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# Federal Habeas Corpus: A Legal Overview

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## Summary

Federal habeas corpus is a procedure under which a federal court may review the legality of an individual's incarceration. It is most often the stage of the criminal appellate process that follows direct appeal and any available state collateral review. The law in the area is an intricate weave of statute and case law.

Current federal law operates under the premise that with rare exceptions prisoners challenging the legality of the procedures by which they were tried or sentenced get "one bite of the apple." Relief for state prisoners is only available if the state courts have ignored or rejected their valid claims of detention in violation of federal law, and there are strict time limits within which they may petition the federal courts for relief. Moreover, a prisoner relying upon a novel interpretation of law must succeed on direct appeal; federal habeas review may not be used to establish or claim the benefits of a "new rule." Expedited federal habeas procedures are available in the case of state death row inmates if the state has provided an approved level of appointed counsel. The Supreme Court has yet to hold that a state death row inmate who asserts he is "actually innocent" may be granted habeas relief in the absence of an otherwise constitutionally defective conviction.

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## Introduction<sup>1</sup>

Federal habeas corpus as we know it is by and large a procedure under which a federal court may review the legality, under federal law, of an individual's incarceration by federal or state authorities.<sup>2</sup> It is most often invoked after conviction and the exhaustion of the ordinary means of appeal. It is at once the last refuge of scoundrels and the last hope of the innocent. It is an intricate weave of statute and case law whose reach has flowed and ebbed over time.

Prior to enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, it was said that federal habeas was “the most controversial and friction producing issue in the relation between federal and state courts. . . . Commentators [were] critical, . . . federal judges [were] unhappy, . . . state courts resented [it], . . . [and] prisoners thrive[d] on it as a form of occupational therapy . . . .”<sup>3</sup> The AEDPA was enacted and yet the debate goes on. Judges, academics, and political figures regularly urge that the boundaries for federal habeas be readjusted; some would make it more readily available; others would limit access to it.<sup>4</sup>

Debate has been particularly intense in capital punishment cases. There, unlike most other cases, the decisions of the state courts stand unexecuted while they await completion of federal habeas corpus proceedings; there, unlike most other cases, an erroneously executed sentence is beyond any semblance of correction or compensation. The AEDPA offers states expeditious habeas procedures in capital cases under certain circumstances;<sup>5</sup> no state was initially able to take full advantage of the offer, which led Congress to adjust the method of determining qualification in the USA PATRIOT Improvement and Reauthorization Act.<sup>6</sup> In 2020, the Attorney General certified that Arizona had qualified.<sup>7</sup>

## History

### Origins

At early English common law, much of the business of the courts began with the issuance of one of several writs, many of which have survived to this day. The writs were a series of written order forms, issued by the court in the name of the king, commanding the individual to whom they were addressed to return the writ to the court for the purpose stated in the writ. The purpose was generally reflected in the name of the writ itself. Thus, for example, a *subpoena ad testificandum* was a command to return the writ to the court at a specified time and place, “sub poena,” that is,

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<sup>1</sup> This report is available in an abridged version as CRS Report RS22432, *Federal Habeas Corpus: An Abridged Sketch*, by Charles Doyle.

<sup>2</sup> *E.g.*, 28 U.S.C. §§ 2254, 2255. Claims that an individual is in custody in violation of state law, rather than federal law, are beyond the reach of the federal writ and beyond the scope of this report.

<sup>3</sup> 17B Charles Alan WRIGHT, et al., FEDERAL PRACTICE AND PROCEDURE § 4261 (3d ed. 2007).

<sup>4</sup> [Judge] Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 NOTRE DAME L. REV. 1809, 1834 (2020); Lee Kovarsky, *The New Negative Habeas Equity*, 137 HARV. L. REV. 222, 2273 (2024); CRS Report R41011, *Habeas Corpus Legislation in the 111th Congress*, by Charles Doyle, *AEDPA Repeal*, 107 CORNELL L. REV. 1739 (2022); Leah M. Litman, *The Myth of the Great Writ*, 100 TEX. L. REV. 219 (2021).

<sup>5</sup> 28 U.S.C. §§ 2261–2266.

<sup>6</sup> P.L. 109-177, § 507, 120 STAT. 250–51 (2006); 28 U.S.C. § 2265.

<sup>7</sup> Certification of Arizona Capital Counsel Mechanism, 85 Fed. Reg. 20,705 (Apr. 14, 2020).

“under penalty” for failure to comply, and “ad testificandum” that is, “for the purpose of testifying.”

Just as the writs of subpoena have been shortened in common parlance to “subpoena,” references to the several writs of habeas corpus have been shortened. The habeas corpus writs were all issued by the courts in the name of the king and addressed to one of the king’s officials or a lower court. The writs commanded the officers of the Crown to appear before the court with the “corpus” (“body”) of an individual named in the writ, whom “habeas” (“you have” or “you are holding” or may be holding), for the purpose stated in the writ. Thus, for instance, the writ of *habeas corpora juratorum* commanded the sheriff to appear before the court having with him or holding the bodies of potential jurors.<sup>8</sup>

By the colonial period, “habeas corpus” had come to be understood as those writs available to a prisoner, held without trial or bail or pursuant to the order of a court without jurisdiction, ordering his jailer to appear with the prisoner before a court of general jurisdiction and to justify the confinement.<sup>9</sup>

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<sup>8</sup> Other habeas corpus writs included:

(1) *Habeas corpus ad deliberandum et recipiendum*, a writ for bringing an accused from a different county into a court in the place where an offense had been committed for purposes of trial, or more literally to return holding the body for purposes of “deliberation and receipt” of a decision.

(2) *Habeas corpus ad faciendum et recipiendum*, a writ of a court of superior jurisdiction to a custodian to return with the body being held in confinement pursuant to the order of a lower court for purposes of “receiving” the court’s decision and of “doing” what the court instructed with the prisoner.

(3) *Habeas corpus ad faciendum, subjiciendum et recipiendum*, or more simply, *habeas corpus ad subjiciendum*, a writ ordering a custodian to return with a prisoner for the purposes of “submitting” the question of confinement to the court, of “receiving” its decision, and of “doing” what the court instructed with the prisoner.

(4) *Habeas corpus ad prosequendum*, a writ ordering return with a prisoner for the purpose “prosecuting” him before the court.

(5) *Habeas corpus ad respondendum*, a writ ordering return to a court of superior jurisdiction of a body under the jurisdiction of a lower court for purposes of allowing the individual to “respond” with respect to matters under consideration in the high tribunal.

(6) *Habeas corpus ad satisfaciendum*, a writ ordering return with the body of a prisoner for “satisfaction” or execution of a judgment of the issuing court.

(7) *Habeas corpus ad testificandum*, a writ ordering return with the body of a prisoner for the purposes of “testifying”; and

(8) *Habeas corpus cum causa*, a writ ordering return with the body of a prisoner and “with the cause” of his confinement so that the issuing court might pass upon the validity of continued confinement and issue appropriate additional orders. BLACK’S LAW DICTIONARY (11th ed. 2019); 1 BOUVIER’S LAW DICTIONARY, (11th ed. 1914); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95–98 (1807); for English history of habeas corpus see WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS, 12–94 (1980); IX WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW, 104-25 (2d ed. 1938).

<sup>9</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES 131 (“[I]f any person be restrained of his liberty by order or decree of any illegal court, or by command of the king’s majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king’s bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. 2., c. 2, commonly called the *habeas corpus* act [of 1679], the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained imprison, except in those cases in which the law requires and justifies such detainer.”) (A Facsimile of the First Edition of 1765-1769) (transliteration supplied) .

## Early American Experiences

Colonial America was well acquainted with habeas corpus and with occasional suspensions of the writ.<sup>10</sup> The drafters of the United States Constitution, after enumerating the powers of Congress, inserted the limitation that “[t]he [p]rivilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>11</sup>

The Act that created the federal court system empowered federal judges to issue writs of habeas corpus “and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions . . . [a]nd . . . to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.”<sup>12</sup> The power was limited, however, in that “writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.”<sup>13</sup>

The Supreme Court further clarified federal habeas corpus law when in *Ex parte Bollman*,<sup>14</sup> it held that the power of the federal courts to issue the writ was limited to the authority vested in them by statute. The courts had no common law or inherent authority to issue writs of habeas corpus. While the common law might provide an understanding of the dimensions of the writ, the power to issue it depended upon and was limited by the authority which Congress by statute vested in the courts.<sup>15</sup>

Consistent with the common law, the writ was available to those confined by federal officials without trial or admission to bail, but was not available to contest the validity of confinement pursuant to conviction by a federal court of competent jurisdiction, even one whose judgment was in error.<sup>16</sup>

Congress expanded the authority it had given the federal courts in response to the anticipated state arrest of federal officers attempting to enforce an unpopular tariff in 1833 and again in 1842 in response to British protest over the American trial of one of its nationals. The writ was made available to state prisoners held because of “any act done, or omitted to be done, in pursuance of a law of the United States,”<sup>17</sup> and to state prisoners who were foreign nationals and claimed

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<sup>10</sup> WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS, 95–125 (1980); Max Rosenn, *The Great Writ – A Reflection of Societal Change*, 44 OHIO ST. L.J. 337 (1983); ROBERT SEARIES WALKER, THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY (1961).

<sup>11</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>12</sup> 1 STAT. 81–82 (1789).

<sup>13</sup> *Id.* Then, as now, federal authorities kept prisoners in local jails since they rarely maintained federal jails except in the territories, see 1 STAT. 91 (1789) (“[F]or any crime or offence against the United States, the offender may, . . . where he may be found agreeably to the usual mode of process against offenders of such state, and at the expense of the United States, be arrested, and imprisoned or bailed.”).

<sup>14</sup> 8 U.S. (4 Cranch) 75 (1807).

<sup>15</sup> *Id.* at 93.

<sup>16</sup> *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830).

<sup>17</sup> 4 STAT. 634–35 (1833) (Section 7 of the Act of March 2, 1833, ch.52, more fully reads, “*And be it further enacted*, That either of the justices of the Supreme Court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof, anything in any act of Congress to the contrary notwithstanding.”).

protection of the Act of State doctrine.<sup>18</sup> The federal writ otherwise remained unavailable for prisoners held under state authority rather than the authority of the United States.<sup>19</sup>

## Birth of the Modern Writ

In 1867, Congress substantially increased the jurisdiction of federal courts to issue the writ by authorizing its issuance “in all cases,” state or federal, “where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”<sup>20</sup>

Originally, habeas corpus permitted collateral attack upon a prisoner’s conviction only if the sentencing court lacked subject matter jurisdiction. Shortly after 1867, the Supreme Court began to recognize a growing number of circumstances where courts were said to have acted beyond their jurisdiction because some constitutional violation had extinguished or “voided” their jurisdiction.<sup>21</sup>

This development was of limited benefit to most prisoners, since most were confined under state convictions and relatively few of the rights guaranteed by the Constitution were thought to apply against the states. Even when a constitutional claim was available, state prisoners could not be granted federal habeas relief until all possibility of state judicial relief—trial, appellate, and postconviction—had been exhausted.<sup>22</sup>

## Ebb and Flow

Eventually two developments stimulated new growth in the use of the writ. First, the jurisdictional tests, cumbersome and somewhat artificial, were discarded in favor of a more generous standard. Later, the explosion in the breadth of due process and in the extent of its application to the states multiplied the instances when a state prisoner might find relief in federal habeas corpus.

Evolution began with two cases which reached the Supreme Court early in the last century and in which petitioners claimed that mob rule rather than due process of law led to their convictions and death sentences. The Supreme Court in *Frank v. Mangum*<sup>23</sup> denied the writ because Frank’s

<sup>18</sup> 5 STAT. 539–40 (1842).

<sup>19</sup> *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845).

<sup>20</sup> 14 STAT. 385–86 (1867); see also *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

<sup>21</sup> See, e.g., *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873) (Lange had been convicted of an offense punishable by a fine or term of imprisonment. The trial court had sentenced him to a fine and a term of imprisonment. Lange paid his fine and was imprisoned. The Court held that once Lange had paid the fine the trial court lost all jurisdiction over the case and thus his confinement was subject to the writ.).

*Ex parte Siebold*, 100 U.S. 371 (1879) (In *Siebold*, although the statute in question was found to be within the power of Congress, the Court held that had the prisoner been convicted under an unconstitutional law he would have been entitled to discharge upon the writ.).

*Ex parte Wilson*, 114 U.S. 417 (1885) (The Court held that Wilson was entitled to discharge on the writ because the trial court had exceeded its jurisdiction when it tried, convicted and sentenced him to fifteen years hard labor based upon an information filed by the district attorney rather than upon a grand jury indictment as required by the Fifth Amendment in the case of all capital and otherwise infamous crimes.).

*In re Snow*, 120 U.S. 274 (1887) (Snow was convicted of three counts of cohabitation based on the same conduct during three different periods of time. The Court found that the misconduct was one continuous offense rather than three offenses. Since three sentences would constitute multiple punishment contrary to the Fifth Amendment, the trial court had acted beyond its jurisdiction and the writ should issue.).

<sup>22</sup> *Ex parte Royall*, 117 U.S. 241 (1886); *Ex parte Fonda*, 117 U.S. 516 (1886); *Pepke v. Cronan*, 155 U.S. 100 (1894).

<sup>23</sup> 237 U.S. 309 (1915).

claim had already been heard and rejected as part of the state appellate process. The Court did suggest, however, that a state court might lose jurisdiction by virtue of a substantial procedural defect, such as mob domination of the trial process, and that federal habeas relief would be available to anyone convicted as a consequence of the defect. It also indicated that the question of whether relief should be granted was not to be resolved solely by examination of the trial court record, as had historically been the case, but upon federal court consideration of the entire judicial process which pre-dated the petition.<sup>24</sup>

If *Frank* had been intended as a warning, it appears to have been in vain, for soon thereafter the Court confronted yet another conviction allegedly secured by mob intervention in *Moore v. Dempsey*.<sup>25</sup> Despite the fact that the state appellate courts had already heard and denied the petitioners' claims, the Court ordered the lower federal court in which relief had been initially sought to make its own determination of the validity of petitioners' claims of procedural defect.

Soon thereafter it became clear that federal habeas was not limited to instances of mob intervention or other external contaminants of the judicial process; it reached deficiencies from within the process which rendered the process so unfair as to result in a loss of life or liberty without due process of law, whether they took the form of a prosecutor's knowing use of perjured testimony and suppression of evidence that would impeach it,<sup>26</sup> or of a denial of the assistance of counsel in criminal prosecutions,<sup>27</sup> or of confessions or guilty pleas secured by government coercion.<sup>28</sup>

Early in the 1940s, the Court stopped requiring that an alleged constitutional violation void the jurisdiction of the trial court before federal habeas relief could be considered.<sup>29</sup> Federal judges soon complained that federal prisoner abuses of habeas had become "legion."<sup>30</sup> Congress responded by incorporating into the 1948 revision of the judicial code the first major revision of the federal habeas statute since 1867.<sup>31</sup>

State courts exerted little pressure for revision of the federal habeas statute in 1948. Although habeas relief had been available to state prisoners by statute since 1867 and subsequent decisions seemed to invite access, the hospitality that federal habeas extended to state convicts with due process and other federal constitutional claims had not yet become apparent.

This all changed over the next two decades. As noted earlier, some of the change was attributable to expansive Supreme Court interpretations of the procedural guarantees of the Bill of Rights and of the extent to which those guarantees were binding upon the states through the Due Process Clause of the Fourteenth Amendment.<sup>32</sup>

<sup>24</sup> *Id.* at 331 ("[I]t results that under the [federal habeas] sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him.").

<sup>25</sup> 261 U.S. 86 (1923).

<sup>26</sup> *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam).

<sup>27</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>28</sup> *Waley v. Johnston*, 316 U.S. 101 (1942) (per curiam).

<sup>29</sup> *Id.* at 104–05; see also *Walker v. Johnston*, 312 U.S. 275 (1941); Case Comment, *The Freedom Writ – The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948).

<sup>30</sup> Louis E. Goodman, *Use & Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 314 (1948).

<sup>31</sup> 28 U.S.C. §§ 2241–2255 (1946 ed.) (Supp. III, 1949).

<sup>32</sup> Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 155–(continued...)



Federal habeas was the vehicle used to carry much of the due process expansion to the states. After the Supreme Court's decision in *Brown v. Allen*<sup>33</sup> there was little doubt that the federal habeas corpus statute afforded relief to state prisoners whose convictions were tainted by constitutional violations, both those violations that would void state court jurisdiction and those that would not.

The majority position in *Brown* on the impact of the Court's denials of certiorari contributed to the expansion of federal habeas as well. When the Court refused to review a state case by denying certiorari, it thereby left the decision of the state's high court intact. If this should be read as the Court's endorsement of the state's disposal of constitutional issues as part of the normal appellate process, it would seem to chill any subsequent lower federal court reconsideration of those issues under habeas. *Brown* precludes such a result.<sup>34</sup>

The Court's denials of certiorari meant no more than that the Court had declined to hear the case; no conclusions on the Court's view of the issues raised could be drawn from its declinations. Moreover, in subsequent habeas proceedings, the lower federal courts were not bound by state resolution of federal constitutional issues, even if the state courts had given applicants for the writ a full and fair hearing on the same issues raised on habeas.

But the requirement to exhaust state remedies remained. *Brown* held that a state prisoner, seeking habeas relief, could not satisfy the requirement merely by showing that a remedy, once open to him, had been lost by his own inaction.<sup>35</sup>

The Court eased the exhaustion restriction considerably in *Fay v. Noia*,<sup>36</sup> in which it held that federal courts were permitted, but not required, to deny habeas for an intentional failure to

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56 (1970) ("The dimensions of the problem of collateral attack today are a consequence of two developments. One has been the Supreme Court's imposition of the rules of the fourth, fifth, sixth and eighth amendments concerning unreasonable searches and seizures, double jeopardy, speedy trial, compulsory self-incrimination, jury trial in criminal cases, confrontation of adverse witnesses, assistance of counsel, and cruel and unusual punishments, upon state criminal trials. The other has been a tendency to read these provisions with ever increasing breadth. The Bill of Rights, as I warned in 1965, has become a detailed Code of Criminal Procedure, to which a new chapter is added every year. The result of these two developments has been a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis." (footnotes omitted)).

<sup>33</sup> 344 U.S. 443, 485 (1953) ("The writ of habeas corpus in federal courts . . . is only authorized when a state prisoner is in custody in violation of the Constitution of the United States.") (citing 28 U.S.C. § 2241).

The Court in *Brown* was divided on the questions of habeas corpus, the effect to be given a denial of certiorari, and equal protection. There were six separate opinions, including two by Justice Frankfurter and two by Justice Black. Justice Reed's opinion for the Court also includes the minority position on the certiorari question, and on the two questions for which he wrote the majority opinion for the Court his views must be read in conjunction with those of Justice Frankfurter which appear in the companion case, *Daniels v. Allen*: 344 U.S. 488, 497 (1953): "This opinion is designed to make explicit and detailed matters that are also the concern of Mr. Justice Reed's opinion. The uncommon circumstances in which a district court should entertain an application ought to be defined with greater particularity, as should be the criteria for determining when a hearing is proper. The views of the Court on these questions may thus be drawn from the two opinions jointly."

<sup>34</sup> Commentators suggested the Court intended the denial of certiorari and the anticipated subsequent recourse to federal habeas to permit it to enlist the aid of the lower federal courts to review the federal constitutional questions raised in state cases, Friendly, *supra* note 32, at 154–55; J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 *YALE L.J.* 895, 897–98 (1966) (both citing Judge Wyzanski's statement in *Geagan v. Gavin*, 181 F. Supp. 466, 469 (D. Mass. 1960)).

<sup>35</sup> *Brown*, 344 U.S. at 487 ("A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time was passed for appeal [without an appeal by the prisoner] is not enough [to demonstrate the absence of a state remedy and] to empower the Federal District Court to issue the writ.").

<sup>36</sup> 372 U.S. 391 (1963).

exhaust state remedies.<sup>37</sup> At the same time, it articulated circumstances under which the evidentiary hearing, found permissible in *Brown*, would be mandatory in *Townsend v. Sain*.<sup>38</sup>

Relaxation of the default bar coupled with expansion of the circumstances under which constitutional issues might be reconsidered forecast the possibility of repetitious habeas applications and of lower court efforts to discourage repetition. The Supreme Court and Congress anticipated and combined to control such eventualities.

Within weeks of *Noia* and *Townsend*, the Court announced the rule applicable for federal prisoners in *Sanders v. United States*: “Controlling weight may be given to denial of a prior application for federal habeas corpus . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, . . . (3) the ends of justice would not be served by reaching the merits of the subsequent application” and (4) any new ground presented in the subsequent application had been deliberately abandoned or withheld earlier under the same test used in state cases for default.<sup>39</sup> Congress closed the circle in 1966 by amending the federal habeas statute to apply a rough equivalent of the *Sanders* rule to state prisoner petitions for federal habeas.<sup>40</sup>

The few years which followed *Sanders* probably stand as the high-water mark for the reach of federal habeas corpus. But by the early seventies, the Supreme Court had begun to announce a series of decisions grounded in the values of respect for the work of state courts and finality in the process of trial and review. Thus, for example, state prisoners who fail to afford state courts an opportunity to correct constitutional defects were barred from raising them for the first time in federal habeas in the absence of a justification.<sup>41</sup> Nor might they scatter their habeas claims in a series of successive petitions.<sup>42</sup> Those who plead guilty and thereby waived, as a matter of state law, any constitutional claims, might not use federal habeas to revive them.<sup>43</sup> And with narrow exception, state prisoners might not employ federal habeas as a means to assert, or retroactively claim the benefits of, a previously unrecognized interpretation of constitutional law (i.e., a “new rule”).<sup>44</sup>

## Contemporary Limits on the Exercise of Habeas Jurisdiction

The AEDPA<sup>45</sup> codified, supplemented, and expanded upon the Supreme Court’s limitations on the availability of the writ. AEDPA was the culmination and amalgamation of disparate legislative efforts, including habeas proposals, some stretching back well over a decade.<sup>46</sup> Its adjustments help define the contemporary boundaries of the writ.

<sup>37</sup> *Id.* at 438–39.

<sup>38</sup> *Townsend v. Sain*, 372 U.S. 239, 312–13 (1963).

<sup>39</sup> *Sanders v. United States*, 373 U.S.1, 15 (1963) (footnote omitted).

<sup>40</sup> 28 U.S.C. §§ 2244, 2254.

<sup>41</sup> *Wainwright v. Sykes*, 433 U.S. 72 (1977).

<sup>42</sup> *McCleskey v. Zant*, 499 U.S. 467 (1991).

<sup>43</sup> *Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Tollett v. Henderson*, 411 U.S. 258 (1973).

<sup>44</sup> *Teague v. Lane*, 489 U.S. 288, 312–13 (1989).

<sup>45</sup> P.L. 104-132, 110 STAT. 1214 (1996).

<sup>46</sup> See e.g., *Habeas Corpus Reform Act of 1982: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d (continued...)

## Deference to State Courts

Before passage of the AEDPA, state court interpretations or applications of federal law were not binding in subsequent federal habeas proceedings.<sup>47</sup> The debate that led to passage was marked by complaints of delay and wasted judicial resources countered by the contention that federal judges should decide federal law.<sup>48</sup> Out of deference to state courts and to eliminate unnecessary delay, the AEDPA, in 28 U.S.C. § 2254, barred federal habeas relief on a claim already passed upon by a state court “unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”<sup>49</sup>

For purposes of § 2254, an unreasonable application of clearly established federal law as determined by the Supreme Court “occurs when a state court ‘identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of’” the case before it.<sup>50</sup> Moreover, the Court has said on several occasions, the question before the federal courts when they are confronted with a challenged state court application of a Supreme Court recognized principle is not whether the federal courts consider the application incorrect but whether the application is objectively unreasonable.<sup>51</sup> The Court observed that “This

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Sess. (1982); *Comprehensive Crime Control Act of 1983: Hearings Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); *Habeas Corpus Reform: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); *Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st & 2d Sess. (1990); *Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990); *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991); *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st & 2d Sess. (1994); *Innocence & the Death Penalty: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993); *Federal Habeas Corpus—Eliminating Prisoners’ Abuse of the Judicial Process: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995).

<sup>47</sup> Cf., *Brown v. Allen*, 344 U.S. 443, 463 (1953).

<sup>48</sup> Litigation generally involves finding facts, identifying the legal principles necessary to resolve the dispute arising from the facts, and applying the legal principles to the facts. Federal courts, sitting to consider habeas petitions from state prisoners, generally deferred to the fact-finding decisions of state courts. The habeas reform proposals called for deference to state court rulings of law and applications of the law to the facts. Endorsing a similar proposal in an earlier Congress, the Senate Judiciary Committee cited finality and judicial economy, S. REP. NO. 98-226, 98th Cong., 1st Sess. 6-7 (1983). The report also noted academic support and that a comparable state of the law existed before the Court’s decision in *Brown*, 344 U.S. 443, *id.* at 23 (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 444–62 (1963)); Friendly, *supra* note 32, at 165 n.125.

Opponents of the proposals generally responded first to what they saw as a shrinking of the Great Writ and that prisoners with federal claims ought to be entitled to present them in a federal forum, 137 CONG. REC. 26,761 (1991) (remarks of Rep. Jenkins); Larry W. Yackle, *The Reagan Administration’s Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 621 (1983). But the “federal right/federal forum” argument was not without its detractors, *Withrow v. Williams*, 507 U.S. 680, 722 (1993) (Scalia, J., dissenting).

<sup>49</sup> 28 U.S.C. § 2254(d) (2000), as amended, 28 U.S.C. § 2254(d); *Brown v. Davenport*, 596 U.S. 118, 125 (2022); *Cullen v. Pinholster*, 563 U.S. 170 (2011); *see generally*, Joseph Blocher & Brandon L. Garrett, *Fact Stripping*, 73 DUKE L.J. 1 (2023).

<sup>50</sup> *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)).

<sup>51</sup> *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (“It is not enough that a federal habeas court, in its ‘independent review of the legal question,’ is left with a ‘firm conviction’ that the state court was ‘erroneous.’ We have held precisely the opposite: ‘Under § 2254(d)(1)’s ‘unreasonable application’ clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision (continued...)”).

means that a state court’s ruling must be ‘so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’”<sup>52</sup>

For purposes of § 2254(d)(1), a decision is “contrary to . . . clearly established Federal law, as determined by the Supreme Court,” “if it applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of [the] Court but reaches a different result.”<sup>53</sup> A state court determination of a question which relevant Supreme Court precedent leaves unresolved can be neither contrary to, nor an unreasonable application of, Court precedent.<sup>54</sup>

Section 2254(d)’s contrary-to-or unreasonable-application threshold applies even when the *Brecht v. Abrahamson*<sup>55</sup> standard (which requires a state prisoner seeking to challenge his conviction in collateral federal proceedings to show that trial error had a substantial and injurious effect or influence on the outcome of the trial) is in play.<sup>56</sup>

The Supreme Court has had fewer occasions to construe the unreasonable-determination-of-facts language in § 2254(d)(2). Several cases have involved the prosecution’s purportedly discriminatory peremptory jury strikes, in which context the Court declared that “a federal habeas court can only grant [such a] petition if it was unreasonable to credit the prosecutor’s race-neutral explanations for the *Batson* challenge. State-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by ‘clear and convincing evidence.’”<sup>57</sup> Section 2254(e) also limits the new evidence that might be used to undermine a prior factual determination to previously undiscoverable evidence or evidence made available by the retroactive application of a Supreme Court “new rule” of constitutional interpretation.<sup>58</sup> Even if

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applied clearly established federal law erroneously or incorrectly.’ Rather, that application must be objectively unreasonable.”) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)); *see also* *Bell v. Cone*, 535 U.S. 685, 699 (2002); *Rompilla*, 545 U.S. at 380; *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017); *Shoop v. Twyford*, 596 U.S. 811, 819 (2022).

<sup>52</sup> *Shoop v. Hill*, 586 U.S. 45, 48 (2019) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)); *see also* *LeBlanc*, 582 U.S. at 94.

<sup>53</sup> *Brown v. Payton*, 544 U.S. 133, 141 (2005) (first quoting 28 U.S.C. § 2254(d)(1)); then citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000); and then citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)); *Carey v. Musladin*, 549 U.S. 70, 74 (2006).

<sup>54</sup> *Kernan v. Cuero*, 583 U.S. 1, 8 (2017) (“[C]ircuit precedent does not constitute ‘clearly established Federal law, as determined by the Supreme Court.’”) (quoting *Glebe v. Frost*, 754 U.S. 21, 23 (2014) (per curiam)); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005).

<sup>55</sup> 507 U.S. 619 (1993).

<sup>56</sup> *Brown v. Davenport*, 596 U.S. 118, 145 (2022) (“Even assuming Mr. Davenport met his burden under *Brecht*, he cannot do so under AEDPA. And a federal court cannot grant habeas relief unless a state prisoner like Mr. Davenport satisfies both this Court’s equitable precedents and Congress’s statute.”).

<sup>57</sup> *Rice v. Collins*, 546 U.S. 333, 338–39 (2006) (first quoting 28 U.S.C. § 2254(d)(2); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (“the standard is demanding but not insatiable . . . ‘deference does not by definition preclude relief’” quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)); *see also* *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (an assistance of counsel case in which Court observed that a “partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court’s decision”); *Porter v. McCollum*, 558 U.S. 30, 41–44 (2009) (per curiam) (state court decision that petitioner was not prejudiced by counsel’s failure to investigate potential mitigating evidence was unreasonable); *see generally*, 28 U.S.C. § 2254(e).

<sup>58</sup> *Shoop v. Twyford*, 596 U.S. 811, 819 (The section permits a petitioner to offer new evidence undermining the validity of his conviction if the evidence was previously undiscoverable or made admissible by an intervening Supreme Court decision).

all of § 2254(e)'s conditions are met, admission of the new evidence is a matter of the court's discretion.<sup>59</sup>

## Exhaustion

The deference extended to state courts reaches not only their decisions but the opportunity to render decisions arising within the cases before them. State prisoners had long been required to exhaust the opportunities for state remedial action before federal habeas relief could be granted.<sup>60</sup> The Supreme Court has observed that this “exhaustion doctrine is principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings. Under our federal system, the federal and state courts [are] equally bound to guard and protect rights secured by the Constitution.”<sup>61</sup> Because “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,” the Court described federal courts as applying the doctrine of comity, which “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.”<sup>62</sup>

“A rigorously enforced total exhaustion rule . . . encourage[s] state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. As the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues. Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.”<sup>63</sup>

The AEDPA preserves the exhaustion requirement,<sup>64</sup> and reinforces it with an explicit demand that a state’s waiver of the requirement must be explicit.<sup>65</sup> On the other hand, Congress appears to have been persuaded that while as a general rule constitutional questions may be resolved more quickly if state prisoners initially bring their claims to state courts, in some cases where a state

<sup>59</sup> *Shinn v. Ramirez*, 596 U.S. 366, 381–82 (2022) (“Finally, even if all of these requirements [under § 2254(e)] are satisfied, a federal habeas court still is not *required* to hold a hearing or take any evidence. Like the decision to grant habeas relief itself, the decision to permit new evidence must be informed by principles of comity and finality that govern every federal habeas case.”). (emphasis in original).

<sup>60</sup> 28 U.S.C. § 2254(b),(c) (1994 ed.).

<sup>61</sup> *Rose v. Lundy*, 455 U.S. 509, 518 (1982).

<sup>62</sup> *Darr v. Burford*, 339 U.S. 200, 204 (1950).

<sup>63</sup> *Rose*, 455 U.S. at 518–19.

<sup>64</sup> 28 U.S.C. § 2254(b)(1)(A); *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022). The requirement is subject to exception when “it appears that . . . (i) there is an absence of available state corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant,” 28 U.S.C. § 2254(b)(1)(B); *Banks v. Dretke*, 540 U.S. 668, 690 (2004); *see generally*, 28 U.S.C. § 2254(b) (“(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that - (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant. (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.”).

<sup>65</sup> 28 U.S.C. § 2254(b)(3). *Banks v. Dretke*, 540 U.S. 668, 705 (2004) (“[U]nder pre-AEDPA law, exhaustion and procedural default defenses could be waived based on the State’s litigation conduct,” (citing *Granberry v. Greer*, 481 U.S. 129, 135 (1987))).



prisoner has mistakenly first sought relief in federal court, operation of the exhaustion doctrine may contribute to further delay.<sup>66</sup> Hence, the provisions of 28 U.S.C. § 2254(b)(2) authorize dismissal on the merits of mixed habeas petitions filed by state prisoners.

## Successive Petitions

The AEDPA also bars repetitious habeas petitions by state and federal prisoners under § 2244 which with limited exceptions gives habeas petitioners “one and only one bite of the apple,” no more continuing parade of habeas petitions from a single prisoner.<sup>67</sup> Under earlier law, state prisoners could not petition for habeas relief on a claim they had included or could have included in earlier federal habeas petitions unless they could show “cause and prejudice” or a miscarriage of justice.<sup>68</sup> Cause could be found in the ineffective assistance of counsel;<sup>69</sup> the subsequent development of some constitutional theory which would have been so novel at the time it should have been asserted as to be considered unavailable;<sup>70</sup> or the discovery of new evidence not previously readily discoverable.<sup>71</sup>

A prisoner unable to show cause and prejudice might nevertheless be entitled to federal habeas relief upon a showing of a “fundamental miscarriage of justice,” that is, that “the constitutional error ‘probably’ resulted in the conviction of one who was actually innocent.”<sup>72</sup> “To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”<sup>73</sup> The Supreme Court’s pre-AEDPA tolerance for second or successive habeas petitions from state prisoners was limited; the tolerance of the AEDPA is, if anything, more limited. “If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases.”<sup>74</sup> A claim not mentioned in an earlier petition must be dismissed unless it falls within one of two narrow exceptions: (A) it relies on a newly announced constitutional interpretation made retroactively applicable;<sup>75</sup> or (B) it is predicated upon on newly discovered evidence, not

<sup>66</sup> H.R. Rep. No. 104-23 at 9–10 (1995) (“This reform will help avoid the waste of state and federal resources that now result when a prisoner presenting a hopeless petition to a federal court is sent back to the state courts to exhaust state remedies. It will also help avoid potentially burdensome and protracted inquiries as to whether state remedies have been exhausted, in cases in which it is easier and quicker to reach a negative determination of the merits of a petition . . . . The [Act] further provides that a state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance on the requirement unless it waives the requirement expressly through counsel. This provision accords appropriate recognition to the important interests in comity that are implicated by the exhaustion requirement in cases in which relief maybe granted. This provision is designed to disapprove those decisions which have deemed states to have waived the exhaustion requirement, or barred them from relying on it, in circumstances other than where the state has expressly waived the requirement.”).

<sup>67</sup> 28 U.S.C. § 2244(b).

<sup>68</sup> *McCleskey v. Zant*, 499 U.S. 467, 492–97 (1991).

<sup>69</sup> *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

<sup>70</sup> *Reed v. Ross*, 468 U.S. 1 (1984).

<sup>71</sup> *Amadeo v. Zant*, 486 U.S. 214 (1988).

<sup>72</sup> *Schlup v. Delo*, 513 U.S. 298, 322 (1995).

<sup>73</sup> *Id.* at 327. The Court insisted upon a higher standard of proof when the asserted constitutional defect affected the question not of the petitioner’s guilt but of his death sentence. There the gateway showing of innocence, required a showing “by clear and convincing evidence that but for a constitutional error, no reasonable juror would find [the petitioner] eligible for the death penalty under [applicable state] law,” *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992).

<sup>74</sup> *Tyler v. Cain*, 533 U.S. 656, 661 (2001) (citing, 28 U.S.C. § 2244(b)(1)).

<sup>75</sup> *Id.* at 662 (“This provision [28 U.S.C. § 2244(b)(2)(A)] establishes three prerequisites to obtaining relief in a second or successive petition: First, the rule on which the claim relies must be a ‘new rule’ of constitutional law; second, the rule must have been ‘made retroactive to cases on collateral review by the Supreme Court;’ and, third, the claim must (continued...)”).

previously available through the exercise of due diligence, which together with other relevant evidence establishes by clear and convincing evidence that but for the belatedly claimed constitutional error “no reasonable factfinder would have found the applicant guilty.”<sup>76</sup> Moreover, the exceptions are only available if a three-judge panel of the federal appellate court authorizes the district court to consider the second or successive petition because the panel concludes that the petitioner has made a prima facie case that his claim falls within one of the exceptions.<sup>77</sup> And the section purports to place the panel’s decision beyond the en banc jurisdiction of the circuit and the certiorari jurisdiction of the Supreme Court.<sup>78</sup>

The Supreme Court, in *Felker v. Turpin*, held that because it retained its jurisdiction to entertain original habeas petitions neither the gatekeeper provisions of 28 U.S.C. § 2244(b)(3) nor the limitations on second or successive petitions found in § 2244(b)(1) and (2) deprive the Court of appellate jurisdiction in violation of Article III, § 2 of the Constitution.<sup>79</sup> At the same time, it held that the restrictions came well within Congress’ constitutional authority and did not “amount to a ‘suspension’ of the writ contrary to Article I, § 9.”<sup>80</sup> In *Castro v. United States*,<sup>81</sup> the Court held that § 2244(b)(3)(E) constraint upon its certiorari jurisdiction is limited to instances where the lower appellate court has acted on a request to file a successive petition, and does not apply to instances where the lower appellate court has reviewed a trial court’s successive petition determination. A claim, which becomes ripe after an earlier petition, such as a claim that the petitioner’s mental health precludes his execution, is not considered a second petition.<sup>82</sup>

## Statute of Limitations

Until the mid-20th century, a federal habeas corpus petition could be filed and the writ granted at any time as long as the petitioner remained under government confinement,<sup>83</sup> but court rules applicable to both state and federal prisoners were then adopted to permit the dismissal of stale petitions if the government’s ability to respond to the petition has been prejudiced by the passage of time.<sup>84</sup> Federal habeas review was not precluded merely because the government’s ability to

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have been ‘previously unavailable.’ In this case, the parties ask us to interpret only the second requirement . . . . Based on the plain meaning of the text read as a whole, we conclude that ‘made’ means ‘held’ and, thus, the requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review.”)

<sup>76</sup> 28 U.S.C. § 2244(b)(2); *Foster v. Chatman*, 578 U.S. 488, 520 (2016). Section 2255(h) sets comparable restrictions against repetitive motions by federal prisoners (“A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitution law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.”); *Jones v. Hendrix*, 599 U.S. 465, 490 (2023).

<sup>77</sup> 28 U.S.C. § 2244(b)(3); *Banister v. Davis*, 590 U.S. 504, 509 (2020).

<sup>78</sup> 28 U.S.C. § 2244(b)(3)(E).

<sup>79</sup> *Felker v. Turpin* 518 U.S. 651, 661–63 (1996). The so-called “gatekeeper” provision is so designated because it requires the courts of appeals to open the way for district court consideration of a habeas petitioner’s second or successive application for habeas relief.

<sup>80</sup> *Id.* at 664.

<sup>81</sup> 540 U.S. 375, 379–81 (2003).

<sup>82</sup> *Panetti v. Quarterman*, 551 U.S. 930, 944–45 (2007).

<sup>83</sup> *United States v. Smith*, 331 U.S. 469, 475 (1947) (“habeas corpus provides a remedy . . . without limit of time”).

<sup>84</sup> Rule 9(a), *Rules Governing Section 2254 Cases in the United States District Courts*, 28 U.S.C. § 2254 App. (1994 ed.); see also Rule 9(a), *Rules Governing Section 2255 Cases in the United States District Courts*, 28 U.S.C. § 2255 App. (1994 ed.). Rule 9 now provides: “Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).”

retry the petitioner had been prejudiced by the passage of time.<sup>85</sup> The court rules also did not apply where the petitioner could not reasonably have acquired the information necessary to apply before prejudice to the government occurred.

The AEDPA establishes a one-year deadline, codified at 28 U.S.C. § 2244(d), within which state and federal prisoners must file their federal habeas petitions.<sup>86</sup> The period of limitations begins with the latest of:

- the date of final completion of direct state review procedures;<sup>87</sup>
- the date of removal of a government impediment preventing the prisoner from filing for habeas relief;
- the date of Supreme Court recognition of the underlying federal right and of the right’s retroactive application;<sup>88</sup> or
- the date of uncovering previously undiscoverable evidence upon which the habeas claim is predicated.

The period is tolled during the pendency of state collateral review,<sup>89</sup> that is, “during the interval between (1) the time a lower state court reaches an adverse decision, and (2) the day the prisoner timely files an appeal.”<sup>90</sup> When the state appeal is not filed in a timely manner, when it “is untimely under state law, ‘that [is] the end of the matter’ for purposes of § 2244(d)(2).”<sup>91</sup> A qualifying petition must be “properly filed” with the appropriate state court, but a petition for state collateral review is no less properly filed simply because state procedural requirements other than timeliness preclude the state courts from ruling on the merits of the petition.<sup>92</sup>

<sup>85</sup> *Vasquez v. Hillery*, 474 U.S. 254, 264–65 (1986).

<sup>86</sup> 28 U.S.C. § 2244(d) (“(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”); § 2255(f) is comparably worded.

<sup>87</sup> Although a conviction is ordinarily final when the deadline for filing a final appeal has passed, the beginning of the limitations period here may be tolled until competition of any direct appeal allowed to proceed out of time, *Jimenez v. Quarterman*, 555 U.S. 113, 118–21 (2009).

<sup>88</sup> When the Court recognizes the right in one decision and later asserts its retroactive application, the statute of limitations begins to run from the date of the decision recognizing the right, *Dodd v. United States*, 545 U.S. 353, 360 (2005).

<sup>89</sup> Many states have a state equivalent of federal habeas corpus sandwiched between direct appeal and federal habeas. In these jurisdictions there may be as many as eight levels of review: (1) direct appeal in state court, (2) an opportunity to petition for review by the United States Supreme Court, (3) petition for collateral review in state court, (4) appeal to state appellate courts of any denial of collateral relief in state court, (5) an opportunity to petition for review by the United States Supreme Court, (6) petition for habeas relief in federal district court, (7) appeal of any denial in federal district court, and (8) an opportunity for United States Supreme Court review.

<sup>90</sup> *Evans v. Chavis*, 546 U.S. 189, 192 (2006) (citing *Carey v. Saffold*, 536 U.S. 214, 219–21 (2002)).

<sup>91</sup> *Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) (alteration in original) (quoting *Carey v. Saffold*, 536 U.S. 214, 226 (2002)); similarly for federal prisoners, tolling pending appeal ends when the Court renders its decision or when the time for filing a petition for certiorari expires, *Clay v. United States*, 537 U.S. 522, 527–28 (2003).

<sup>92</sup> *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).



Amendments, submitted after the expiration of a year, to a petition filed within the one-year period limitation, that assert claims unrelated in time and type to those found in the original petition do not relate back and are time barred.<sup>93</sup> A state may waive the statute of limitations defense, but its intent to do so must be clear and not simply the product of a mathematical miscalculation.<sup>94</sup>

The 1-year statute of limitations provisions are subject to a miscarriage of justice exception under which a “petitioner ‘must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.’”<sup>95</sup>

The same 1-year provisions initially presented a novel problem for district courts faced with petitions presenting containing claims over which opportunities for state relief had exhausted and unexhausted claims. Before the AEDPA, district courts could not adjudicate mixed petitions but were required to first give state courts the opportunity to resolve the unexhausted claims.<sup>96</sup> Petitioners could then return to the federal habeas court for adjudication of any remaining exhausted claims. “As a result of the interplay between AEDPA’s 1-year statute of limitations and *Lundy’s* dismissal requirement, petitioners who come to federal court with ‘mixed’ petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner file[d] a timely but mixed petition in federal district court, and the district court dismis[s]e[d] it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review.”<sup>97</sup> Nevertheless, the district court was under no obligation to warn pro se petitions of the perils of mixed petitions.<sup>98</sup> Although cautioning against abuse if too frequently employed, the Supreme Court endorsed a “stay and abeyance” solution suggested by several of the lower courts, under which the portion of a state prisoner’s mixed petition related to exhausted habeas claims are stayed and held in abeyance until he can return to state court and exhaust his unexhausted claims.<sup>99</sup>

## Appeals

At one time, an appeal from a federal district court’s habeas decision could only proceed upon the issuance of a probable cause certification issued by either the district court judge or a federal appellate judge that the appeal involved an issue meriting appellate consideration,<sup>100</sup> and could

<sup>93</sup> *Mayle v. Felix*, 545 U.S. 644, 655 (2005).

<sup>94</sup> *Day v. McDonough*, 547 U.S. 198, 202 (2006).

<sup>95</sup> *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

<sup>96</sup> *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982).

<sup>97</sup> *Rhines v. Weber*, 544 U.S. 269, 275 (2005).

<sup>98</sup> *Pliler v. Ford*, 542 U.S. 225, 227 (2004) (the Court left open the question of whether such a prisoner might subsequently file an out of time, amended petition relating back to his original timely petition under a claim of improper dismissal).

<sup>99</sup> “[S]tay and abeyance should be available only in limited circumstances . . . [S]tay and abeyance is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless . . . . And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay. On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics,” *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005); *see also* *Gonzalez v. Thaler*, 565 U.S. 134, 153–54 (2012).

<sup>100</sup> 28 U.S.C. § 2254 (1994 ed.).

only be granted after the prisoner had made a “substantial showing of the denial of [a] federal right.”<sup>101</sup>

With slight changes in terminology, the AEDPA leaves the matter largely unchanged.<sup>102</sup> Appeals are only possible upon the issuance of certification of appealability (COA), based on a substantial showing of a constitutional right.<sup>103</sup> A petitioner satisfies the requirement when he can show that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”<sup>104</sup>

This does not require the petitioner show a likelihood of success on the merits; it is enough that reasonable jurists would find that the claim warrants closer examination.<sup>105</sup> Should the district have dismissed the habeas petition on procedural grounds, a COA may be issued only upon the assessment that reasonable jurists would consider both the merits of the claim and the procedural grounds for dismissal debatable.<sup>106</sup> Because the COA requirement is jurisdictional, an appellate court may not treat an application of the COA as an invitation to immediately pass upon the merits without first granting the certificate.<sup>107</sup> Although the Supreme Court had declared that it lacked statutory jurisdiction to review the denial of a certificate of probable cause under a writ of certiorari,<sup>108</sup> the denial of a COA may be challenged under the writ.<sup>109</sup>

<sup>101</sup> *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

<sup>102</sup> 28 U.S.C. § 2253(c).

<sup>103</sup> *Id.* § 2253(c) (“(1) Unless a circuit justice or judge issues a certification of appealability, an appeal may not be taken to the court appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255. (2) A certification of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.”); *Ayestas v. Davis*, 584 U.S. 28, 37 n.1 (2018) (“[T]he jurisdiction of a court of appeals to entertain an appeal from a final order in a habeas proceeding is dependent on the issuance of a COA.”) (citing 28 U.S.C. § 2253(c)(1) and *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012)); *Welch v. United States*, 578 U.S. 120, 127 (2016).

<sup>104</sup> *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *see also* *Tharpe v. Sellers*, 583 U.S. 33, 35 (2018) (per curiam); *Banks v. Dretke*, 540 U.S. 668, 703–05 (2004).

<sup>105</sup> *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (“A prisoner seeking a COA must prove ‘something more than the absence of frivolity’ or the existence of mere ‘good faith’ on his or her part. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim may be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration that petitioner will not prevail.”).

<sup>106</sup> *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismissed the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”).

<sup>107</sup> *Miller-El*, 537 U.S. at 336–67 (“This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction”).

<sup>108</sup> *House v. Mayo*, 324 U.S. 42, 44 (1945).

<sup>109</sup> *Hohn v. United States*, 524 U.S. 236, 253 (1998).

## Default

Default occurs when a state prisoner fails to afford state courts the opportunity to correct a constitutional defect and then seeks federal habeas relief.<sup>110</sup> Default lies at the heart of the Supreme Court’s deferential “independent and adequate state ground” doctrine, which bars “federal habeas when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds.”<sup>111</sup> Ordinarily, the Supreme Court will consider an independent state ground “adequate” if it is “firmly established and regularly followed,” unless the state ruling is grounded in an “unforeseeable and unsupported” application of state law.<sup>112</sup>

In some cases, a prisoner’s attorney may fail to satisfy the requirements designed to ensure finality and comity, through negligence or by choice, and the prisoner asserts that the failure is due to constitutionally defective assistance of counsel. The Sixth Amendment guarantees the criminally accused the right to the assistance of counsel.<sup>113</sup> The right is binding against the states through the Fourteenth Amendment.<sup>114</sup> The right “is the right to effective counsel.”<sup>115</sup> The want of efficient counsel may lead to reversal of a conviction or vacatur of a sentence.<sup>116</sup> To prove deficient performance of counsel, a defendant must show first that counsel’s performance was not reasonably “within the range of competence demanded of attorneys in criminal cases . . . under prevailing professional norms.”<sup>117</sup> Second, “the defendant must show that the deficient performance prejudiced the defense,” that is, that counsel’s errors were so serious as to deprive the defendant of a fair trial.”<sup>118</sup>

In *Wainwright v. Sykes*<sup>119</sup> and the cases which followed its lead, the Supreme Court declared that state prisoners who fail to raise claims in state proceedings are barred from doing so in federal habeas proceedings unless they can establish both “cause and prejudice.”<sup>120</sup> The Court later explained that the same standard should be used when state prisoners abused the writ with successive petitions asserting claims not previously raised,<sup>121</sup> and when they sought to establish a

<sup>110</sup> *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (“Under that doctrine [of procedural default], federal courts generally decline to hear any federal claim that was not presented to the state courts ‘consistent with [the State’s] own procedural rules.’”) (quoting *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000)).

<sup>111</sup> *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991) (citing *Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977)).

<sup>112</sup> *Cruz v. Arizona*, 598 U.S. 17, 25–26 (2023).

<sup>113</sup> U.S. CONST. amend. VI.

<sup>114</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963).

<sup>115</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>116</sup> *Id.* at 687. Ineffective assistance of counsel is one of the two most common habeas claims. *Habeas Relief for State Prisoners*, 52 GEO. L. J. ANN. REV. CRIM. PROC. 1125, 1139 (2023).

<sup>117</sup> *Strickland*, 466 U.S. at 687, 688; *Andrus v. Texas*, 590 U.S. 806, 813 (2020) (per curiam) (describing state court determination that petitioner failed to show “counsel’s representation fell below an objective standard of reasonableness”).

<sup>118</sup> *Strickland*, 466 U.S. at 687; see also *Shinn v. Kayer*, 592 U.S. 111, 117–18 (2020) (“In the capital sentencing context, the prejudice inquiry asks ‘whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’”) (quoting *Strickland*, 466 U.S. at 695); *Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024).

<sup>119</sup> 433 U.S. 72 (1977).

<sup>120</sup> *E.g.*, *Shinn v. Ramirez*, 596 U.S. 366, 379 (2022) (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

<sup>121</sup> *McClesky v. Zant*, 499 U.S. 467 (1991).

claim by developing facts which they had opted not to establish during previous proceedings.<sup>122</sup> Of the two elements, prejudice requires an actual, substantial disadvantage to the prisoner.<sup>123</sup>

What constitutes cause is not easily stated, and the cases reflect the Supreme Court's reluctance to second-guess counsel. Cause does not include tactical decisions,<sup>124</sup> ignorance, inadvertence or mistake of counsel,<sup>125</sup> or the assumption that the state courts would be unsympathetic to the claim.<sup>126</sup> Cause may include the ineffective assistance of counsel;<sup>127</sup> some forms of prosecutorial misconduct;<sup>128</sup> the subsequent development of some constitutional theory which would have been so novel at the time it should have been asserted as to be considered unavailable;<sup>129</sup> or the discovery of new evidence not previously readily discoverable.<sup>130</sup>

The Constitution does not guarantee the right to the effective assistance of counsel in post-conviction litigation after the direct appeal stage.<sup>131</sup> Consequently, ineffective assistance there cannot supply cause to excuse default,<sup>132</sup> unless the default is the product of state law.<sup>133</sup>

Federal courts may entertain a habeas petition, notwithstanding default and the failure to establish cause, in any case where failure to grant relief, based on an error of constitutional dimensions,

<sup>122</sup> *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

<sup>123</sup> *Engle v. Isaac*, 456 U.S. 107 (1982); *Ramirez*, 596 U.S. at 379.

<sup>124</sup> *Smith v. Murray*, 477 U.S. 527 (1986).

<sup>125</sup> *Murray v. Carrier*, 477 U.S. 478 (1986).

<sup>126</sup> *Engle*, 456 U.S. at 130.

<sup>127</sup> *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022) (“In *Martinez v. Ryan*, 566 U.S. 1[, 14] (2012), this Court explained that ineffective assistance of postconviction counsel is ‘cause’ to forgive procedural default of an ineffective-assistance-of-trial-counsel claim, but only if the State required the prisoner to raise that claim for the first time during [later] state postconviction proceedings [and the claim had some merit.]”) (parallel citations omitted) (emphasis added); in *Davila v. Davis*, 582 U.S. 521, 529 (2017), the Court refused “to extend *Martinez* to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of **appellate** counsel when a prisoner’s state postconviction counsel provide[d] ineffective assistance by failing to raise that claim.”) (emphasis added); in *Ramirez*, 596 U.S. at 371, The Court refused to evoke *Martinez*’s equitable principles to dispense with AEDPA’s limits (28 U.S.C. § 2254(e)(2)) on new evidentiary supplements to the record of state court proceedings; *Kimmelman v. Morrison*, 477 U.S. 365 (1986). For ineffective assistance of counsel to satisfy a petitioner’s burden to show cause for his procedural default (by failing to raise a claim in state court), the claim of ineffective assistance must have been presented to the state courts, *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (“‘a claim of ineffective assistance’ must ‘be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default’” (quoting *Murray v. Carrier*, 477 U.S. 478, 489 (1986))).

<sup>128</sup> *Strickler v. Greene*, 527 U.S. 263 (1999) (finding cause for failure to raise a Brady claim relating to the prosecution’s obligation to disclose of exculpatory evidence when “(a) the prosecution withheld exculpatory evidence; (b) petitioner reasonable relied on the prosecution’s open file policy as fulfilling the prosecution’s duty to disclose such evidence; and (c) the [State] confirmed petitioner’s reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received everything known to the government”) (quoted with approval in *Banks v. Dretke*, 540 U.S. 668, 692–93 (2004)).

<sup>129</sup> *Reed v. Ross*, 468 U.S. 1, 16 (1984).

<sup>130</sup> *Amadeo v. Zant*, 486 U.S. 214, 222 (1988).

<sup>131</sup> *Shinn v. Rameriz*, 596 U.S. 366, 383 (2022) (citing *Davila v. Davis*, 582 U.S. 5221, 529 (2017))

<sup>132</sup> *Ramirez*, 596 U.S. at 380 (“[I]n proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default.”) (quoting *Davila*, 582 U.S. at 529 (2017)).

<sup>133</sup> *Ramirez*, 596 U.S. at 380 (“In *Martinez*, this Court recognized a ‘narrow exception’ to the rule. . . . There, the Court held that ineffective assistance of state postconviction counsel may constitute ‘cause’ to forgive procedural default of a trial-ineffective-assistance claim, but only if the State requires prisoners to raise such claims for the first time during state collateral proceedings. . . . One year later, in *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court held that this ‘narrow exception’ applies if the State’s judicial system effectively forecloses direct review of trial-ineffective-assistance claims. *Id.* at, 428. Otherwise, attorney error where there is no right to counsel remains insufficient to show cause.”) (parallel citations omitted).

would result in a miscarriage of justice due to the apparent conviction of the innocent.<sup>134</sup> To meet this “actually innocent” standard, the prisoner must show that “it is more likely than not that no reasonable juror would convict him.”<sup>135</sup> When the petitioner challenges his capital sentence rather than his conviction, he must show “by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.”<sup>136</sup> This miscarriage of justice exception, whether addressed to the petitioner’s guilt or sentence, is a matter that can be taken up only as a last resort after all non-defaulted claims for relief and the grounds for cause excusing default on other claims have been examined.<sup>137</sup>

## Actual Innocence

In its 1993 decision in *Herrera v. Collins*,<sup>138</sup> the Supreme Court considered whether newly discovered evidence of actual innocence, without some procedural error of constitutional magnitude, permitted habeas relief. Chief Justice Rehnquist, author of the opinion for the Court, finessed the issue by assuming without deciding that at some quantum of evidence of a defendant’s innocence the Constitution would rebel against his or her execution.<sup>139</sup> Short of that point and cognizant of the availability of executive clemency, newly discovered evidence of the factual innocence of a convicted petitioner, unrelated to any independent constitutional error, does not warrant habeas relief.<sup>140</sup>

*House v. Bell*,<sup>141</sup> came to much the same end. House supplied evidence of his innocence of sufficient weight to overcome the procedural default that would otherwise bar consideration of his habeas petition. “[W]hatever burden a hypothetical freestanding innocence claim would require,” however, the record in *House* (new evidence and old) was not sufficient.<sup>142</sup>

*In re Davis* afforded the Court the opportunity to consider anew the issue it put aside in *Herrera* and *House*—may habeas relief be granted on the basis of a freestanding claim of innocence, and if so, what level of persuasion is required before such relief may be granted? The Supreme Court transferred Davis’ habeas petition to the U.S. District Court for the Southern District of Georgia to receive evidence and make findings concerning Davis’ innocence.<sup>143</sup> Justice Scalia, joined by Justice Thomas, characterized the transfer as a “fool’s errand,” since in their view the lower court may not grant habeas relief regardless of its findings.<sup>144</sup> Justice Stevens, in a concurrence joined

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<sup>134</sup> *Murray v. Carrier*, *supra*.

<sup>135</sup> *Schlup v. Delo*, 513 U.S. 298, 327 (1995). The standard rests between that of *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (that the petitioner show “by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner [guilty or] eligible for the death sentence under the applicable state law”) and that of *Strickland v. Washington*, 466 U.S. 668, 695 (1986) (the petitioner must show “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt”), *Schlup*, 513 U.S. at 332–33 (O’Connor, J., concurring).

<sup>136</sup> *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

<sup>137</sup> *Dretke v. Haley*, 541 U.S. 386, 393–94 (2004).

<sup>138</sup> 506 U.S. 390 (1993).

<sup>139</sup> *Id.* at 417.

<sup>140</sup> *Id.* at 400.

<sup>141</sup> 547 U.S. 518 (2006).

<sup>142</sup> *Id.* at 555.

<sup>143</sup> *In re Davis*, 557 U.S. 952 (2009).

<sup>144</sup> *Id.* at 954 (Scalia, J., with Thomas, J., dissenting).

by Justices Ginsburg and Breyer, disagreed.<sup>145</sup> The lower federal courts subsequently denied relief<sup>146</sup> and the Supreme Court denied certiorari.<sup>147</sup>

## Harmless Error

The mere presence of constitutional error by itself does not present sufficient grounds for issuance of the writ unless the error is also harmful (i.e., “unless the error had a substantial and injurious effect or influence in determining the jury’s verdict.”)<sup>148</sup> The writ will issue, however, where the court has grave doubt as to whether the error was harmless.<sup>149</sup>

## New Rules and Retroactivity

A line of cases beginning with the Supreme Court’s 1989 decision in *Teague v. Lane*<sup>150</sup> drastically limited use of federal habeas to raise novel legal issues by restricting for habeas purposes the retroactive application of the Supreme Court’s decisions. The Court’s 2021 decision in *Edwards v. Vannoy*<sup>151</sup> limited availability even further.

Prior to *Teague* when the Court announced a new rule concerning constitutional requirements binding in state criminal procedure cases, it employed one of two approaches. In some cases, it simultaneously announced whether the new rule was to have retroactive or prospective applications. In others, it postponed that decision until a subsequent case. In either instance, the Court employed a test first articulated in *Linkletter v. Walker*<sup>152</sup> to determine whether a new rule should be applied retroactively. Under the test, the Court considered “(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.”<sup>153</sup>

In *Teague*, the Court adopted a different approach, borrowing from a position espoused earlier by Justice John M. Harlan.<sup>154</sup> Under this view, habeas is perceived as a deterrent used to encourage state and lower federal courts to adhere to constitutional standards. Therefore, a novel constitutional interpretation, or “new rule” should not be applied retroactively during federal habeas review of state convictions since state courts could only be expected to defer to those rules in existence when their consideration became final. Furthermore, since it would be unfair to grant a habeas petitioner the benefit of a new rule but deny its benefits retroactively to others similarly situated, a plurality of the Court held that “habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to

<sup>145</sup> *Id.* at 952–53 (Stevens, J., with Ginsburg and Breyer, JJ., concurring).

<sup>146</sup> *Davis v. Terry*, 625 F.3d 716 (11th Cir. 2010).

<sup>147</sup> *Davis v. Humphrey*, 563 U.S. 904 (2011).

<sup>148</sup> *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

<sup>149</sup> *O’Neal v. McAninch*, 513 U.S. 432, 435 (1995).

<sup>150</sup> 489 U.S. 288 (1989).

<sup>151</sup> 593 U.S. 255 (2021) (discussed in Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505 (2022)).

<sup>152</sup> 381 U.S. 618 (1965).

<sup>153</sup> *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

<sup>154</sup> *See Desist v. United States*, 394 U.S. 244, 256 (1969) (Harlan, J. dissenting); *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J. concurring).



all defendants on collateral review” under one of the two exceptions where retroactive application is permitted.<sup>155</sup>

Thus, under *Teague* and its companion, *Penry v. Lynaugh*,<sup>156</sup> a new rule could not be sought through federal habeas and a new rule could only be applied retroactively for the benefit of habeas petitioners when (1) the new interpretation “places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,’”<sup>157</sup> or places “a certain category of punishment for a class of defendants because of their status or offense” beyond the power of the criminal law-making authority to proscribe,<sup>158</sup> or (2) the new interpretation “significantly improve[s] the pre-existing fact finding procedures . . . [which] implicate the fundamental fairness of the trial . . . [and] without which the likelihood of an accurate conviction is seriously diminished.”<sup>159</sup>

To constitute a new interpretation or “new rule” for purposes of the exceptions, the interpretation must “break[] new ground or impose[] a new obligation on the States or Federal Government,” or “[t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>160</sup> A decision may announce a “new rule” for purposes of *Teague*, even if the Court states its decision is “dictated by precedent,” as long as a split in the lower courts or some other source of authority provides a ground upon which a different outcome might reasonably have been anticipated,<sup>161</sup> for the *Teague* rule “serves to validate reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.”<sup>162</sup>

The Court later indicated that the rules covered in the first exception, the exception for rules that place certain conduct beyond proscriptive reach, are more accurately characterized as substantive rather than procedural rules and thus not subject to the *Teague* rule from the beginning.<sup>163</sup>

The second exception, available to new “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding” like *Gideon v. Wainwright*<sup>164</sup> did not extend to cases less indispensable to fundamental fairness than *Gideon*.<sup>165</sup> The Court observed in *Beard v. Banks* that it had yet to find another case that satisfied this second *Teague* exception,<sup>166</sup> and in *Edwards* it gave up the search.

<sup>155</sup> *Teague*, 489 U.S. at 316 (emphasis of the Court).

<sup>156</sup> 492 U.S. 302 (1989).

<sup>157</sup> *Teague*, 489 U.S. at 307.

<sup>158</sup> *Penry*, 492 U.S. at 330.

<sup>159</sup> *Teague*, 489 U.S. at 312–13.

<sup>160</sup> *Id.* at 301 (emphasis of the Court).

<sup>161</sup> *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

<sup>162</sup> *Sawyer v. Smith*, 497 U.S. 227, 234 (1990) (quoting *Butler*, 494 U.S. at 414); *Graham v. Collins*, 506 U.S. 461 (1993); *Gilmore v. Taylor*, 508 U.S. 333 (1993). The lower courts may not, however, disregard clear indications that a rule, sought or sought to be applied retroactively, is “dictated by precedent” and thereby escape the new rule limitations, *Stringer v. Black*, 503 U.S. 222, 234–35 (1992).

<sup>163</sup> *Beard v. Banks*, 542 U.S. 406, 411 n.3 (2004) (“Rules that fall within what we have referred to as *Teague*’s first exception ‘are more accurately characterized as substantive rules not subject to [*Teague*’s] bar’”) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004)).

<sup>164</sup> 372 U.S. 335 (1963).

<sup>165</sup> *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990).

<sup>166</sup> *Beard v. Banks*, 542 U.S. 406, 417 (2004).

In *Edwards*, the Court repudiated the “watershed rules of criminal procedure” exception and summarized the surviving rule as follows:

New substantive rules alter “the range of conduct or the class of persons that the law punishes.” Those new substantive rules apply to cases pending in trial courts and on direct review, and they also apply retroactively on federal collateral review. New procedural rules alter “only the manner of determining the defendant’s culpability.” Those new procedural rules apply to cases pending in trial courts and on direct review. But new procedural rules do not apply retroactively on federal collateral review.<sup>167</sup>

## Opting In

The most controversial of the proposals that preceded enactment of the AEDPA involved habeas in state capital cases.<sup>168</sup> Capital habeas cases presented special problems. Existing procedures afforded not only the incentive, but the opportunity, for delay. A state defendant convicted of a capital offense and sentenced to death could take advantage of three successive procedures to challenge constitutional defects in his or her conviction or sentence. His or her claims could be raised on appeal, in state habeas proceedings, and in federal habeas proceedings. As a consequence, there were extensive delays between sentence and execution of sentence.<sup>169</sup>

<sup>167</sup> *Edwards v. Vannoy*, 593 U.S. 255, 276 (2021) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2007)).

<sup>168</sup> The major crime bills passed by the House and Senate in the 101st Congress each contained habeas corpus amendments, S. 1970 and H.R. 5269. In an effort to secure final passage of a crime bill before adjournment, provisions over which the two Houses had major differences, such as habeas corpus, were stripped out, before a clean bill, S. 3266, was enacted, 136 CONG. REC. 36,925, 36,926 (1990) (remarks of Reps. Hughes and Hyde); 136 CONG. REC. 36,311-36,312 (1990) (remarks of Sen. Biden).

Habeas reform issues reemerged during the 102d Congress in which the Senate passed an omnibus crime bill containing reform proposals, S. 1241, and the House approved a different package, H.R. 3371. H.R. 3371 was ultimately reported out of conference committee with amendments and passed the House but not the Senate, 138 CONG. REC. 36,311—36,312 (1992) (remarks of Sens. Biden and Thurmond).

In the 103d Congress, the Senate elected to exclude habeas corpus reform from the major crime package it passed, H.R. 3355 (S. 1607), 139 CONG. REC. 30,574 (1993); 32,286-32,394 (1993) (text); 29,439-29,440 (1993) (remarks of Sen. Biden explaining omission). When the House Judiciary Committee reported the bill out, H.R. 4092, it included habeas reform provisions, 140 CONG. REC. 7374 (1994) (text). They were dropped during debate pursuant to an amendment by Rep. Hyde and despite a subsequent unsuccessful amendment offered by Rep. Derrick that would have restored a modified version of the Committee reform proposals, 140 CONG. REC. 7,804-7,810 (1994).

The issues resurfaced in the 104th Congress beginning with early House passage of the Effective Death Penalty Act (H.R. 729), 141 CONG. REC. 4090-4121 (1995); see also H.R. Rep. No. 104-23. In the Senate, the provisions were part of the terrorism bill, S. 735, from the beginning and passed the Senate as part of S. 735, 141 CONG. REC. 15,018–15,065 (1995), and were ultimately enacted into law as the first title in the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 STAT. 1214 (1996).

<sup>169</sup> “The problem is that, unlike the defendants serving their imprisonment – whose only incentive to apply for collateral review is the small chance that they will be released – defendants on death row have a very good reason to bring as many habeas corpus proceedings as the law allows. The time these reviews take literally keeps the death row defendants alive, and from their point of view the investment of time and energy for legal proceedings is very worthwhile.

“Of course, from our point of view it can be argued that if these defendants know there is no substance in their claims, they should withdraw their suits and take their punishment. Unfortunately, this kind of self-sacrifice is asking too much of anyone, let alone the kinds of people who have committed the types of crimes which have resulted in their being sentenced to death. . . .

“Moreover, the reversal rate in capital cases, both on direct appeal and on post-conviction relief, is far greater than that of noncapital – even murder – cases. Partly this results from the greater complexity of capital cases, since courts are especially careful in these cases to make sure the law is followed, and there is no doubt that the ambivalence of the courts toward the death penalty plays a part in this process. Moreover, capital cases, being harder fought, tend to raise (continued...)



In 1988, Chief Justice Rehnquist named a committee chaired by retired Justice Powell to study “the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases in which the prisoner had or had been offered counsel.”<sup>170</sup> The Committee identified three problems associated with federal habeas corpus in state capital punishment cases: unnecessary delay and repetition, the need to make counsel more generally available, and last minute litigation. The Committee recommended amendments to the federal habeas statute and Chief Justice Rehnquist transmitted its report to Congress in September 1989.<sup>171</sup>

Congress weighed the recommendations, but initially enacted no major revision, other than the provision in the 1988 Anti-Drug Abuse Act that required the appointment of counsel in conjunction with federal habeas in capital punishment cases.<sup>172</sup> The AEDPA, however, offered procedural advantages to the states to ensure the continued availability of qualified defense counsel in death penalty cases.<sup>173</sup> Prior to the AEDPA, federal law called for the appointment of counsel to assist indigent state prisoners charged with or convicted of a capital offense at every stage of the proceedings other than during collateral review in state court. The AEDPA offered a streamlined habeas procedure in cases involving state death row inmates to those states that fill this gap.<sup>174</sup>

When it became apparent that the states could not or would not opt in, Congress changed the procedure under which states are deemed to have qualified.<sup>175</sup> Under amendments in the USA PATRIOT Improvement and Reauthorization Act of 2005, the Attorney General rather than the courts determines whether a state has taken the steps necessary to opt in. States that elect to opt in must still provide a “mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state postconviction proceedings.”<sup>176</sup> References to competence standards for appointed counsel were removed.<sup>177</sup>

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more issues upon which the defense can appeal, and provide more incentive to make sure they are thoroughly briefed and argued. Moreover, in capital cases, the appellate courts are less willing to conclude that they should not disturb the verdict on the grounds that, on the whole, justice was done. In capital cases, more than others, all parties seem to feel that it is not merely sufficient that the right result be reached, but also that the appropriate procedures be scrupulously followed,” John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 573–74.

The complexity of death penalty jurisprudence contributed to a success rate estimated by some at almost 50%, a factor that not only enhanced delay but stiffened resistance to a narrower writ, Joseph L. Hoffman & William J. Stunt, *Habeas After the Revolution*, 1993 S. CT. REV. 65, 110 n.144 (“Professor James Liebman has determined that, between 1976 and 1985, the overall success rate for death penalty petitioners in habeas was 49 percent. See Liebman, *Federal Habeas Corpus* at 23–24 n.97 [(1988)]”).

<sup>170</sup> *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report (Powell Committee Report)*, printed in 135 CONG. REC. 24,694 (1989).

The American Bar Association issued a somewhat more detailed series of recommendations concerning reform of habeas in capital cases, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION’S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION’S PROJECT ON DEATH PENALTY HABEAS CORPUS (1990).

<sup>171</sup> 135 CONG. REC. 24,693 (1989).

<sup>172</sup> P.L. 100-690, §7001, 102 STAT. 4393; 21 U.S.C. § 848(q)(4)(B) (2000 ed.).

<sup>173</sup> 28 U.S.C. §§ 2261–2266.

<sup>174</sup> *Id.* §§ 2261, 2265.

<sup>175</sup> *Id.* § 2265.

<sup>176</sup> *Id.* § 2265(c).

<sup>177</sup> Prior to amendment, section 2261(b) read: “This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by (continued...)”

The Attorney General's certification<sup>178</sup> that a state has taken the necessary steps to opt in is subject to de novo review in the United States Court of Appeals for the District of Columbia, an appeal which in turn is subject to certiorari review in the Supreme Court.<sup>179</sup> The Attorney General promulgated implementing regulations in late 2008.<sup>180</sup>

For states that opt in, the AEDPA establishes a one-time automatic stay of execution for state death row inmates carrying through until completion of the federal habeas process.<sup>181</sup> Previously, the federal habeas statute authorized federal courts to stay the execution of a final state court judgment during the pendency of a state prisoner's federal habeas proceedings and related appeals.<sup>182</sup> Federal appellate courts could consider motions for a stay, pending review of the district court's decision or at the same time they considered the merits of the appeal. This regime encouraged unnecessary litigation over whether a stay was or was not in order and often resulted in state death row inmates waiting until the last hour before simultaneously filing a motion for a stay and an appeal from the district court's denial of the writ.

The AEDPA creates a 180-day statute of limitations for filing federal habeas petitions after the close of state proceedings with the possibility of one 30-day extension upon a good cause showing for states that opt in.<sup>183</sup>

When a state opts in, federal habeas review of a claim filed by a state death row inmate is limited to issues raised and decided on the merits in state court unless the state unlawfully prevented the claim from being raised in state court, or the claim is based on a newly recognized, retroactively applicable constitutional interpretation or on newly unearthed, previously undiscoverable evidence.<sup>184</sup>

In cases where the federal habeas application has been filed by a prisoner under sentence of death under the federal law or the laws of a state that has opted in, the government has a right, enforceable through mandamus, to a determination by the district court within 450 days of the filing of an application<sup>185</sup> and by the federal court of appeals within 120 days of the filing of the parties' final briefs.<sup>186</sup>

The implementing regulations are still in force,<sup>187</sup> but Arizona appears to be the only state to have opted in.<sup>188</sup>

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indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. *The rule of court or statute must provide standards of competency for the appointment of such counsel,*" 28 U.S.C. 2261(b) (2000 ed.) (emphasis added).

<sup>178</sup> 28 C.F.R. pt. 26B.

<sup>179</sup> 28 U.S.C. § 2265(c).

<sup>180</sup> 73 Fed. Reg. 75,327 (Dec. 11, 2008).

<sup>181</sup> 28 U.S.C. § 2262.

<sup>182</sup> 28 U.S.C. § 2251 (1994 ed.).

<sup>183</sup> 28 U.S.C. § 2263.

<sup>184</sup> 28 U.S.C. § 2264.

<sup>185</sup> Or, if sooner, within 60 days after the date the case is submitted for decision, 28 U.S.C. § 2266(b)(1)(A). Prior to the passage of the USA PATRIOT Improvement and Reauthorization Act, district courts were given 120 days from filing, 28 U.S.C. § 2266(b)(1) (A) (2000 ed.).

<sup>186</sup> 28 U.S.C. § 2266.

<sup>187</sup> 28 C.F.R. §§ 26.20 to 26.23.

<sup>188</sup> 85 Fed. Reg. 20,705 (Apr. 14, 2020); see also *Habeas Relief for State Prisoners*, 52 ANN. REV. CRIM. PROC. 1125, 1192 (2023) (mentioning only Arizona as having opted in).

## Habeas for Federal Convicts: The Section 2255 Substitute

Federal prisoners who claim that they are being held by virtue of a conviction or sentence rendered contrary to the Constitution or laws of the United States must ordinarily repair to § 2255 of title 28 of the United States Code for collateral review. Congress added § 2255 when it revised title 28 in 1948 to expedite review.<sup>189</sup> The section “replaced traditional habeas corpus for federal prisoners . . . . The purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient.”<sup>190</sup> The section “was intended to mirror § 2254 in operative effect,”<sup>191</sup> although there are occasionally differences between the two. When the AEDPA amended the provisions governing access to habeas by state prisoners, in some instances it made comparable changes in § 2255.<sup>192</sup>

Thus, both the state inmate’s habeas petition and federal convict’s § 2255 motion must be filed within a year after their direct appeals become final.<sup>193</sup> “An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.”<sup>194</sup> As for procedural default, “[w]here the petitioner—whether a state or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation.”<sup>195</sup>

The Supreme Court has yet to address the question of whether the *Teague* rule, which generally requires a new constitutional interpretation be claimed on direct appeal rather in habeas, applies to § 2255. The Court has observed that the lower federal courts have applied the *Teague* rule to § 2255,<sup>196</sup> and the logic that led to the elimination of the *Teague* “watershed rules of criminal procedure” exception in habeas petition cases would seem to apply with equal force in § 2255 motion cases.<sup>197</sup> The statutory provisions, governing both petition and motion cases, restrict relief for second or successive invocations in much the same manner, but they do so in different terminology.<sup>198</sup>

<sup>189</sup> H.R. Rep. No. 79-2646, at A172 (1946).

<sup>190</sup> *Boumediene v. Bush*, 553 U.S. 723, 774–75 (2008).

<sup>191</sup> *Reed v. Farley*, 512 U.S. 339, 353 (1994) (quoting *Davis v. United States*, 417 U.S. 333, 344 (1974)).

<sup>192</sup> Compare § 105 (§ 2255 amendments) with §§ 104 (§ 2254 amendments) and 106 (limits on second or successive applications) in P.L. 104-132, 110 STAT. 1218-211 (1996).

<sup>193</sup> 28 U.S.C. §§ 2244(d), 2255(f).

<sup>194</sup> 28 U.S.C. § 2255(d).

<sup>195</sup> *Reed*, 512 U.S. at 354.

<sup>196</sup> *Danforth v. Minnesota*, 552 U.S. 264 n.16 (2008); *see also* *Welch v. United States*, 578 U.S. 120, 128 (2016) (“The parties here assume that the *Teague* framework applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction, and we proceed on that assumption.”).

<sup>197</sup> *See* *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021).

<sup>198</sup> 28 U.S.C. §§ 2244(b), 2255(h); *see also* *Gonzalez v. Crosby*, 545 U.S. 524, 529 n.3 (2005); *Jones v. Hendrix*, 599 U.S. 465, 477–78 (2023).

## Congressional Authority to Bar or Restrict Access to the Writ

For many years, one of the most interesting and perplexing features of federal habeas involved the question of Congress' authority to restrict access to the writ. The Constitution nowhere expressly grants a right of access to the writ, although it might be seen as attribute of the Suspension Clause or the Due Process Clause or both. The Suspension Clause says no more than that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>199</sup> The Due Process Clause speaks with an equal want of particularity when it declares that, "no person shall . . . deprived of life, liberty, or property, without due process of law."<sup>200</sup> Balanced against this, is the power of Congress to "ordain and establish" the lower federal courts,<sup>201</sup> to regulate and make exceptions to the appellate jurisdiction of the Supreme Court;<sup>202</sup> to enact all laws necessary and power to carry into effect the constitutional powers of the courts as well as its own,<sup>203</sup> and the power to suspend the privilege to the writ in times of rebellion or invasion.<sup>204</sup>

In the past, when it seemed that Congress had extinguished the habeas jurisdiction of the lower courts, the Supreme Court observed that it retained jurisdiction to issue the writ on a petition filed originally with the Supreme Court, following a denial for want of jurisdiction or other action in a lower court. When legislation finally attempted to seal off this avenue to the Great Writ as well, the Court confirmed that separation-of-powers concerns reflected in the Suspension Clause preclude absolute denial of access to the writ (or to an adequate substitute) except under the circumstances noted in the Suspension Clause.<sup>205</sup>

### The Original Writ

The Constitution vests the judicial power of the United States in the Supreme Court and in the inferior courts created by Congress,<sup>206</sup> and describes two classes of Supreme Court jurisdiction, original and appellate. It explicitly identifies the kinds of cases which fall within the Court's original jurisdiction; the Court's appellate jurisdiction is portrayed more generally and with the notation that it is subject to congressional exception and regulation.<sup>207</sup>

The Judiciary Act of 1789 declared that "all the before mentioned courts of the United States [the Supreme Court, circuit courts, and district courts] shall power to issue writs of . . . habeas corpus . . . And that either of the justices of the supreme court, as well as judges of the district courts

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<sup>199</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>200</sup> U.S. CONST. amend. V.

<sup>201</sup> U.S. CONST. art. III, § 1.

<sup>202</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>203</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>204</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>205</sup> *Boumediene v. Bush*, 553 U.S. 723, 771–72 (2008).

<sup>206</sup> 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 the Congress may from time to time ordain and establish . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .").

<sup>207</sup> U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

shall power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment . . . .”<sup>208</sup>

After the Civil War, Congress conferred additional habeas authority upon the federal courts as a check against state authorities in the newly reconstructed South by making the writ available to anyone held in violation of the Constitution and other laws of the United States. It vested appellate jurisdiction over lower court exercise of this new authority in the Supreme Court, but made an exception for prisoners held by military authorities.<sup>209</sup>

Notwithstanding the exception for prisoners held under military authority, the first case to come before the Supreme Court involved William McCardle, a Mississippi newspaper editor, arrested by military authorities for trial by a military commission under the reconstruction laws on charges of inciting “insurrection, disorder and violence.”<sup>210</sup> His petition for a writ of habeas corpus was denied by the federal circuit court and he appealed to the Supreme Court.<sup>211</sup>

The government moved to dismiss the appeal on the ground that appeal had been expressly excluded in cases involving Confederate sympathizers held in military custody. The Court denied the motion—because the military custody exception applied only to the expansion of habeas afforded by the 1867 Act while *McCardle* called upon the pre-existing habeas authority of the Judiciary Act of 1789—and set the case for argument.<sup>212</sup> But before the case could be decided on its merits, Congress repealed the law vesting appellate jurisdiction in the Court.<sup>213</sup>

Its jurisdiction to decide the appeal having been withdrawn, the Supreme Court dismissed the appeal for want of jurisdiction in *Ex parte McCardle*.<sup>214</sup> In doing so, however, the Court made it clear that the loss of its jurisdiction to hear appeals in habeas cases did not mean the loss of its ability to review lower court habeas decisions altogether.<sup>215</sup> The review available prior to the 1867 Act remained available just as the Court had described in its earlier *McCardle* case:

But, though the exercise of appellate jurisdiction over judgments of inferior tribunals was not unknown to the practice of this court before the act of 1867, it was attended by some inconvenience and embarrassment. It was necessary to use the writ of *certiorari* in addition

<sup>208</sup> 1 STAT. 81-82 (1789).

<sup>209</sup> “[T]he several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . . From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court of the United States . . . and from said circuit court to the Supreme Court of the United States, on such terms and under such regulations and orders . . . as may prescribed by the Supreme Court . . . . This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence, or with having aided or abetted rebellion against the government of the United States prior to passage of this act,” 14 STAT. at 385–86 (1867).

<sup>210</sup> Charles Fairman, *Reconstruction and Reunion 1864–88*, VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES 437 (1971).

<sup>211</sup> *Id.* at 438–40.

<sup>212</sup> *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868).

<sup>213</sup> “That so much of the act approved February five, eighteen hundred and sixty seven [14 STAT. 385] . . . as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed,” 15 STAT. 44 (1868).

<sup>214</sup> 74 U.S. (7 Wall.) 506 (1868).

<sup>215</sup> “Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.” *Id.* at 514 (citing “*Ex parte McCardle*, 6 Wallace, 324”).

to the writ of *habeas corpus*, and there was no regulated and established practice for the guidance of parties invoking the jurisdiction.<sup>216</sup>

The Court reexamined and confirmed this view the following year when it concluded that it had jurisdiction under writs of habeas corpus and certiorari to review the case of another Mississippi newspaper man held by military authorities. The 1868 Act repealed appellate jurisdiction vested in the Court by the 1867 Act. The 1868 Act did not repeal any of the provisions of the Judiciary Act of 1789. In *Ex parte Yerger*, the Supreme Court recognized that its earlier authority to review habeas cases from the lower federal courts through writs of habeas corpus, aided by writs of certiorari, remained available.<sup>217</sup>

Over a century later, the question as to the scope of Congress' control over Court's appellate jurisdiction in habeas cases surfaced again when a prisoner challenged the AEDPA's habeas limitations in *Felker v. Turpin*.<sup>218</sup> In particular, Felker argued that the provisions of 28 U.S.C. § 2244(b)(3)(E), which declared the appellate court determination of whether to authorize a second or successive habeas petition, was neither appealable nor "subject to a petition for rehearing or for a writ of certiorari."

As before, the Supreme Court took no offense to the limitation of habeas appellate jurisdiction. Since the AEDPA "does not repeal [the Court's] authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, §2."<sup>219</sup> Review remained possible under the "original" writ of habeas corpus.

After *McCardle* and *Yerger*, Congress restored the Court's jurisdiction to review habeas cases under less cumbersome appellate procedures in 1885.<sup>220</sup> Once Congress reopened more normal means of Supreme Court review in habeas cases, recourse to the original writ of habeas corpus in the Supreme Court described in *McCardle* and *Yerger* had been infrequent and rarely successful. Seen only as a burdensome way station of the unartful and ill advised, its best-known chronicler urged its effective abandonment.<sup>221</sup>

Yet it offered the Court in *Felker* precisely what it supplied in *McCardle* and *Yerger*, a means of preserving Supreme Court review, under circumstances where Congress rather clearly intended to deny that possibility, without forcing the Court to address the question of whether Congress' efforts exceed its constitutional authority.

The Supreme Court, in an opinion by Chief Justice Rehnquist, declared that "although the Act does impose new conditions on [the Court's] authority to grant relief, it does not deprive [the]

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<sup>216</sup> *Ex parte McCardle*, 73 U.S. (6 Wall.) at 324. The writ of certiorari cited by the Court was not the statutorily fortified writ we now know, but a considerably more modest version. It worked to remove an indictment or other record and thus proceedings from an inferior court. Both writs were required because (1) the Supreme Court's original jurisdiction could not be statutorily increased, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and thus an "original" writ could only issue from the Court in aid of its appellate jurisdiction; (2) but habeas, unaided, did not remove proceedings from a lower court since it only demanded the presence of a prisoner and his or her custodian to appear before the court; (3) certiorari, unaided, was likewise insufficient since it accomplished no more than to retrieve process and records from an inferior court, Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 S. CT. REV. 153, 154 ("The two [writs] were complimentary. Certiorari removed the record, but not the prisoner; habeas corpus removed the prisoner, but not the record.").

<sup>217</sup> 75 U.S. (8 Wall.) 85 (1869).

<sup>218</sup> 518 U.S. 651 (1996).

<sup>219</sup> *Felker*, 518 U.S. at 661–62.

<sup>220</sup> 23 STAT. 437.

<sup>221</sup> Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 S. CT. REV. 153, 206–07.



Court of jurisdiction to entertain original habeas petitions.”<sup>222</sup> Just as *McCardle* and *Yerger* “declined to find a repeal of §14 of the Judiciary Act of 1789 as applied to [the] Court by implication . . . [*Felker*] decline[s] to find a similar repeal of § 2241 of Title 28 . . . .”<sup>223</sup>

Felker sought not only review, but reversal. The Court refused to grant relief under its original writ authority because Felker’s claims satisfied neither the demands of the Act nor those of the Court’s Rule 20.<sup>224</sup> It stopped short of holding, however, that it was required to follow the Act’s standards in its original writ determinations: “Whether or not we are bound by these restrictions [of the AEDPA], they certainly inform our consideration of original habeas petitions.”<sup>225</sup> Its reticence may have been calculated to avoid any suggestion that Suspension or Exception Clauses have become dead letters.

Although it concluded that Felker had not satisfied the requirement that the original writ issue only upon “exceptional circumstances,”<sup>226</sup> the Supreme Court did not say why nor did it indicate when such exceptional circumstances might exist. On the other hand, the Court’s denial makes it clear that *McCardle* and *Yerger* notwithstanding, legislative barriers blocking access to the more heavily traveled paths to review do not by themselves constitute the necessary exception circumstances.

It is notable that the Court based its decisions on the “original” habeas rather than deciding that the gatekeeper provision came within Congress’ power under the Exceptions and Regulations Clause. Given the expedited nature of the proceedings, it might have meant no more than the Court lacked the time to formulate an opinion outlining the dimensions of the clause in terms that a majority on the Court could endorse.<sup>227</sup> A simpler explanation may be that, in deference to the political branches, the Court sought every means to avoid suggesting that they might have overstepped their constitutional bounds. Historically, the Court has been reluctant to hold that the

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<sup>222</sup> *Felker*, 518 U.S. at 658.

<sup>223</sup> *Id.* at 661. The symmetry is less than perfect, however, since *McCardle* and *Yerger* found the dual authority in two distinct sources, the Judiciary Act of 1789 and the Act of 1867 while the Court points to § 2241 as the contemporary source of both. Moreover, while the nineteenth century Congress purported to do no more than withdraw appellate jurisdiction, its twentieth century successor sought to curtail certiorari jurisdiction as well.

Justice Steven’s concurrence identifies additional sources of review authority with the observation that the AEDPA “does not purport to limit our jurisdiction under [§ 1254(1)] to review interlocutory orders in such cases, to limit our jurisdiction under 1254(2) [relating to Supreme Court review of questions certified by a court of appeals seeking instruction], or to limit our jurisdiction under the All Writs Act, 28 U.S.C. §1651.” *Id.* at 666 (Souter & Breyer, JJ. concurring).

<sup>224</sup> *Id.* at 665 (“Our Rule 20.4(a) delineates the standards under which we grant such [original] writs [of habeas corpus]: ‘A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the reason for not making application to the district court of the district in which the applicant is held. If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court’s discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.’ Reviewing petitioner’s claims here, they do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court. Neither of them satisfies the requirements of the relevant provisions of the Act, let alone the requirement that there be ‘exceptional circumstances’ justifying the issuance of the writ.”).

<sup>225</sup> *Felker*, 518 U.S. at 663.

<sup>226</sup> *Id.* at 665.

<sup>227</sup> “[I]f it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress’ Exception Clause power would be open,” 518 U.S. at 667 (Stevens, J., with Souter & Breyer, JJ) (concurring).

privilege of the writ had been denied other than through a lawful exercise of the Suspension Clause.

## Suspension of the Privilege of the Writ

The Suspension Clause, housed among the explicit limitations on the constitutional powers of Congress, declares that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>228</sup>

The English history of the writ helps explain its purpose. When the King and the royal courts began to recognize restrictions on the writ, the English Parliament had responded with the Habeas Corpus Act of 1679.<sup>229</sup> But in times of crisis, the Parliament allowed that the privilege of the writ should be temporarily suspended upon its approval.<sup>230</sup>

<sup>228</sup> U.S. CONST. art. I, § 9, cl. 2; see generally Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 VA. L. REV. 575 (2008); John Harrison, *The Original Meaning of the Habeas Corpus Suspension Clause, the Right of Natural Liberty, and Executive Discretion*, 29 WM. & MARY BILL RTS. J. 649 (2021).

<sup>229</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134–35 (1768) (“And yet, early in the reign of Charles I, the court of king’s bench relying on some arbitrary precedents (and those perhaps misunderstood) determined that they could not upon an *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary enquiry, and produced the *petition of right*, 3 Car. I, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council . . . the judges delayed for two terms . . . to deliver an opinion how far such a charge was bailable . . . . These pitiful evasions gave rise to the statute 16 Car. I. c.10. §.8. whereby it was enacted, that if any person be committed by the king himself in person, or by his privy council, or by any member thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of habeas corpus upon demand or motion to the court of the king’s bench or common pleas . . . . Other abuses had also crept into daily practice [concerning the availability of the writ of habeas corpus], which had in some measure defeated the benefit of this great constitutional remedy . . . . The oppression . . . gave birth to the famous *habeas corpus* act, 31 Car. II. c.2, which is frequently considered as another *magna carta* of the kingdom.”).

<sup>230</sup> See e.g., 1 Wm.& Mary ch.7 (1689), reprinted in 6 STATUTES OF THE REALM 57 (“*For the Securing the Peace of the Kindome in this time of Imminent Danger against the Attempts and Traiterous Conspiracies of Evill disposed Persons Bee it enacted* . . . That every Person or Persons that shall be in Prison at or upon the Five and twentyeth Day of Aprill in the Yeare of our Lord One thousand six hundred eighty and nine or after by Warrant of Their said Majesties most Honourable Privy Councill Signed by Six of the Said Privy Councill for Suspicion of High Treason or Treasonable Practices or by Warrant Signed by either of his Majesties secretaries of State for such Causes aforesaid may be detained in same Custodie without Baile or Mainprize\* until the Five and twentieth Day of May next.

“And that noe Judge or Justice or Court of Justice shall Baile or Try any such Person or Persons soe committed without Order from Their said Majesties Privy Councill Signed by Six of the Said Privy Councill till the said Five and twentieth Day of May any Law or Statute to the contrary notwithstanding.

“Provided always That from and after the said Five and twentyeth Day of May the said Persons soe Committed shall have the Benefit and Advantage of an Act made in One and thirtyeth yeare of King Charles the Second Entitled an Act for the better Securing the Liberty of the Subjects and for Prevention of Imprisonment beyond the Seas, and alsoe of all other Laws and Statute any way relating to or provideing for the Liberty of the Subjects of this Realme And that this present Act shall continue untill the said Five and twentyeth day of May and noe longer”).

\* “The writ of mainprize, manucapio, is a writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence, and bail hath been refused; or specially, when the offence or cause of commitment is not properly bailable below) commanding him to take sureties for the prisoner’s appearance, usually called mainpernors, and to set him at large. Mainpernors differ from bail, in that a man’s bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day; bail are only sureties, that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever,” 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 128 (1768).





without bail or trial by a court of competent jurisdiction. In more contemporary times, the Supreme Court and scholars pondered the extent to which the Suspension Clause marks an outer limit of the authority of Congress and the courts to adjust the procedures associated with the writ.<sup>239</sup> If, as these authorities indicated, the Suspension Clause enjoys organic qualities that permit it to expand and contract under various environmental circumstances, several evolutionary stages of the modern writ deserve repeating.

First, as part of the Reconstruction after the Civil War, Congress expanded federal habeas to make it available to state prisoners held in violation of federal law.<sup>240</sup> Second, by the early 1940s the Court had completed its slow abandonment of the common law prohibition against use of habeas to attack a conviction or sentence collaterally.<sup>241</sup> Thereafter, the Court used an expanded habeas to help carry the commands of the Bill of Rights to the state criminal procedure.<sup>242</sup> Beginning in the 1970s, the Court announced a series of doctrines calculated to eliminate unnecessary delay, repetition and frivolity.<sup>243</sup> The AEDPA extended this last trend.

<sup>239</sup> *E.g.*, *United States v. Haemin*, 342 U.S. 205 (1952) (a court of appeals decision that a provision that permitted collateral attack of a federal conviction (28 U.S.C. § 2255) violated the Suspension Clause was vacated because the prisoner was entitled to relief under the section and it was therefore unnecessary to reach the constitutional issue); *Fay v. Noia*, 372 U.S. 391, 406 (1963) (“We need not pause to consider whether it was the Framers’ understanding that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ. There have been some intimations of support for such a proposal in the decisions of this Court . . . . But at all events it would appear that the Constitution invites, if it does not compel, a generous construction of the power of the federal courts to dispense the writ comfortably with common-law practice”) (internal citations omitted); *Sanders v. United States*, 373 U.S. 1, 11–12 (1963) (“Moreover, if construed to derogate from the traditional liberality of the writ of habeas corpus, § 2244 might raise serious constitutional questions.”) (citing “Article I, § 9, cl.2 of the Federal Constitution”); *Swain v. Pressley*, 430 U.S. 372 (1977) (establishing an adequate and effective alternative procedure for habeas relief does not violate the suspension clause); Mello & Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451 (1990–91).

<sup>240</sup> 14 STAT. 385 (1867) (“[T]he several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .”).

<sup>241</sup> *E.g.*, *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874); *Ex parte Siebold*, 100 U.S. 371 (1880); *Ex parte Wilson*, 114 U.S. 417 (1885); *In re Snow*, 120 U.S. 274 (1887); *Frank v. Mangum*, 237 U.S. 309 (1915); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Waley v. Johnson*, 316 U.S. 101 (1942) (per curiam); *Walker v. Johnson*, 312 U.S. 275 (1941); *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, *supra* note 29.

While a number of theories might be formulated to explain the Court’s authority to modify the procedures associated with the writ, the Court made the task unnecessary when it explained that, “the history of the Great Writ of Habeas Corpus reveals . . . the gradual evolution of more formal judicial, statutory, or rules-based doctrines of law. In earlier times, the courts followed comparatively simple rules . . . as they exercised the writ in light of its most basic purpose, avoiding serious abuses of power by a government, say a king’s imprisonment of an individual without referring the matter to a court. As the writ has evolved into an instrument that now demands not only conviction by a court of competent jurisdiction, but also application of basic constitutional doctrines of fairness, Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise. Those principles seek to maintain the courts’ freedom to issue the writ, aptly described as the ‘highest safeguard of liberty,’ while at the same time avoiding serious, improper delay, expense, complexity, and interference with a State’s interest in the ‘finality’ of its legal process,” *Lonchar v. Thomas*, 517 U.S. 314, 322–23 (1996) (internal citations omitted).

<sup>242</sup> *Brown v. Allen*, 344 U.S. 443 (1953); *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963); *Henry J. Friendly*, *supra* note 32 at 154–55 (1970); *Wright & Sofaer*, *supra* note 34 at, 897–98.

<sup>243</sup> *E.g.*, *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. (continued...)

*Felker* dispelled any contention that the AEDPA's provisions violated the Suspension Clause. The Georgia Attorney General and the Solicitor General each denied that the Suspension Clause had been violated. The Court agreed. It did not rely on the proposition that the Suspension Clause does not extend to convicted prisoners or any other prisoner ineligible for the writ under common law, however, but "assume[d], for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."<sup>244</sup>

Even under this relaxed standard, it found any claim based on *Felker*'s case wanting. The AEDPA's limitation on repetitious or stale claims was seen as a variation of *res judicata*, which in the area of habeas had been an "evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions."<sup>245</sup> "The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process and . . . do not amount to a 'suspension' of the writ contrary to Article I, § 9."<sup>246</sup>

Shortly after *Felker*, the Court narrowly construed congressional efforts to restrict review of various immigration decisions and recognized that the courts retained jurisdiction to review habeas petitions, with the observation that otherwise serious Suspension Clause issues would arise.<sup>247</sup>

The Court was compelled to face the issue of Congress' constitutional authority to absolutely bar access to the writ, which the Court avoided in *Felker*, in *Boumediene v. Bush*.<sup>248</sup> *Boumediene* was among the foreign nationals detained at the U.S. Naval Station at Guantanamo Bay, Cuba. Until *Hamdi v. Rumsfeld*<sup>249</sup> held otherwise, the government questioned whether habeas remained available to citizens seized in a combat zone. Thereafter, the Defense Department established tribunals to determine whether detainees were in fact enemy combatants. However, until *Rasul v. Bush*,<sup>250</sup> held otherwise, the government questioned whether detainees held outside the United States, whether in Guantanamo or elsewhere, rested beyond the habeas reach of U.S. courts.

While the detainees' subsequent habeas petitions were pending, Congress passed the Detainee Treatment Act, providing combatant status review tribunal procedures and stating that "no court, justice, or judge shall have jurisdiction to hear or consider" a habeas petition filed on behalf of a foreign national detained in Guantanamo.<sup>251</sup> After the Supreme Court held that the Detainee

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107 (1982); *Teague v. Lane*, 489 U.S. 288 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *Sawyer v. Smith*, 497 U.S. 227 (1990); John H. Blume & Davis P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271 (1996); Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 S. CT. REV. 65.

<sup>244</sup> *Felker*, 518 U.S. at 663–64 (emphasis added).

<sup>245</sup> *Id.* at 664 (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

<sup>246</sup> *Felker*, 518 U.S. at 664.

<sup>247</sup> *INS v. St. Cyr*, 533 U.S. 289, 305 (2001) ("[A] serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have withdrawn that power [to review of certain immigration cases under habeas] from federal judges and provide no adequate substitute for its exercise,") One of the statutes in question in *St. Cyr*, section 401(e) of the AEDPA began with the caption "Elimination of Custody Review by Habeas Corpus," 110 STAT. 1268 (1996).

<sup>248</sup> 553 U.S. 723 (2008).

<sup>249</sup> 542 U.S. 507 (2004).

<sup>250</sup> 542 U.S. 466 (2004).

<sup>251</sup> 119 STAT. 2742 (2006).

Treatment Act provision did not apply to cases pending prior to its enactment,<sup>252</sup> Congress passed the Military Commissions Act, which made the provision applicable to pending cases.<sup>253</sup>

At this point, the constitutional issue could not be avoided. The government argued in *Boumediene* “that noncitizens designated as enemy combatants and detained in territory located outside our Nation’s borders have no constitutional rights and no privilege to habeas corpus.”<sup>254</sup> The detainees disputed both claims.<sup>255</sup> They argued that the legislation violated the Suspension Clause which declares that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>256</sup>

The Supreme Court began with the observation that, “[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.”<sup>257</sup> The Framers also remembered the history of the English writ, with its periodic suspensions of the writ. “In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the right of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”<sup>258</sup>

These separation of powers concerns and the history of the territorial scope of the writ led the Court to conclude that “Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”<sup>259</sup> And so, the question became, did the Suspension Clause bar curtailment of habeas jurisdiction in the manner of the Military Commissions Act provision? Since the Military Commissions Act did not constitute a formal suspension of the writ,<sup>260</sup> the issue was “whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus” in the Detainee Treatment Act’s combatant status review tribunal procedures.<sup>261</sup>

The Supreme Court found little precedent to guide its “adequate substitute” assessment. *Felker* involved a Suspension Clause challenge, but the provisions there did little more than replicate and codify pre-existing habeas jurisprudence. Besides, *Felker* arose following a state criminal conviction, hardly a close parallel to the federal detention without trial of *Boumediene*.<sup>262</sup> Two other “habeas substitute” cases decided decades earlier—*Swain v. Pressley*<sup>263</sup> and *United States v. Hayman*<sup>264</sup>—did little to explain the characteristics of an adequate substitute, because they involved statutes designed to expand rather than curtail habeas relief.<sup>265</sup>

<sup>252</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>253</sup> 120 STAT. 2636 (2007).

<sup>254</sup> *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

<sup>255</sup> *Id.*

<sup>256</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>257</sup> *Boumediene*, 553 U.S. at 739.

<sup>258</sup> *Id.* at 745.

<sup>259</sup> *Id.* at 771.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 774.

<sup>263</sup> 430 U.S. 372 (1977).

<sup>264</sup> 342 U.S. 205 (1952).

<sup>265</sup> *Boumediene*, 553 U.S. at 776.

The Court identified, in context of *Boumediene*, the essential features of habeas corpus and any adequate substitute. First, it noted that “the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”<sup>266</sup> Second, “the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings.”<sup>267</sup> Thus, “[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is more pressing.”<sup>268</sup> Third, “[f]or the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occur during [prior] proceedings.”<sup>269</sup> Fourth, it must have “some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.”<sup>270</sup>

The Court found the Detainee Treatment Act procedures wanting when assessed against the standards of an adequate substitute for normal habeas procedures.<sup>271</sup> Thus, the provision of the Military Combatants Act, purporting to curtail habeas jurisdiction with respect to Guantanamo detainees, was found to constitute an unconstitutional suspension of the writ.<sup>272</sup>

In 2020, the Court in *Department of Homeland Security v. Thuraissigiam*, explained that the “[Suspension] Clause, at a minimum, ‘protects the writ as it existed in 1789,’ when the Constitution was adopted,” at which time “[t]he writ simply provided a means of contesting the lawfulness of restraint and securing release.”<sup>273</sup> It refused to afford habeas petitioners any remedy other than release from unlawful detention.<sup>274</sup> The *Thuraissigiam* Court acknowledged that “release is the habeas remedy though not the ‘exclusive’ result of every writ, given that it is often ‘appropriate’ to allow the executive to cure defects in a detention.”<sup>275</sup>

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<sup>266</sup> *Id.* at 779.

<sup>267</sup> *Id.* at 781.

<sup>268</sup> *Id.* at 783.

<sup>269</sup> *Id.* at 786.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 792.

<sup>272</sup> *Id.*

<sup>273</sup> Dep’t of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 116–17 (2020) (internal quotation marks omitted).

<sup>274</sup> *Thuraissigiam*, 591 U.S. at 107 (“Habeas has traditionally been a means to secure *release* from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country.”) (emphasis in the original). In *Munaf v. Green*, 553 U.S. 674, 683 (2008), the Court refused to allow a petitioner to invoke habeas corpus for an order prohibiting his release to Iraqi authorities.

<sup>275</sup> *Thuraissigiam*, 591 U.S. at 137.

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## Author Information

Charles Doyle  
Senior Specialist in American Public Law

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