*

Core judicial power would be an empty power if courts did not have certain ancillary powers necessary to fulfill the courts' core function. Accordingly, courts have recognized a category of independent power that might be most aptly described as essential.[101] Core judicial power is the constitutionally recognized minimal ability to decide disputed cases on the basis of legal reasons in the form of a final judgment.[102] This power flows from the Constitution and, like any other constitutional power, may be exercised fully—absent some other constitutional limitation. By way of comparison, take the pardon power. The Constitution empowers the President to pardon criminals.[103] Congress cannot reduce this power by, for example, allowing the President to pardon only certain crimes, or pardon on certain days, or only grant clemency instead of full pardons.[104] Doing so would encroach on the President's constitutional prerogative.[105] Likewise, Congress cannot reduce the judicial power in particular cases once Congress has vested it in the lower federal courts either by wholly preventing its exercise or reducing it.

But there are many roads Congress could potentially take, some of them not so obvious, leading to the abrogation or reduction of the Article III judicial power. This is because many necessary or "indispensable" steps lie between the initiation of a disputed case and a final judgment.[106] Complaints are filed, lawsuits proceed through the pre-trial adjudication process to trial, and ultimately, after trial or settlement, terminate in the form of a final judgment. If Congress undermined the parts of this process that are essential to deciding cases based on legal reasons, it would indirectly gain plenary control

[101] Professor Robert J. Pushaw Jr., describing these powers as "implied indispensable" powers, argues that "courts can infer a power only if they would otherwise be unable to perform their express constitutional functions competently." Pushaw, *supra* note 2, at 847.

[102] *See supra* Part II.A.

[103] U.S. CONST. art II, § 2, cl. 1.

[104] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 334 (1866) ("The power of pardon conferred by the Constitution upon the President is unlimited except in cases of impeachment. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. The power is not subject to legislative control.").

[105] *See id.*

[106] *See* Pushaw, *supra* note 2, at 847.

over the judicial power vested in Article III courts.[107] This is no more permissible than a law directly preventing courts from issuing final judgments in cases over which they have jurisdiction or otherwise interfering with Article III judicial power. Thus, Congress's ability to regulate essential, independent powers is limited.

The framework for determining the validity of an act of Congress that regulates an essential independent power proceeds in two steps.[108] First, courts should determine whether the power is essential to the exercise of Article III judicial power. By "essential," this Article contends that if the power did not exist, courts would not enjoy the ability to fully exercise Article III judicial power in a case over which Congress has vested them with jurisdiction.[109] Second, assuming that the independent power asserted by the courts is indeed essential, a congressional action regulating it is invalid if it eliminates or restricts the full exercise of the power.[110] Some courts and commentators have referred to this as "material" or "serious" impairment.[111]

---

[107] If Congress cannot instruct a court on how to decide a case *directly*, it follows that Congress cannot accomplish the same end *indirectly* by limiting or controlling the means with which courts decide cases. *Cf.* REDISH, *supra* note 22, at 47–48 (instructing courts "*how* to decide" cases is not a part of Congress's authority).

[108] *See* Pushaw, *supra* note 2, at 847 for a well-reasoned analytical framework to assess the propriety of courts' exercise of what he terms "implied indispensable powers." As a correlative principle, Pushaw argues that "[b]ecause the Constitution grants federal judges implied indispensable powers, it surely does not authorize Congress to destroy or impair them." *Id.* at 848. This Article agrees with the latter limiting principle, but disagrees with the former for reasons discussed below.

[109] *Cf.* Pushaw, *supra* note 2, at 847–48 (noting that "[b]ecause the Constitution grants federal judges implied indispensable powers, it surely does not authorize Congress to destroy or impair them").

[110] As discussed, *supra*, in *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, the Court considered whether a statute "materially interfere[d]" with the contempt power. Michaelson v. United States *ex rel.* Chi., St. Paul, Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65 (1924). Although the Court ultimately held that extending the jury trial right to criminal contempt in certain cases did not materially interfere with the power, the proposition that a valid law may not "materially" interfere with, or impair, an essential power is sound. "Material" roughly means meaningful, or bearing some logical connection with facts or result. *See* BLACK'S LAW DICTIONARY 1066 (9th ed. 2009) (material means "[h]aving some logical connection with the consequential facts").

[111] *See e.g.*, Pushaw, *supra* note 2, at 833, 847–48. This principle relates to step one of the analysis but is distinct. If Congress cannot constitutionally pass laws that reduce core judicial power, step one is a gatekeeper that validates any congressional action with respect to an "inherent" power disconnected from core judicial power. Step two determines if congressional action touching a power necessary to the exercise of core judicial power merely regulates the essential power or, instead, impermissibly reduces core judicial power indirectly. *Cf., e.g.*, Pushaw, *supra* note 2,

Professor Pushaw employs a similar test, which he labels as "strict necessity," to describe both the test for whether a court can exercise an independent power in the first place and whether Congress can restrict a power so exercised.[112] While this Article adopts part of his well-reasoned framework (Congress cannot eliminate or abrogate powers that are necessary for the exercise of Article III power), it rejects the contention that a power must be indispensable before a court can exercise it.[113]

For Pushaw, along with Professor Van Alstyne, courts can exercise a non-core power independently (i.e., without congressional authorization) only if the power is essential, or strictly necessary to the exercise of judicial power.[114] But courts plainly exercise non-essential (or "beneficial") powers on a daily basis without congressional authorization.[115] Thus, by conflating the analysis of whether a court can act absent congressional authorization with the question of whether Congress can prevent a court from acting, Pushaw's analysis tempts courts to describe inherent powers as indispensable when they really are not.[116] This creates the real risk that courts will later resist congressional regulation of putatively indispensable powers because they have previously been described as indispensable or "strictly necessary."[117] Thus, this Article adopts a

at 847–48.

[112] Pushaw describes the strict necessity test as allowing courts to "infer a power only if they would otherwise be unable to perform their express constitutional functions *competently*." *Id.* at 847 (emphasis added). The competent exercise of judicial power may, in many cases, be coextensive with the ability to fully exercise judicial power. For instance, either a court has the ability to render a final, binding judgment or it does not. A law preventing a court from rendering judgment in a case that is otherwise properly before it would prevent both the *full* and *competent* exercise of judicial powers. In other instances, competent exercise of judicial power might amount to something less than full exercise. In those cases, courts have the ability to exercise Article III judicial power fully.

[113] *Contra* Pushaw, *supra* note 2, at 843, 847–48.

[114] Pushaw, *supra* note 2, at 847–48; *see also* William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102, 129 (1976).

[115] *See* Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 313–15 (2010) (describing the widespread use of inherent power in the modern rules system).

[116] The use of inherent powers is widespread in courts, both historical and modern. *See* Pushaw, *supra* note 2, at 760–82 (cataloguing inherent powers precedent); Jordan, *supra* note 115, at 313–15 (acknowledging the same).

[117] This is not to suggest that all court resistance to inherent powers regulation is impermissible. Indeed, separation of powers concerns mandate that courts do so in some instances. *See, e.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of*

framework that acknowledges the reality that courts often utilize non-essential power in a gap-filling role while preserving Congress's ability to prohibit it. Accordingly, if a putative essential court power is not actually essential, Congress has plenary authority to regulate or abolish it. But where it is helpful to do so, courts may fill the gaps in prescribed procedures in the meantime.

Throughout history, essential powers have arisen in three principle areas.[118] First, courts have the essential power to maintain functionality by mandating both decorum and compliance with court orders.[119] Second, courts have the essential power to develop an accurate and impartial factual record.[120] Third, courts have the essential power to control their dockets.[121]

The contempt power is a good example of the first category of essential independent power and also a good example of how the framework for independent powers operates.[122] Although the contours of the contempt power have always been defined through a system of regulation shared by Congress and courts, Congress cannot eliminate the contempt power.[123] The Judiciary Act of 1789 recognized the contempt power but did little to regulate or control it.[124] In response to perceived judicial abuse of the broad contempt

Congress, 79 NOTRE DAME L. REV. 1677, 1688 (2004) (arguing that a limited number of inherent powers are beyond congressional regulation as a matter of separation of powers).

[118] Professor Pushaw contends that indispensable powers may arise through either Article III's "judicial power" language or its creation of "courts." *See* Pushaw, *supra* note 2, at 847. This is likely true because the term "court" implies certain necessary characteristics in any court Congress chooses to create. In most cases, however, any central attributes of "courts" are embodied in the concept of core judicial power. For instance, Professor Pushaw suggests that being a "court" means having the ability to regulate internal administrative affairs. *Id.* The power to do this is also likely to be essential to the adjudicatory function described by "judicial power." Authority is difficult to find, however, for the further conclusion that Congress cannot abrogate "court" powers unrelated to adjudication. *But see id.* at 848 (arguing that "essential 'court' power may be exercised regardless of whether adjudication has been affected.").

[119] *See* Michaelson v. U. S. *ex rel.* Chi., St. Paul, Minneapolis. & Omaha. Ry. Co., 266 U.S. 42, 66 (1924) (noting that Congress may regulate, but not eliminate, the contempt power).

[120] *See* Pushaw, *supra* note 2, at 847 ("[A]djudication requires impartial, relevant, and consistent fact finding.").

[121] *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 706–07 (1997) (noting that a court has "broad discretion to stay proceedings as an incident to its power to control its own docket" but also observing that this power is not without limits).

[122] *See Michaelson*, 266 U.S. at 66.

[123] *See id.*

[124] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789), *invalidated on other*

power set out in 1789, Congress passed a statute limiting the contempt power in 1831.[125]

While this statute has survived as a permissible regulation, rather than elimination or impermissible impairment, of the contempt power, the Court has since recognized that this power is "essential to the preservation of order in judicial proceedings."[126] Indeed, in *Ex Parte Robinson*, the Court observed that "[t]he moment the courts of the United States were called into existence and invested with jurisdiction over any subject" they attained the contempt power.[127] In *Robinson*, a court disbarred an attorney for refusing to obey a court order.[128] The Supreme Court overturned this use of the power, however, because Congress "limited and defined" contempt in the 1789 Act (and again in the 1831 Act) to be punishable by fine or imprisonment, not disbarment.[129] *Robinson* sets up an analytical framework that survives to this day: Congress may limit or regulate the contempt power, but it may not eliminate or impair the power in a way that prevents the full exercise of core judicial power.[130] By exclusively allowing for fine and imprisonment as punishment, Congress limited the contempt power. But this limitation did not eliminate the contempt power's ability to protect the day-to-day functions of courts.

The contempt power, however, has long been subject to criticism that it is easily abused, and drawing the lines between permissible regulation and material impairment can be difficult.[131]

---

grounds by Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[125] The 1831 Act limited contempt to misconduct in the court's presence (or close enough to hamper the court's function); disobedience or resistance of a lawful order, process, rule, decree, writ, or command; and misbehavior by court officers in their official transactions. Act of March 2, 1831, ch. 99, 4 Stat. 487, 488 (1831) (current version at 18 U.S.C. § 401 (2006)).

[126] *Ex parte* Robinson, 86 U.S. 505, 510 (1873).

[127] *Id. Cf.* REDISH, *supra* note 22, at 8–9 (noting that certain attributes, including independence from other branches, inhere in any courts Congress chooses to create).

[128] *See Ex parte Robinson*, 86 U.S. at 509–10.

[129] *See id.* at 512. The Court even insinuated that the contempt power of the *lower* courts might be subject to plenary congressional regulation, a position it would retreat from a few decades later in *Michaelson*. *See* Michaelson v. U.S. *ex rel.* Chi., St. Paul, Minneapolis. & Omaha. Ry. Co., 266 U.S. 42, 66 (1924).

[130] *See* Felix Frankfurter & James M. Landis, *Power of Congress in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1022 (1924) (arguing that inherent contempt power emanates "solely to the fact that a court has business in hand and must get on with it").

[131] *See* Pushaw, *supra* note 2, at 770 n.171 for a discussion of several notable examples of judicial exploitation of the contempt power, including *In re Debs,* 158

Perceived abuses of contempt resulted in additional acts of Congress regulating the power.[132] During the end of the nineteenth century and beginning of the twentieth century, courts were criticized for abusing the contempt power to punish labor activists, and Congress responded with a statute requiring a jury trial for contempt where the act underlying the contempt was also a separate criminal offense.[133] The Court sustained this regulation but again observed that courts have the contempt power when created and vested with jurisdiction.[134] And although Congress may regulate the lower courts' contempt powers, the Court noted that the powers "can neither be abrogated nor rendered practically inoperative" by an act of Congress.[135] The Court went on to uphold the statute at issue because it did not "materially" impair the lower courts' contempt powers.[136]

The Court's protection of the contempt power is well founded. The contempt power is essential to the exercise of core judicial power because it would be impossible to decide at least some cases if courts could not punish courtroom misconduct or certain out-of-court misconduct. For instance, it is impossible to decide cases if courts cannot hold hearings in a case because a litigant stands and shouts profanities in the courtroom every time court convenes. Likewise, it would be impossible to decide some cases if witnesses refused to obey subpoenas and testify, depriving the court of a factual record upon which to base a legal decision. The contempt power provides a mechanism for punishing non-compliance with such subpoenas and is thus an essential part of the adjudication process.

Both statutory and rule-based restrictions, to date, have not eliminated or materially impaired the contempt power.[137] Congress has successfully required juries for certain contempt actions, placed

U.S. 564 (1895), in which the Court upheld contempt sanctions punishing labor activists for conspiring to violate railroad laws and *Walker v. City of Birmingham*, 388 U.S. 307 (1967) in which the Court upheld contempt convictions against Martin Luther King, Jr.

[132] *See, e.g.*, 18 U.S.C. § 402 (2006).

[133] *See id.*

[134] *See Michaelson*, 266 U.S. at 66.

[135] *Id.*

[136] *Id.* at 65–66.

[137] Federal Rule of Criminal Procedure 42 both contemplates the contempt power and regulates it. The rule tracks the traditional contempt power but adds additional protections consistent with the Court's extension of constitutional criminal procedure guarantees to contempt cases. *See* FED. R. CRIM. P. 42; *see also* Young v. United States, 481 U.S. 787, 795–801 (1987) (requiring a disinterested prosecutor); Bloom v. Illinois, 391 U.S. 194, 197 (1968) (extending the right to jury trial to contempt sanctioned by substantial punishment).

restrictions on contempt for those not physically present in court, limited contempt to the violation of *lawful* orders, and regulated both the amount of fine and length of imprisonment that courts can impose for contemptuous action.[138] While these restrictions narrow the power, they do not restrict it in a way that prevents the exercise of core judicial power.[139] To date, imprisonment and fine, even in limited amounts, have proven sufficient to encourage compliance and decorum in the courts. Thus, contempt still serves its essential function. If, however, Congress attempted to regulate contempt in a way that intruded on the ability of courts to decide cases and otherwise exercise Article III judicial power, then the regulation would be invalid.

Courts also have the essential, independent power to develop an accurate factual record, a category that comprises several distinct sub-powers.[140] At the outset, the power to develop a factual record is essential, in itself, to the exercise of Article III judicial power. Indeed, it is impossible to decide cases without a factual record. Applying the law to the facts and reaching a result was central to adjudication when the Constitution was drafted and ratified and remains so today. If Congress prohibited courts from developing a record, they could not decide cases.

Despite congressional regulation of the subpoena power, the power to compel testimony is a necessary sub-part of the power to develop an accurate factual record. Congress has long regulated the power to subpoena witnesses and compel testimony.[141] But the power to compel testimony is essential to fact-finding and, accordingly, adjudication; therefore, Congress cannot eliminate or materially impair it.[142] The power to develop a factual record would be an empty one without the power to compel the creation of such a

---

[138] *See* 18 U.S.C. §§ 401, 402 (2006).

[139] *See, e.g.*, *Michaelson*, 266 U.S. at 66–69 (upholding the Clayton Act's jury trial requirement for certain classes of contempt while noting the critical relationship the contempt power has with the exercise of judicial power).

[140] See Pushaw, *supra* note 2, at 847 for a basic discussion of fact finding as a necessary part of adjudication. *See also* Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rulemaking*, 55 MICH. L. REV. 623, 642–44 (1957) (noting that the court's ability to find facts is a necessary feature).

[141] *See* FED. R. CIV. P. 45(a) (providing a mechanism to compel testimony of witnesses); 28 U.S.C. § 1826(a) (2006) (stating that refusal to provide testimony can result in summary confinement "until such time as the witness is willing to give such testimony or provide such information").

[142] *See* Pushaw, *supra* note 2, at 847 (arguing that the power to compel testimony is indispensable).

record. Even if some witnesses testify voluntarily, some witnesses will not, making compelled testimony a basis of fact-finding in at least some cases.

Finally, courts have several essential, independent powers to regulate and control their own dockets.[143] For instance, courts have the power to stay cases or continue trial settings.[144] This power is essential to the exercise of core judicial power because it guarantees that the court can meaningfully engage in the judicial function.[145] For example, if Congress prohibited all continuances and all stays, courts with busy dockets would be overwhelmed and not able to adjudicate the merits of each case based on legal reasons. Taken to the extreme, cases would be dismissed or otherwise decided based on the arbitrary circumstances of the court in which they were filed, namely court congestion. Thus, Congress may not eliminate the power to stay and continue cases because doing so would strip some Article III courts of the power to decide these cases.

Congress's ability to regulate essential independent judicial power should always be tested against the impact that the regulation will have on Article III judicial power. Often, history is instructive on the contours and limits of essential independent power, but it is not binding. If eliminating or restricting a power does not interfere with or eliminate constitutional judicial power—because the allegedly essential power is unrelated to Article III judicial power, or exists through some other mechanism, or because the regulation restricts the essential power without affecting judicial power—then Congress has the power to do so. Indeed, the third category of independent court power—non-essential independent power (sometimes known as beneficial or gap-filling power)—is subject to the plenary control of Congress.

B. *Congress Has the Plenary Authority to Regulate or Eliminate Non-Essential Independent Judicial Power*

Courts have recognized other independent powers—powers that are helpful or beneficial to their function but not essential to the exercise of Article III judicial power. This category of power is best

[143] *See, e.g.*, Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).
[144] *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 706 (1997).
[145] *See Landis*, 299 U.S. at 254 ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

described as non-essential independent power.[146] Both the Constitution and the records of the convention are silent with respect to who has the power to prescribe the practices and procedures of the federal courts.[147] But from the beginning, both Congress and courts recognized that Congress has the power to regulate court procedures.[148] Scholars continue to debate the propriety of the Rules Enabling Act (REA), and this Article does not take a position on the propriety of the REA.[149] Rather, I observe that the REA rulemaking scheme continues to develop procedural rules that courts continue to follow.[150] While the rules are comprehensive, they are not exhaustive. To be sure, Congress's ability to regulate court procedures does not

[146] Commentators have affixed various labels to this category of power. *See* Ryan, *supra* note 26, at 776–79 (describing non-essential independent power as the "weak version" of inherent power); Pushaw, *supra* note 2, at 848–49 (discussing the "beneficial powers" vested in federal courts); Jordan, *supra* note 115, at 313–15 (noting that courts have long employed "inherent" power to fill procedural gaps where useful).

[147] *See* Ryan, *supra* note 26, at 767 ("It is common ground that, at the Constitutional Convention, the Framers did not address the issue of whether the judicial power granted to the federal courts includes the power to establish court practices and procedures."). But the records of the state ratification conventions, however, do contain some slight indications that Congress could prescribe procedural rules. *See id.* at 776–79 (citing 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110 (2d ed. 1866)). Hamilton also observed that the legislative power "to constitute courts is a power to prescribe the mode of trial" when arguing that Congress would have the power to prescribe jury trials in civil causes. *See* THE FEDERALIST NO. 83, at 419 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[148] *See, e.g.*, Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789) (stating that lower courts "have the power to grant new trials," "impose . . . necessary oaths and affirmations," and punish contempt, provided that lower courts had power to "establish all necessary rules for the orderly conducting business" so long as those rules did not conflict with other law), *invalidated on other grounds by* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); The Process Act of 1789, ch. 21, 1 Stat. 93, 93–94 (1789) (prescribing that federal courts should adopt the procedures of the state courts from the state in which the federal courts sat); *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) ("Congress has . . . undoubted power to prescribe rules for the courts it has created"); Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts.").

[149] *See, e.g.*, Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 734–35 (1995) (arguing that procedural rulemaking is a uniquely judicial function). *But see, e.g.*, Martin H. Redish, *Federal Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 724–26 (1995) (arguing that rulemaking is well within Congress's prerogative).

[150] *See, e.g.*, *Shady Grove*, 130 S. Ct. at 1442 ("Congress has . . . undoubted power to prescribe rules for the courts it has created.").

translate into an actual rule on every conceivable procedural matter.[151] As a result, gaps exist. And courts have consistently recognized their authority to fill gaps to maintain efficient and effective operation.[152]

Some commentators argue that courts should exercise independent powers only when doing so is absolutely indispensable, even in the face of rulemaking silence.[153] The better approach, taken by William Ryan, recognizes that procedural rules will always contain gaps and that courts can and do fill those gaps—even if the gaps are not significant enough to cripple the courts—as a type of "specialized federal common law."[154] Moreover, insisting that courts exercise independent power only when doing so is indispensable ignores what courts actually do.[155] The case reporters are filled with examples of courts, including the Supreme Court, exercising powers that are convenient but not indispensable. Examples include dismissal for *forum non-conveniens*,[156] dismissal for want of prosecution,[157] sanctioning litigants for misconduct, and appointing special masters or auditors to assist with a case.[158]

While this Article takes a position on the minimum features of Article III judicial power, it does not purport to speak to the outer

[151] Federal Rule of Civil Procedure 83(b) contemplates gaps and allows judges to fill them with local rules and practices. *See* FED. R. CIV. P. 83(b). Because Rule 83 allows judges to do by rule what they sometimes do by asserting inherent power, Professor Samuel Jordan contends that the use of inherent power as a gap-filler is gratuitous. *See* Jordan, *supra* note 115, at 314–15.

[152] *See, e.g.*, Jordan, *supra* note 115, at 313 n.6 (quoting United States v. Hudson, 11 U.S. 32, 34 (2011)) ("[C]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.").

[153] Van Alstyne, *supra* note 114, at 118, 129 (1976) (arguing that courts and the executive may only assert inherent powers when the need to do so is indispensable); Pushaw, *supra* note 2, at 847 (2001) (same).

[154] Ryan, *supra* note 26, at 777–78 (citing Henry Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964)).

[155] *See* FED. R. CIV. P. 83(b) (expressly contemplating that judges will face procedural gaps); Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules.").

[156] *See, e.g.*, Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 429 (2007) (recognizing federal courts' "common law" power to dismiss cases on the basis of *forum non-conveniens*).

[157] *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 629 (2007) ("The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted.").

[158] *See, e.g.*, *Ex parte* Peterson, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.").

limits of the power. For instance, judicial power may comprise something more than just the power to decide. William Ryan argues persuasively that the power to decide cases includes, necessarily, some level of analytical independence, citing *United States v. Klein*.[159] Ryan essentially argues that *Klein* stands for the proposition that Congress cannot dictate how a court decides a pending case.[160] This argument may be subject to the criticism that Congress directs the outcome of cases all of the time, including pending cases and cases on direct review, through retroactive legislation.[161] This Article does not weigh in on the longstanding debate about what *Klein* means. In any event, Ryan contends that *Klein* and other decisions support a notion of judicial power that prevents Congress from interfering in the judicial decision-making process to effectively decide the outcome of cases.[162] This is certainly a broader concept of judicial power than this Article advocates.

And if the minimum attributes of judicial power are something greater than what this Article describes, then it necessarily follows that what is essential to support those features must be greater as well. Assuming, for the sake of argument, that judicial power includes a certain level of analytical independence, some traditional inherent powers are still plainly not necessary to support it. This is because at least some traditionally inherent powers have no connection to the power to decide cases or the process by which a court decides.

The power to dismiss cases for want of prosecution and for *forum non-conveniens* is not essential.[163] The power to dismiss a case stands in stark contrast with the power to stay or continue cases. While the power to dismiss a case for want of prosecution may be *helpful* to the court in conducting its business because it will have more time for other matters that are being prosecuted diligently, it is not essential. This is true even if the court faces an incredibly congested docket. If congestion is interfering with a court's ability to decide cases based on legal reasons, it has the power to stay or continue certain cases

[159] *See* Ryan, *supra* note 26, at 791–92 (arguing that *United States v. Klein*, 80 U.S. 128 (1870), protects the analytical independence of federal courts).

[160] *See id.*

[161] *See, e.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145 (1976) (holding that Congress amended the relevant statute to provide discrimination protection based on pregnancy after Supreme Court held pregnancy did not qualify).

[162] *See* Ryan, *supra* note 26, at 791–92.

[163] *See, e.g.*, Pushaw, *supra* note 2, at 852 (disagreeing with the result in *Link v. Wabash R.R. Co.*, and observing "a court's ability to dismiss cases for want of prosecution is not essential to its functioning").

while it considers others.[164] Because staying or continuing cases may be vital to proper adjudication in some circumstances, however, the power to stay is essential, as described above. Thus, Congress may regulate, or totally eliminate, the power to dismiss for want of prosecution.[165]

Likewise, the power to dismiss for *forum non-conveniens* is not essential to the exercise of Article III judicial power. The reasons typically underlying a *forum non-conveniens* dismissal include both private and public interests.[166] Among the public interests, courts point to court administration concerns, like docket burdens on the federal courts, and the interests of the foreign tribunal.[167] Neither of those concerns implicate a threat to Article III judicial power because in the case of the former, courts can always stay actions to properly adjudicate each one, and in the case of the latter, respect for international tribunals is not a cognizable Article III judicial power interest. Thus, eliminating the power would not interfere with court power to decide cases, nor would it interfere with courts' analytical processes. While the power to dismiss for *forum non-conveniens* may be helpful, it is not necessary to effectuate core judicial power.

While the exercise of non-essential independent power is firmly entrenched in both doctrine and practice,[168] Congress has plenary authority to abrogate non-essential powers.[169] Recent cases have raised the question of whether another traditional independent power, the power to vacate judgments for fraud on the court, is essential or merely beneficial.

---

[164] *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 706 (1997) (noting that courts have broad powers to stay cases and manage their docket).

[165] *Cf., e.g.*, Pushaw, *supra* note 2, at 847.

[166] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257–60 (1981) (assessing both public and private interest factors when deciding that a foreign forum was more convenient).

[167] *Cf., e.g.*, *id.*; *see also* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430 (2007) ("Dismissal for *forum non conveniens* reflects a court's assessment of a range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.").

[168] *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 39–41 (1991); *see also* Pushaw, *supra* note 2, at 847–49.

[169] *See, e.g.*, *Chambers*, 501 U.S. at 39–41; *see also* Pushaw, *supra* note 2, at 847–49.

IV. CONGRESS CANNOT PRECLUDE THE EXERCISE OF THE TRADITIONAL INDEPENDENT POWER TO VACATE JUDGMENTS FOR FRAUD ON THE COURT

The power to vacate judgments for fraud on the court allows courts to vacate otherwise final judgments when a court officer, including an attorney, commits fraud that results in an improper final judgment.[170] Although the precise limits of the doctrine are the subject of dispute, typical examples of fraud on the court have included document falsification by an attorney, a judge acting under the influence of a bribe, or an attorney wrongfully withholding evidence. The power extends to judgments for which the time to appeal has long since passed.[171] Indeed, the power to vacate judgments for fraud on the court does not have a firm time limit and could theoretically be exercised, in the absence of a valid laches defense, at any future time after the fraud is discovered.[172]

This power has run head on into Congress's attempt to limit successive habeas applications by inmates. In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA).[173] One of AEDPA's purposes was to shorten the habeas process and eliminate repetitive, unmeritorious habeas claims that were supposedly clogging the federal courts.[174] To do so, AEDPA placed onerous restrictions on "successive" habeas applications.[175]

Last year, AEDPA collided with the power to vacate judgments for fraud on the court. The Sixth Circuit held, in *Johnson v. Bell*, that the fraud on the court power was subject to AEDPA's restrictions even if those restrictions could ultimately eliminate the power in certain classes of cases.[176] This decision effectively subordinated an essential independent power, the fraud on the court power, to an act of Congress. Both the history of the fraud on the court power, and the power's essential nature, mandate that *Johnson* and other cases following in its wake be overturned.

---

[170] *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944).

[171] *See, e.g.*, *id.* (overturning a judgment founded on a trade publication an expert was wrongfully paid to write).

[172] *See, e.g.*, *In re* Whitney-Forbes, Inc., 770 F.2d 692, 698 (7th Cir. 1985) ("The doctrine of laches applies to such [independent] actions.").

[173] *See* 28 U.S.C. § 2244 (2006).

[174] *See* Benjamin R. Orye III, *The Failure of Words: Habeas Corpus Reform, The Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. 2255(1)*, 44 WM. & MARY L. REV. 441, 453 (2002).

[175] *See id.* § 2244(b)(1).

[176] 605 F.3d 333, 335 (6th Cir. 2010).

A. *The History of the Fraud on the Court Power Suggests That It Is Essential to the Exercise of Article III Judicial Power*

The power to vacate a judgment for fraud on the court gives courts the power to vacate a final judgment, and thus reopen a case after the trial court's jurisdiction over the case has expired.[177] This power is available when a judicial officer commits fraud during the litigation process.[178] Fraud on the court is usually discovered long after the judgment is final and cannot be vacated through normal procedural or appellate means. The history of fraud on the court indicates that the power arose out of necessity and that the circumstances that gave rise to it persist in modern courts.[179] While the history of any particular court power is not dispositive on the question of whether the power is essential, the origin of a particular power can shed light on its necessity.

The "savings clause" of Rule 60(d) (formerly Rule 60(b)) recognizes fraud on the court as an inherent basis for relief from a final judgment,[180] but the rule did not create the power to obtain relief based on fraud on the court.[181] Rather, the rule is rooted in a long line of precedent recognizing the right to relief from judgments procured by fraud.[182] Actionable fraud in the judgment relief context is delineated into two primary categories: inter-party fraud and fraud on the court.[183]

Before Rule 60(d), courts had limited their own independent power to vacate judgments for inter-party fraud. This limitation traces its roots, in part, to nineteenth century cases recognizing the power of a court to relieve one party from a final judgment procured

---

[177] *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944); *see also* FED. R. CIV. P. 60(d) (observing that the Federal Rules of Civil Procedure do not disturb the traditional inherent power to vacate judgments for fraud on the court).

[178] *See Hazel-Atlas Glass, Co.*, 332 U.S. at 244.

[179] *See, e.g.*, *id.*; Toscano v. C. I. R., 441 F.2d 930, 937 (9th Cir. 1971).

[180] *See* FED. R. CIV. P. 60(d)(3) ("[T]his rule does not limit a court's power to . . . set aside a judgment for fraud on the court."); *see also* Dustin B. Benham, Twombly *and* Iqbal *Should (Finally!) Put The Distinction Between Intrinsic and Extrinsic Fraud Out of Its Misery*, 64 SMU L. REV. 649, 659–67 (2011) (exploring the historical development of Rule 60(b), (d) and its relationship to fraud on the court claims).

[181] *Cf. Hazel-Atlas Glass Co.*, 322 U.S. at 244.

[182] *See, e.g.*, United States v. Throckmorton, 98 U.S. 61, 68 (1878); *Hazel-Atlas Glass Co.*, 322 U.S. at 244.

[183] *See* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.81[1][b][v] (3d ed. 1999) [hereinafter MOORE'S] (noting that courts attempt to, and should, "distinguish between an ordinary claim of fraud between parties that resulted in a wrongly procured judgment and a special category of fraud claim that affects the very integrity of the judicial process itself").

by the fraud of another party.[184] In these cases, the courts developed what has become known as the intrinsic fraud rule. According to this rule, courts could vacate judgments for inter-party fraud only when the fraud was *extrinsic* to the underlying proceeding instead of *intrinsic*. *Throckmorton v. United States* remains the style case on the distinction between intrinsic and extrinsic fraud and the root of modern judgment-relief precedent in the fraud context.[185] In *Throckmorton*, the Supreme Court limited litigants' power to reopen final judgments for fraud to situations where the fraud essentially prevented the party from coming to court or presenting a claim (i.e., extrinsic fraud).[186] Under the *Throckmorton* test, most egregious litigation fraud, like falsification of documents or perjury (both forms of intrinsic fraud under *Throckmorton*), was not a basis to reopen a judgment.[187] The pressure that this severe limitation put on the judgment relief system arguably led to the creation of the modern fraud on the court doctrine.

After limiting judgment-modification power for inter-party fraud, the Supreme Court revisited the issue of judgments procured through litigation fraud in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*[188] The alleged fraud (fabrication of a trade publication and false testimony) appeared to be intrinsic under the standard set out in *Throckmorton*. But the Court reopened the case and decisively revived the independent power to vacate judgments for what has become known as "fraud on the court."

In *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, Hartford Empire Co. (Hartford) sought a patent from the U.S. Patent Office for a machine that helped make glass bottles.[189] The patent office was largely hostile to Hartford's patent application, leaving Hartford looking for a way to convince the office to grant the patent.[190] Hartford ultimately concocted a scheme to draft a phony trade article touting the novelty of its invention, to be signed by a prominent bottling expert.[191] Based, at least in part, on the article, the patent

[184] *See Throckmorton*, 98 U.S. at 68.
[185] *See id.*
[186] *See id.* at 66–68.
[187] *See id. But see* Marshall v. Holmes, 141 U.S. 589, 596–97 (1891) (granting relief for fraud that appears intrinsic under the *Throckmorton* standard articulated a few years earlier).
[188] 322 U.S. 238, 244–45 (1944).
[189] *See id.* at 240.
[190] *See id.*
[191] *See id.* at 239–41.

office granted the application in 1928.[192] Hartford later filed suit against Hazel-Atlas Glass Company (Hazel) for patent infringement, using its new patent.[193] The plaintiff failed to prove infringement.[194] Hartford appealed the unfavorable decision, and the circuit court reversed the district court's decision, "[q]uoting copiously from the article" to support its finding that Hazel infringed on Hartford's patent.[195]

Years later, after learning that the article was falsified and that Hartford paid the expert to sign it, Hazel filed a petition to seek relief from the original 1932 judgment in the circuit court.[196]

Justice Black, writing for the Court, observed that "where enforcement of the judgment is manifestly unconscionable," a court has the independent power to grant relief from a long-since final judgment.[197] Although the judgment from which Hazel sought relief was nine years old (well outside of the term that the court rendered it in), the Court granted Hazel relief.[198] Hartford's conduct amounted to a deliberate, calculated scheme to "defraud . . . the Circuit Court of Appeals" in the original action.[199] Critical to the Court's decision, and the most important material distinction from *Throckmorton*, was the fact that Hartford's attorney participated directly.[200] Because an attorney is a court officer, Hartford's conduct not only injured the opposing party but also injured the integrity of the courts, thus making it actionable.[201]

The Court granted relief from the judgment, formally recognizing the independent power to vacate judgments for fraud on the court even when those frauds would appear to be merely intrinsic absent the participation of a court officer.[202] Beyond righting a wrong for an individual party and protecting the Court's integrity, there is an implication of necessity in what the court did. The fraud in *Hazel-Atlas* was so egregious that the nefarious court officer had prevented the court from deciding the case based on impartial legal reasons.

[192] *See id.* at 240–41.
[193] *See id.* at 241.
[194] *See Hazel-Atlas Glass Co.*, 322 U.S. at 241.
[195] *See id.* at 241–42.
[196] *See id.* at 241–43.
[197] *Id.* at 244–45 (citation omitted).
[198] *Id.* at 244–51.
[199] *Id.* at 245.
[200] *See Hazel-Atlas Glass Co.*, 322 U.S. at 246–47.
[201] *See id.*
[202] *See id.* at 251.

Instead, the Court had been effectively hijacked, by its own officers, for the private purposes of a particular party.

Since *Hazel-Atlas*, both the Supreme Court and lower federal courts have continued to recognize the independent power to vacate judgments for fraud on the court.[203] In its modern incarnation, fraud on the court is fraud that seriously affects the judicial machinery or involves officers of the court itself.[204] Most circuits agree that fraud on the court requires the participation of a court official or officer, including attorneys.[205] Whatever the exact parameters of the fraud on the court doctrine, courts and commentators, with near unanimity, have confirmed that the power is "inherent," or independent, emanating from the court itself..[206] The modern Supreme Court, writing about Rule 60(b), which recognized the fraud on the court power before Rule 60(d) was restyled, held: "[Rule 60(b)] confirms *the courts' own inherent and discretionary power*, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity."[207]

Thus, the power to vacate a judgment for fraud on the court is an independent power, deeply rooted in American court practice and reaffirmed by the modern Court. The remaining important question about the fraud on the court power, then, is whether the power is essential to the exercise of core judicial power and not just beneficial. If it is, indeed, essential, Congress's attempts to eliminate it are constitutionally invalid.

---

[203] *See, e.g.*, *In re* Intermagnetics Am., Inc., 926 F.2d 912, 916 (9th Cir. 1991) ("[F]raud upon the court includes both attempts to subvert the integrity of the court and fraud by an officer of the court.").

[204] *See, e.g.*, *id.* (stating that misconduct of court officer is fraud on the court); Great Coastal Exp., Inc. v. Int'l Bd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 675 F.2d 1349, 1358 (4th Cir. 1982) (noting that the definition of fraud on the court is "elusive" but includes fraud "in which the integrity of the court and its ability to function impartially is directly impinged").

[205] *See, e.g.*, Demjanjuk v. Petrovsky, 10 F.3d 338, 348–50 (6th Cir. 1993).

[206] *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 234 (1995); *see also* MOORE'S, *supra* note 183, at ¶ 60App.108[3] ("A court has inherent power to set aside a judgment for fraud practiced upon it, and amended Rule 60(b) states that it does not limit the power of a court so to do.").

[207] *Plaut*, 514 U.S. at 234 (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944)) (emphasis added). Note that the savings clause that recognizes the fraud on the court power has now been moved to Rule 60(d) as part of the restyling of the civil rules. FED. R. CIV. P. 60(d).

B. *The Power to Vacate Judgments for Fraud on the Court Is Essential to the Full Exercise of Judicial Power*

The independent power to vacate judgments for fraud on the court is essential to the exercise of the core judicial function for at least two reasons. First, issuing a judgment after adjudicating cases based on legal reasons is a central part of the core judicial power, and the power to vacate judgments for fraud on the court is essential to the exercise of that power.[208] Second, the power to vacate judgments for fraud on the court is essential to preserve at least a modicum of integrity consistent with what it means to be an Article III "court."[209]

First, the power to vacate judgments for fraud on the court is essential to the core power of a court rendering a judgment based on legal reasons as appropriate in the particular case. Fraud on the court necessarily involves court officers, like judges or attorneys, working to undermine the integrity of the adjudication process, specifically with the goal of obtaining a result for the benefit of a personal or professional interest.[210] For instance, if an attorney, acting as a court officer, engages in a well-hidden scheme to suborn perjury, and the perjury undermines the integrity of the court system by decisively affecting the outcome of the proceedings, the court was deprived of the power to render a judgment based on legal reasons. Rather, the court in that instance bases its judgment on the fraudulent, extra-legal actions of one of its own officers. The power to vacate a judgment for fraud on the court, and the correlative power to reissue a judgment based on the true merits of the case without the fraudulent influence of a court officer, is necessary to render at least one judgment based on legal reasons—a core judicial prerogative.

In part, the concept of fraud on the court as an essential power involves properly divorcing court entities working under the corrupt influence of their officers from the Article III concept of "judicial power" vested in "courts." When, for instance, an Article III judge decides a case based on a bribe instead of legal reasons, this Article contends that the Article III court, because of the extra-legal actions of the judge, never had the chance, or power, to properly pass

[208] *See* Pushaw, *supra* note 2, at 847; Liebman & Ryan, *supra* note 67, at 771 (power to decide cases means "dispositively to arrange the rights and responsibilities of the parties on the basis of independently developed legal reasons").

[209] *Cf.* Pushaw, *supra* note 2, at 848 ("[E]ssential 'court' power may be exercised regardless of whether adjudication has been affected.").

[210] *See, e.g.*, *Hazel-Atlas Glass Co.*, 322 U.S. at 244, 246–47.

judgment on the merits of the case as an Article III court.[211] In effect, the court's machinery turned against itself to defeat its essential purpose: the decision of cases based on legal reasons, not extra-legal ones.[212]

A likely response to this position is that, in our adversarial system of justice, courts are deprived of the chance to pass on the *true* merits all of the time. This might result from a multitude of practical circumstances: a party loses a key document, an attorney simply forgets to put on a key witness, or a judge or jury forgets a key piece of evidence when deciding the case. The critical distinguishing feature of each of these circumstances is that each one involves court officers working to accomplish the judicial function, albeit imperfectly. Fraud on the court is different.[213] With fraud on the court, court officers are actively working to render a judgment *not* based on the merits but rather based on extra-judicial considerations, like self-interest, corruption, or extra-legal bias.[214] By doing so, they are not functioning as courts, but rather as the instruments of the individuals who have fatally corrupted them.

The power to vacate judgments for fraud on the court is necessary to give courts power, even if only in the long run, to properly adjudicate cases at least one time. If Congress were to strip courts of the power, it would essentially prevent them from deciding some cases based on legal reason even after blatant corruption becomes apparent.[215]

Contrast the power to vacate judgments for fraud on the court with the power to vacate or modify judgments for other reasons.[216]

---

[211] *See, e.g.*, THE FEDERALIST NO. 39, *supra* note 7, at 197 (James Madison) (characterizing the proper exercise of judicial power; "[t]he decision [of a particular case] is to be *impartially* made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this *impartiality*") (emphasis added).

[212] *See, e.g.*, *id.*

[213] *See* Great Coastal Exp., Inc. v. Int'l Bd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., 675 F.2d 1349, 1358 (4th Cir. 1982) (fraud on the court is fraud that undermines the judicial function).

[214] *See, e.g.*, *Hazel-Atlas Glass Co.*, 322 U.S. at 241–44 (attorneys conspire with party and expert witness to fabricate article as evidence of patent novelty; court finds fraud on the court).

[215] *Cf.* Liebman & Ryan, *supra* note 67, at 772; THE FEDERALIST NO. 78, *supra* note 7, at 395 (Alexander Hamilton) (courts should not exercise "WILL instead of JUDGMENT").

[216] *Compare Great Coastal Exp., Inc.*, 675 F.2d at 1357–58 (fraud on the court is construed narrowly and is distinct from Rule 60(b)(3) fraud), *with* FED. R. CIV. P. 60(b)(1)–(6) (allowing courts to vacate judgments for, among other reasons,

Although courts have the undoubted power to modify their judgments in some instances, this power is usually not beyond the purview of congressional action. For instance, the Rules appropriately limit the power of district courts to modify or vacate their judgments for most substantive reasons to one year from entry.[217] This limitation is appropriate because a court error, or even the malfeasance of a party, is distinct from fraud on the court. A mistake in adjudication does not mean that the court was deprived of the power to adjudicate the matter. The court simply exercised its power imperfectly or based on imperfect information. The balance between finality and perfection in judgments is the subject of a long debate, but courts and commentators, on the whole, have never doubted the power of Congress to make even erroneous judgments final in most cases.[218] The power to adjudicate in such cases is not hampered in normal circumstances because courts had the opportunity to pass on the merits of the case at least once.[219] This makes congressional limitations on normal judgment relief

mistake, accident, new evidence, discharge, and regular fraud).

[217] Rule 60(c) requires motions brought on the grounds described in Rule 60(b)(1)–(3) to be brought within a "reasonable time," no later than one year after the entry of judgment. FED. R. CIV. P. 60(b)(1)–(3), (c). These reasons include mistake, newly discovered evidence, and regular fraud. FED. R. CIV. P. 60(b)(1)–(3). The remaining 60(b) grounds described in 60(b)(4)–(6), along with fraud on the court claims, may be raised at any reasonable time. FED. R. CIV. P. 60(b)(4)–(6), (c), (d).

[218] *Cf., e.g.*, Mary Kay Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 85–86 (1978) (lamenting the fact that uncertainty produced by Rule 60(b)(6) has "perverted justice" by championing "ultimate right" at the expense of finality and suggesting rule based solutions could make more judgments final).

[219] In both *Hazel-Atlas* and more recently in *Calderon v. Thompson*, the Supreme Court recognized that the fraud on the court power and the power to vacate final judgments in some circumstances are essential to the proper function of the judiciary. *Hazel-Atlas Glass Co.*, 322 U.S. at 244; Calderon v. Thompson, 523 U.S. 538, 549–50, 567 (1998). In *Hazel-Atlas*, the Court held that the independent power to vacate final judgments developed "to fulfill a *universally recognized need* for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the [final judgment rule]." *Hazel-Atlas Glass Co.*, 322 U.S. at 244 (emphasis added). Similarly, while disagreeing on the outcome of the merits of an actual innocence claim, in *Calderon v. Thompson*, the Court unanimously agreed that appellate courts also have the independent power to recall their mandates. *See Calderon*, 523 U.S. at 549–50, 567 (majority and dissent agree that courts of appeals have the inherent power to recall their mandates). Having described the power as both inherent and a universal necessity, the Court properly recognized that correction of judgments for, among other reasons, fraud on the court allows courts to properly adjudicate cases. *See Hazel-Atlas Glass Co.*, 322 U.S. at 244; *Calderon*, 523 U.S. at 549–50, 567.

mechanisms appropriate where the same limitation on the fraud on the court power would not be.

Second, the fraud on the court power protects the ability of the judicial branch to function as the "courts" described in Article III. Integrity and the power to sanction certain offensive conduct are critical features of any "court." Judicial entities hijacked by fraudulent officers who are making and influencing decisions based on extra-legal considerations are not actually functioning as courts.[220] Indeed, any system that allows judicial and court officer corruption to continue unchecked can hardly be called a "judicial" or "court" system at all. This is because our Framers envisioned courts as impartial entities tasked with deciding cases based on legal reasons. The Framers were adamant that the court system not become a tool of the sovereign or any particular extra-legal interests.[221]

This vision of courts as impartial, independent bodies is exemplified by the structural separation the Framers provided when making the judiciary its own branch and the lifetime appointments clause, which protects individual judges from outside influence. Both of these systemic protections were intended to make a "court" something separate and independent from the other two branches. If fraud on the court by a judge or prosecutor, on behalf of another branch or an individual, cannot be remedied when it is detected, the framers' original structural protections of the judicial branch become moot because the interference could continue unchecked.[222] And the entity that is functioning under the influence of such corruption without the ability to correct it cannot be called a court in the Article III sense. Moreover, unsanctioned fraud, whenever it is detected, also fatally undermines the public's perception of the judiciary as an impartial adjudicative body. This spawns more fraud and less respect for the process as a whole, creating a cycle of deteriorating judicial independence and integrity. Thus, the power to sanction fraud on the court by vacating or modifying a judgment is essential to the continued proper function of Article III courts. Accordingly, the power to vacate a judgment for fraud on the court is an independent power that should only be classified as essential.

---

[220] *Cf.* Pushaw, *supra* note 2, at 848.

[221] *See, e.g.*, THE FEDERALIST NO. 39, *supra* note 7, at 197 (James Madison) (Article III courts are impartial).

[222] Of course, impeachment might be available in some circumstances to remedy rampant corruption in a particular court, but impeaching a judge without the correlative power to revisit the judge's wrongful judgments would not be sufficient to make the fraud on the court power non-essential.

C. *The Supreme Court Inadvertently Creates a Constitutional Dilemma with* Gonzalez v. Crosby

In *Gonzalez v. Crosby*, the Court answered the question of whether a Rule 60(b) proceeding to vacate a final habeas corpus judgment should be construed as a successive habeas petition, subject to AEDPA's restrictions on successive habeas actions.[223] Gonzalez, a Florida state prisoner, sought Rule 60(b) relief from the previous denial of a habeas petition.[224] His 60(b) claim was that a new procedural ruling by the Supreme Court mandated that the previously denied petition be considered anew.[225] The Supreme Court ultimately agreed with Gonzalez and found that his Rule 60 claim was not subject to AEDPA's successive habeas bar.[226] Unfortunately, the opinion inappropriately subjected many other Rule 60(b) claims to AEDPA's onerous restrictions on second habeas petitions.

Gonzalez is not a case about inherent power or fraud on the court.[227] But the opinion was drafted broadly and imprecisely, making it susceptible to misinterpretation by the lower courts. This misinterpretation has led to a constitutional dilemma, pitting AEDPA's statutory restrictions on successive habeas petitions against courts' essential independent power to vacate or modify judgments for fraud on the court.[228] The details of the case show, however, that an appropriately narrow and precise reading of *Gonzalez* makes clear that the Court has not directly answered the question of whether Congress can eliminate the power to vacate or modify judgments for fraud on the court.

In *Gonzalez*, a prisoner sought federal habeas corpus relief from his Florida state court conviction in June 1997 after filing two state habeas petitions.[229] AEDPA was passed the year before, in 1996.[230] Under law applicable at the time, Gonzalez's deadline for filing federal habeas petitions was one year from the effective date of

[223] 545 U.S. 524, 526 (2005).
[224] *Id.* at 526–27.
[225] *Id.* at 527.
[226] *See id.* at 530–33.
[227] *See id.* at 526–27.
[228] *See* Johnson v. Bell, 605 F.3d 333, 335 (6th Cir. 2010) (implying that courts' sole power to vacate judgments stems from either Rule 60 or AEDPA, not inherent power).
[229] *See Gonzalez*, 545 U.S. at 526–27.
[230] *See id.*

AEDPA—April 23, 1997.[231] Gonzalez, in response to the state's motion to dismiss his federal petition as time barred, asserted that AEDPA's statute of limitations should be tolled for 163 days, the number of days that his second state habeas application, filed before the federal habeas application at issue, was pending because AEDPA allowed tolling for "properly filed" state habeas applications.[232] The district court disagreed and dismissed his federal habeas petition, holding that the state habeas application had not been "properly filed" because it was untimely and successive, rendering Gonzalez's federal petition untimely by two months.[233]

Some time after the district court dismissed Gonzalez's petition, the Supreme Court decided *Artuz v. Bennett*.[234] In *Artuz*, the court held that a state habeas application was properly filed for tolling purposes even if it was barred by state procedural rules.[235] About nine months after the Supreme Court decided *Artuz*, Gonzalez filed a Rule 60(b) motion, relying on Civil Rule 60(b)(6)'s "any other reason" provision, which allows a district court to reopen a judgment for reasons other than those articulated somewhere else in Rule 60.[236] This motion sought relief based on the change in tolling law as articulated in *Artuz* and asked the district court to vacate its judgment.[237] The district court denied the motion, and the Eleventh Circuit held en banc that the 60(b) motion constituted a successive habeas petition and was thus barred by 28 U.S.C. § 2244 (a section of AEDPA that bars successive habeas applications in most circumstances) because the motion did not meet § 2244's stringent criteria for successive habeas petitions.[238] Section 2244 of AEDPA bars successive habeas applications when the application asserts a claim that has been previously adjudicated.[239] Even if the claim has not been previously raised, it is barred unless it (1) relies on a new rule of constitutional law made retroactive by a decision of the Supreme Court or (2) relies on newly discovered facts showing a high

[231] *See id.*
[232] *See id.*
[233] *See id.*
[234] *See id.* at 527 (citing Artuz v. Bennett, 531 U.S. 4 (2000)).
[235] *See Gonzalez*, 545 U.S. at 526–27.
[236] *See* Fed. R. Civ. P. 60(b)(6).
[237] Gonzalez styled his motion a "Motion to Alter or Amend Judgment," but the Court noted that the contents of the motion clearly sought Rule 60(b)(6) relief. *See Gonzalez*, 545 U.S. at 527 n.1.
[238] *See id.* at 527–28.
[239] *See id.* at 529–30.

probability of actual innocence.[240] The Eleventh Circuit held that, when construed as a successive habeas petition, Gonzalez's motion did not meet any of the § 2244 exceptions.[241]

The Supreme Court disagreed, in part, with the circuit court, announcing a new statutory analysis that turns on whether the Rule 60(b) motion asserts a "claim" for relief and is thus an "application" subject to § 2244's successive habeas restrictions.[242] According to the Court, because Gonzalez's Rule 60(b)(6) motion did not assert a "claim" for merits relief, but rather sought to reverse a procedural ruling, it was not a successive habeas application subject to AEDPA's restrictions.[243]

Justice Scalia, writing for the majority, framed the question in the case more broadly than the facts actually suggest.[244] Instead of appropriately limiting the scope of the issue to Rule 60(b)(6) motions (the procedural ground relied on by Gonzalez in this case), or even Rule 60(b)(1)–(5) cases (i.e., non savings-clause cases that rely on a 60(b) enumerated ground for relief), he posed the following question: "The question presented is whether, in a habeas case, [Rule 60(b)] motions are subject to the additional restrictions that apply to 'second or successive' habeas corpus petitions under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996."[245]

At the time the Court decided *Gonzalez*, Rule 60(b) contained not only the enumerated grounds for relief contained in 60(b)(1)–(6) but also the savings clauses that recognized the longstanding power of courts to entertain an independent action or vacate a judgment for fraud on the court.[246] Justice Scalia's decision to frame the question to engulf the entirety of Rule 60(b), instead of the 60(b)(6) ground actually raised in the case, is problematic for two reasons. First, by holding that *all* Rule 60(b) motions are subject to a statutory analysis, the opinion seems to imply that a motion raising fraud on the court through the independent-power-recognizing

[240] *See id.*
[241] *See id.* at 528.
[242] *See Gonzalez*, 545 U.S. at 530–33.
[243] *See id.* at 535–36.
[244] *See id.* at 526.
[245] *Id.*
[246] The 2007 restyling placed the savings clauses in FED. R. CIV. P. 60(d) but did not materially change their substance. *Compare* FED. R. CIV. P. 60(b) (2006) *with* FED. R. CIV. P. 60(b), (d) (2011).

savings clauses is subject to the § 2244 analysis.[247] Second, by holding that *all* Rule 60(b) motions are potentially subject to AEDPA, the opinion raises the possibility that a fraud on the court claim brought through Rule 60(b)(3), or another enumerated provision, is subjected to AEDPA's statutory restrictions, even though the power to vacate judgments for fraud on the court does not emanate from Rule 60(b).[248] This holding would putatively make a court's independent essential fraud on the court power subject to an act of Congress and thereby potentially infringe on lower courts' Article III prerogatives.

The *Gonzalez* analysis, as drafted, has the real potential to impermissibly subject courts' essential independent power to hear fraud on the court claims to congressional impairment. At the outset, it is important to emphasize that the Rule 60(b) savings clause *recognizes* the essential independent power to hear fraud on the court claims but it does not *create* that power.[249] As discussed above, the power is both deeply rooted in the history of American courts and is essential to the exercise of core judicial power.[250] But a literal reading of Justice Scalia's analysis of the broad question has led some courts to conclude that the power is subordinate to a congressional enactment.[251]

The critical and problematic part of the analysis proceeds in the following way: Because § 2244 applies to successive "applications,"

---

[247] *See Gonzalez*, 545 U.S. at 526.

[248] Some courts have applied Rule 60(b)(6) to consider fraud on the court claims in some instances. While fraud on the court is not enumerated in 60(b)(1)–(5) and thus 60(b)(6) could be a conduit to bring the claim, fraud on the court claims are not dependent on 60(b)(6) for their existence as the savings clauses and history of fraud on the court demonstrate. *See* FED. R. CIV. P. 60(b)(6), (d); *see also* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944) (The power to vacate even final judgments for fraud "was firmly established in English practice long before the foundation of our Republic[.]").

[249] In *Chambers v. NASCO, Inc.*, the Court noted the independent nature of the fraud on the court power, writing

> [I]nherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. This "historic power of equity to set aside fraudulently begotten judgments," is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public."

Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citations omitted) (quoting *Hazel-Atlas Glass Co.*, 322 U.S. at 245–46 (1944)); *see also* FED. R. CIV. P. 60(d) ("This rule does not limit a court's power to . . . set aside a judgment for fraud on the court.").

[250] *See Chambers*, 501 U.S. at 43–45.

[251] *See* Johnson v. Bell, 605 F.3d 333, 335 (6th Cir. 2010).

which the Court defines as "filing[s] that contain[] one or more 'claims,'" the Court must determine whether the Rule 60(b) motion asserts a "claim."[252] A Rule 60(b) motion asserts a "claim" if it (1) adds a new ground for relief or (2) attacks the federal court's previous ruling on the merits.[253] Justice Scalia goes on to clarify that an attack on "the integrity of the federal habeas proceedings" is not a claim on the merits and even footnotes "[f]raud on the habeas court" as just such an example.[254] This analysis, however, necessarily makes the availability of fraud on the court power dependent upon the applicability of an act of Congress, namely whether the fraud on the court action asserts a "claim" within the ambit of § 2244. According to Justice Scalia's opinion, the court has the power to hear a fraud on the court claim only if the claim is not an attack on the "merits," and thus not a "claim" constituting part of an "application" subject to § 2244.[255] Thus, presumably under this analysis, a fraud on the court claim could be barred as a successive habeas application if the claim was construed to attack the merits. Or, if the Court's analysis is taken a step further, Congress could amend § 2244 to bar attacks on the integrity of the habeas proceedings, thus barring all fraud on the court claims. This reading unacceptably subjects the independent fraud on the court power to congressional abrogation or undue regulation.

Indeed, an anecdote from the case exemplifies the opinion's traps for unwary lower courts. The Court notes "that an attack based on . . . habeas counsel's omissions ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably."[256] Clearly, however, some omissions of habeas counsel would rise to the level of fraud on the court and should not be subject to the material congressional impairment embodied in § 2244. For instance, habeas counsel could have conspired with the prosecution to conceal exculpatory evidence from the court, omitting it from the original habeas application. Such an omission would rise to the level of fraud on the court, and the court could correct it upon discovery, despite any contrary congressional pronouncements.

A reading of *Gonzalez* that suggests or requires that fraud on the

[252] *See Gonzalez*, 545 U.S. at 530.
[253] *See id.* at 532.
[254] *See id.* at 532 n.5.
[255] *See id.* at 530–32.
[256] *See id.* at 532 n.5 (citations omitted).

court claims are subject to congressional action should be rejected for multiple reasons. First, *Gonzalez* was not a fraud on the court case. Gonzalez filed his motion based on Rule 60(b)(6) and asserted a change in the law as the basis for relief.[257] Thus, despite a broadly drafted question presented that suggested otherwise, the case resolved a narrow issue and should not be read to resolve the fraud on the court question. Second, Justice Scalia's observation in footnote five of the opinion that "[f]raud on the federal habeas court is one example" of a defect in the integrity of the proceedings indicates that the Court views fraud on the court in a special category of post-judgment relief allegations that are, perhaps, beyond the purview of Congress.[258] While this statement is admittedly a long way from previous holdings that the power to vacate judgments for fraud on the court is an "inherent," or an essential independent power, footnote five, along with holdings in other cases, is at least suggestive that the Court recognizes that it is.[259]

Third, the anecdote involving federal habeas counsel is qualified by statements that protect the fraud on the court power.[260] Justice Scalia notes that an "omission" by federal habeas counsel is not "ordinarily" an attack on the integrity of the proceeding.[261] The focus on "omissions" by habeas counsel suggests that misdeeds or action by habeas counsel would be more likely to exempt a post-judgment relief claim from § 2244. This reasoning is consistent with the notion that most fraud on the court involves some action (i.e., conspiring with prosecutors in the hypothetical above could be construed as part of the fraudulent action supporting the motion). And even if the potential fraud on the court did involve an omission, Scalia takes care to note that omissions by counsel are "ordinarily" not an attack on the integrity of the habeas court—there is room in the analysis for the exceptional case.[262]

While a narrow reading of *Gonzalez* has promise to solve potential problems, the case still contains analytical traps for the unwary. And unfortunately, at least one court of appeals has fallen into those traps, holding that a court does not have the independent

[257] *See id.* at 527.
[258] *See Gonzalez*, 545 U.S. at 532 n.5.
[259] *See id.*; *cf.* Chambers v. NASCO, Inc., 501 U.S. 32, 43–45 (1991) (stating that the power to vacate for fraud on the court is "inherent" in courts).
[260] *See Gonzalez*, 545 U.S. at 532 n.5.
[261] *See id.*
[262] *See id.*

power to entertain a fraud on the court claim if it does not satisfy § 2244 as interpreted by *Gonzalez*.[263]

D. *Because of the Uncertainty Created by Gonzalez, Lower Courts Have Interpreted AEDPA to Preempt Their Independent Power to Vacate Judgments for Fraud on the Court*

Habeas cases often arise in the most serious matters that face the courts, including in the death penalty context.[264] Judgments in those cases represent the most solemn pronouncements made by the justice system and require the most serious consideration that the system has to offer.[265] Rule 60(b) motions and other vehicles used for bringing fraud on the court claims, in light of AEDPA's restrictions on successive habeas applications, are often the last lifeline for the condemned in these cases.[266] In *Johnson v. Bell*, a prisoner convicted of capital murder and sentenced to death, Donnie Johnson, challenged his death sentence in several procedural iterations that ultimately culminated in a federal habeas petition.[267] In the habeas petition, Johnson alleged that the state effectively bought the testimony of its key witness, also facing serious criminal charges, by offering the witness a favorable "deal" in exchange for his testimony.[268] In response to this claim, the state submitted the affidavits of the witness and the prosecutor that attested to the fact that there was no favorable deal for the witness.[269] Based on this evidence, the district court denied habeas relief.[270]

Several years later, Johnson filed a motion for relief from the judgment and asserted that the prosecutor and McCoy, the witness,

[263] *See* Johnson v. Bell, 605 F.3d 333, 335 (6th Cir. 2010) (holding that Rule 60(b) and § 2244 provide the sole means to raise post-habeas-judgment relief claims).

[264] *See, e.g.*, Garcia v. Texas, 131 S. Ct. 2866, 2867 (July 7, 2011) (denying stay of execution based on habeas application).

[265] Ford v. Wainright, 477 U.S. 399, 417 (1986) (positing that fidelity to proper legal principles in application of the death penalty is "the solemn obligation of a civilized society").

[266] In some limited instances, the Supreme Court has already indicated a willingness to provide some relief from § 2244's successive habeas bar where the death penalty is at issue. *See* Panetti v. Quarterman, 551 U.S. 930, 945 (2007) (stating that Section 2244 does not bar successive habeas petition raising a *Ford v. Wainright* incompetency claim as soon as the claim is ripe).

[267] *See Johnson*, 605 F.3d at 334–35.

[268] *See id.* at 336–37.

[269] *See id.* at 337.

[270] *See id.*

submitted false affidavits regarding the alleged deal.[271] The motion asked the district court to vacate the conviction based on its "plenary inherent Article III equitable powers" to vacate or modify judgments for fraud on the court and Rule 60(b).[272] The district court denied the motion, and Johnson appealed to the United States Court of Appeals for the Sixth Circuit.[273]

The Sixth Circuit walked directly into the trap set by *Gonzalez*. In *Johnson*, the question of whether a court has independent (or "inherent") power to vacate a judgment for fraud on the court was directly before the circuit court.[274] The circuit court found that AEDPA and *Gonzalez* eliminated the power, holding:

> The district court declined to base its authority upon Article III and instead recognized that Rule 60(b), which is inherently equitable in nature, empowers district courts to revise judgments when necessary to ensure their integrity. We endorse this approach. Rule 60(b)(6) provides that a district court may grant relief from judgment "for any other reason that justifies relief." This provision confers upon the district court a broad equitable power to "do justice." *Particularly in light of the approach taken by Supreme Court in* Gonzalez*, Rule 60(b) represents the sole authority, short of a successive application approved by this court, under which a district court may entertain a challenge to a prior denial of habeas relief.*[275]

After holding that AEDPA and Rule 60(b) were the "sole authority" to entertain a fraud on the court claim, the court went on to hold that Johnson's fraud on the court claim did in fact go to the integrity of the habeas proceedings, allowing the court to reach the merits of Johnson's claim.[276] Based on the high standards to prove a fraud on

---

[271] *See id.*

[272] *See id.* at 336.

[273] *See Johnson*, 605 F.3d at 335–36.

[274] *See id.* at 336 ("[T]he motions for equitable relief under review cited two sources of authority [including] what petitioner terms the district court's 'plenary inherent Article III equitable powers to revise or amend a judgment in the interest of justice.'").

[275] *See id.* (emphasis added).

[276] This raises the question of why the circuit court felt the need to reach the inherent power question at all. Johnson did advance a second claim in his 60(b) motion alleging prosecutorial misconduct in closing argument. *See id.* at 339–40. This claim was not based on any alleged fraud but rather impermissible vouching by the prosecutor for the credibility of a witness. *See id.* at 340. The circuit could have avoided the inherent power question by simply holding that Johnson's fraud on the court claim satisfied *Gonzalez*, escaping AEDPA. Such a holding would have avoided

the court claim and Johnson's own lack of diligence in pursuing the claim, the court ultimately denied his motion. Johnson petitioned the Supreme Court based on the Rule 60(b) procedural ground (no appeal of the erroneous inherent power ruling was necessary because the court reached the claim through the *Gonzalez* statutory analysis). The Supreme Court declined review, missing the opportunity to rid the fraud on the court "menu" of the Sixth Circuit's "smuggled-in dish."[277] In fairness to the Court, the question was not raised in Johnson's petition for certiorari, but even a cursory reading of the lower court's opinion reveals its serious constitutional infirmity.[278]

Gonzalez undeniably creates confusion about the availability of independent power in fraud on the court cases after AEDPA, even in the most serious matters courts hear. But confusion does not equal constitutional invalidity. If AEPDA and Rule 60, as interpreted by *Gonzalez*, are co-extensive with the essential, independent fraud on the court power, providing the same relief the independent power would, AEDPA does not violate Article III. On the other hand, if AEDPA impairs the exercise of the fraud on the court power in a way that prevents the full exercise of Article III judicial power, it is constitutionally invalid.

E. 28 U.S.C. § 2244 Prevents the Full Exercise of Judicial Power by Impairing the Essential Independent Power to Vacate Judgments for Fraud on the Court

AEDPA § 2244, as interpreted by *Johnson* and other lower courts, impairs the fraud on the court power in several circumstances.[279] At the outset, § 2244 does potentially apply to fraud on the habeas court claims. While a proper reading of *Gonzalez* makes clear that § 2244 does not apply to some fraud on the court actions, it is equally clear

the need to rely on inherent power to entertain the claim and Johnson's prosecutorial misconduct claim was not based on a ground that would fall within the ambit of inherent power whether or not it existed.

[277] Spears v. United States, 555 U.S. 261, 267 (2009) (per curiam).

[278] *See Johnson*, 605 F.3d at 336.

[279] *See, e.g.*, *id.* (AEDPA and Rule 60(b) provide the source of power to entertain an action for fraud on the court). Other courts have broadly interpreted the applicability of § 2244 to preclude fraud on the court actions where "allegations seek to assert or reassert habeas claims . . . or are inextricably intertwined with a claim of fraud committed on the state courts[.]" Berryhill v. Evans, 466 F.3d 934, 937 (10th Cir. 2006). Testing fraud on the court claims for whether they are inextricably intertwined with fraud claims subjugates the independent power to vacate judgments for fraud on the court to § 2244 while at the same time potentially barring valid evidence suppression fraud claims.

that under *Johnson* § 2244 does apply to fraud on the court claims in the Sixth Circuit. Under *Gonzalez*, the threshold question is whether the Rule 60(b) motion asserts a claim going to the "merits" underlying the habeas judgment it attacks.[280] If it does, it is subject to § 2244's successive habeas petition analysis.[281] That analysis allows successive habeas petitions to go forward only in very narrow circumstances.

As described above, the Court takes pains to note in *Gonzalez* that claims regarding the merits do not include challenges to the integrity of the habeas proceeding itself.[282] But often, fraud on the court claims regarding the integrity of the habeas proceedings will also be construed to attack the merits of the habeas decision. For instance, imagine that a claim that a prosecutor unlawfully and fraudulently suppressed evidence in a state criminal trial is challenged in a federal habeas petition. The district court denies the challenge based on the prosecutor's affidavit swearing that he did not withhold evidence. Sometime later, the prisoner discovers additional proof that the prosecutor hid evidence and files a fraud on the court action alleging, again, the suppression claim. Does the action attack the merits of the habeas denial (the prosecutor withheld evidence) or the integrity of the habeas proceeding (the prosecutor lied about withholding evidence)? It could be construed to attack both. *Gonzalez* held that "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," it is not a successive habeas petition subject to § 2244.[283]

But this language does not safeguard against situations where the Rule 60(b) or fraud on the court action attacks both the merits and the integrity of the habeas proceeding *simultaneously*. In these cases, which *Gonzalez* does not expressly contemplate, the opinion's other language indicates that "if [the Rule 60(b) motion] attacks the federal court's previous resolution of a claim *on the merits* . . . [it] is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief," and thus subject to § 2244's successive habeas petition restrictions.[284] Accordingly, § 2244, as interpreted by lower courts engaged in an

[280] *See* Gonzalez v. Crosby, 545 U.S. 524, 530–32 (2005).
[281] *See id.* at 532.
[282] *See id.*
[283] *See id.*
[284] *See id.* (emphasis in original).

impermissibly broad reading of *Gonzalez*, does apply to and restrict at least some valid fraud on the court claims that would otherwise be within the essential non-core power of the court.

Because some fraud on the court actions are subject to § 2244, the extent to which § 2244 restricts courts' power to exercise their essential power to hear those claims is essential to assess whether § 2244 materially impairs the fraud on the court power. First, § 2244 bars any claim that has been previously brought by the applicant.[285] This restriction could be construed to bar claims like the one above involving the prosecutor suppressing evidence. In that case, the habeas applicant sought relief on the basis of evidence wrongfully withheld in the underlying habeas proceeding and then raised a claim about evidence suppression as a fraud on the court claim after discovering the additional proof of the evidence suppression. The better approach, however, is to treat the fraud on the court claim as a new claim because it asserts something new. Instead of merely reasserting the claim that the prosecutor withheld evidence, the habeas petitioner's fraud on the court claim is based on the *lie the prosecutor told about withholding evidence in the habeas proceeding*.[286] Thus, the § 2244 restriction on previously brought claims does not impair the fraud on the court power in a way that prevents the full exercise of judicial power, if courts appropriately treat fraud on the habeas court claims as new claims.

Even if fraud on the court claims are treated as new claims, § 2244 places additional significant restrictions on fraud on the court claims.[287] Pursuant to the statute, a court must dismiss a claim in a successive habeas petition unless (1) the claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," or (2) the claim is based on "*new facts showing a high probability of actual innocence*."[288] The first exception will rarely, if ever, allow a fraud on the court claim subject to § 2244 to go forward. The second exception seems to fit the prosecutorial misconduct

[285] *See* 28 U.S.C. § 2244(b)(1) (2006); Graham v. Johnson, 168 F.3d 762, 789 (5th Cir. 1999).

[286] An appropriately narrow reading of *Gonzalez* would support this result. *See Gonzalez*, 545 U.S. at 532 (post-judgment relief claims going to the integrity of the habeas proceedings are *not* subject to § 2244's bar on successive habeas applications).

[287] Section 2244 applies to habeas applications filed by state prisoners. § 2244(b)(1). But federal prisoners are also subject to restrictions on successive habeas applications or "motions" that are similar to those applied to state prisoners. *See* 28 U.S.C. § 2255(h) (2006) (prescribing that second or successive motion must be certified to court of appeals and meet strict requirements to proceed).

[288] *Gonzalez*, 545 U.S. at 529–30 (emphasis added).

hypothetical above, but the actual language of the exception makes clear that it requires a more onerous showing, equivalent to a high probability of actual innocence, to obtain relief:

> A claim . . . shall be dismissed unless . . .
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (B)(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[289]

Section 2244's requirement that a fraud on the habeas court claimant establish the newly discovered evidence exception by clear and convincing evidence does not prevent the full exercise of judicial power. Post-judgment relief claimants have always faced the requirement to prove fraud on the court by clear and convincing evidence.[290] And despite the increased burden of proof, the habeas court that has been defrauded retains its power to vacate a judgment procured by fraud, albeit only after a more onerous showing by the person seeking relief.[291] And while some judgments may not be subject to reopening where the proof of fraud is something less than clear and convincing, the statute allows the court to remedy the most egregious frauds, preserving the courts' institutional prerogatives in addition to allowing the full exercise of judicial power.

AEDPA § 2244's one-year statute of limitations on newly discovered evidence claims, however, does prevent the full exercise of

---

[289] § 2244(b)(2)(B)(i)–(ii).

[290] Fraud on the court has traditionally been viewed as an injury to the court itself, depriving the court of the ability to exercise the judicial function. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 235, 246 (1944). Thus, fraud that does not benefit an adverse party, the state in § 2244 cases, may still be actionable as a fraud on the court because the court suffers the injury. *See* Southerland v. Cnty. of Oakland, 77 F.R.D. 727, 732–33 (E.D. Mich. 1978) (holding that fraud that benefitted court officer, not party, was actionable). It follows that fraud on the court may be actionable even if the fraud did prevent the presentation of an actual innocence claim. For instance, fraud on the court in the sentencing context would not deprive the guilty prisoner of facts tending to prove actual innocence but would possibly deprive her of facts that could mitigate her sentence. *Cf.* Unthank v. Jett, 549 F.3d 534, 536 (7th Cir. 2008) (holding that Section 2244 barred successive petition where new fact that would result in lower sentence was not a new fact showing high probability of actual innocence). To the extent that § 2244 bars such a claim, it is a material impairment on the court's fraud on the court power.

[291] *See Gonzalez*, 545 U.S. at 529–30 (2005) (stating that § 2244 requires new facts demonstrating a "high probability of actual innocence").

judicial power in some circumstances. When fraud on the court claims are treated as successive habeas petitions, they are subject to § 2244's one-year filing time limit, even if the claim meets one of the § 2244 exceptions (i.e. new rule of constitutional law or newly discovered evidence).[292] The statute provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus" in actions involving state prisoners.[293] The one-year time limit begins to run from the occurrence of several triggers, including "the date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence."[294] Historically, the power to vacate judgments for fraud on the court has been subject to no time limit, not even laches. The lack of a time limit for filing fraud on the court claims exists for good reason.[295]

Imposing a statute of limitations on the fraud on the court power in the habeas context subjugates the practical existence of the power to the filing decisions of inmates.[296] If an inmate files a fraud on the court claim more than one year after the § 2244 triggers, the court never has the opportunity to pass on the claim because its corrupt officers prevented the exercise of judicial power in the first instance and an inmate's (or other litigant's) lack of filing diligence prevents review of the claim the second time.[297] In many cases, claims for fraud on the habeas court would be entirely beyond the reach of Article III courts despite being meritorious. Thus, § 2244 as currently drafted prevents the full exercise of judicial power and, as a result, is an unconstitutional exercise of Congress's power.

---

[292] *See* 28 U.S.C. § 2244(d) (2006).

[293] § 2244(d)(1).

[294] § 2244(d)(1)(D).

[295] *See, e.g.*, Root Ref. Co. v. Universal Oil Prods. Co., 169 F.2d 514, 521–22, 525 (3d Cir. 1948) ("[F]reedom from fraud may always be the subject of further judicial inquiry.").

[296] *Cf.* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944) (noting that the critical, systemic importance of vacating judgments procured through corruption of court officers extends beyond the interests of litigants).

[297] The requirement that the fraud on the habeas court claimant act diligently suffers from the same infirmity as the one-year limitation. Fraud on the court is an injury to the judiciary itself, in addition to any individual litigant. Thus, a requirement that the individual litigant act diligently to discover fraud on the habeas court vests a court prerogative in the hands of an inmate. In some instances, this would prevent the full exercise of judicial power.

V. CONCLUSION

Limits on Congress's ability to regulate or eliminate the independent, or inherent, powers of the judiciary are essential to preserving independent courts. At the same time, if courts take too broad a view of their independent power, the prerogatives of the other two branches are in peril. The balance between some independent power and too much is undoubtedly a fine one. But the question of whether a particular independent court power is beyond the purview of Congress should always turn on the essentiality of that power to the function and nature of the irreducible part of Article III judicial power. A careful analysis of the necessity of some traditionally inherent powers reveals that they are subject to revision or elimination by Congress. Other inherent judicial powers are, in many senses, beyond Congress's reach. In the case of the circuit courts' implementation of AEDPA to restrict lower courts' use of the power to vacate their own judgments for fraud on the court, Congress has overstepped. While one congressional intrusion might not be Constitution shattering, it does portend a view of congressional power that could intrude into other essential independent powers. And in the meantime, Congress has left significant, result-altering fraud by court officers and attorneys, potentially including fraud in death penalty cases, beyond the reach of federal courts in some instances. Separation of powers concerns and the more practical matter of integrity and justice in the most serious cases demand that Congress and the courts revisit the current untenable implementation of AEDPA in fraud on the court actions. Judicial independence and lives hang in the balance.