

# ORIGINAL HABEAS REDUX

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### INTRODUCTION

THE Supreme Court's authority to issue an (inaptly named) *original* writ of habeas corpus is, paradoxically, perhaps its most exotic form of *appellate* power. The Court frequently decides habeas cases, but only pursuant to its authority to entertain certiorari petitions from lower courts. Few are even aware that the Court or its Justices may issue an original habeas writ, directing the release of a prisoner, from their own chambers. Such relief has not issued since 1925,<sup>1</sup> and the leading Supreme Court treatise describes the jurisdiction as an anachronism.<sup>2</sup> Until last year, a half-century had elapsed before the Court exercised even its related original habeas power to transfer a petition within the federal judiciary.<sup>3</sup>

The peculiar role of original habeas was fixed during the early days of the American Republic. Article III, Section 2 of the Constitution specifies nine categories of subject matter to which the federal "Judicial Power" extends.<sup>4</sup> Section 2 also subdivides the Supreme Court's authority over those nine categories into original and appellate jurisdiction, with the latter subject to "such Exceptions, and under such Regulations as the Congress shall make."<sup>5</sup> The Court's original jurisdiction includes only "Cases affecting Ambassadors, other public Ministers and Consuls, and those in

<sup>1</sup> See *Ex parte Grossman*, 267 U.S. 87 (1925).

<sup>2</sup> See Eugene Gressman et al., *Supreme Court Practice: For Practice in the Supreme Court of the United States* 662 (9th ed. 2007).

<sup>3</sup> See *In re Davis*, 130 S. Ct. 1, 1 (2009); *Hayes v. Maryland*, 370 U.S. 931, 931 (1962); *Chaapel v. Cochran*, 369 U.S. 869, 869 (1962).

<sup>4</sup> U.S. Const. art. III, § 2, cl. 1. Three categories are specified by subject matter, and six categories are specified by the parties to a dispute. See *id.*

<sup>5</sup> *Id.* § 2, cl. 2.

which a State shall be Party.”<sup>6</sup> Article III judicial power includes the authority to grant habeas writs, but Section 2 does not specify that jurisdiction as original. *Marbury v. Madison* held, among other things, that Congress may not accrete or diminish the Court’s original jurisdiction.<sup>7</sup> In 1807, *Ex parte Bollman* nonetheless sustained the constitutionality of the Court’s nominally original habeas power as functionally appellate.<sup>8</sup>

For most of the nineteenth century, the Supreme Court lacked conventional appellate authority to review federal criminal confinement.<sup>9</sup> Its original habeas jurisdiction was therefore an exceptionally important source of appellate power. Around the turn of the twentieth century, however, Congress created a series of jurisdictional alternatives rendering original habeas an obsolete form of appellate authority: it vested in petitioners a limited right of appeal from lower court habeas decisions,<sup>10</sup> empowered the Court to issue writs of error in criminal cases,<sup>11</sup> and created statutory certiorari jurisdiction to enable discretionary review.<sup>12</sup> After 1925, original habeas quickly became a dead letter.<sup>13</sup>

In August 2009, by transferring a capital prisoner’s original habeas petition to a federal district court rather than dismissing it outright, *In re Davis*<sup>14</sup> abruptly thrust this obscure power back into mainstream legal debate over both the death penalty and the Supreme Court’s appellate jurisdiction. Faced with particularly strong evidence that Davis did not commit the murder for which he was convicted, the Court exercised its original habeas power to bypass a statutory authorization proceeding and transferred the case to a

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<sup>6</sup> Id.

<sup>7</sup> See 5 U.S. (1 Cranch) 137, 177–78 (1803).

<sup>8</sup> See 8 U.S. (4 Cranch) 75, 100–01 (1807). For an extensive discussion of *Bollman*’s holdings, see Dallin H. Oaks, The “Original” Writ of Habeas Corpus in the Supreme Court, 1962 Sup. Ct. Rev. 153, 159–61 (1962).

<sup>9</sup> See Judiciary Act of 1789, ch. 20, 1 Stat. 73, 76–89; see also *United States v. More*, 7 U.S. (3 Cranch) 159, 173–74 (1805).

<sup>10</sup> See Act of Mar. 3, 1885, ch. 353, 23 Stat. 437, 437.

<sup>11</sup> See Act of Feb. 6, 1889, ch. 113, 25 Stat. 655, 656 (making the writ available in capital cases); Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826, 827 (1891) (extending the writ of error to all offenses punishable by imprisonment).

<sup>12</sup> See Circuit Court of Appeals (Evarts) Act, 26 Stat. at 828.

<sup>13</sup> See *Ex parte Grossman*, 267 U.S. 87 (1925) (granting the original writ for the last time).

<sup>14</sup> 130 S. Ct. 1, 1 (2009).

U.S. district court for merits adjudication.<sup>15</sup> The petition was the first that the Court had transferred under its original habeas power in almost fifty years.<sup>16</sup> Scrambling to understand how the authority has evolved since its nineteenth-century heyday, commentators have been severely limited by the absence of *any* data reporting the attributes of the original petitions themselves. I have filled that empirical void by collecting, compiling, and analyzing the only modern original habeas data, and this Article presents those results for the first time. The data shows that the vast majority of original petitioners are criminally confined (as opposed to imprisoned by the military or pursuant to immigration proceedings) but that these prisoners are not engaged in the first round of collateral attacks on that confinement. Original writ procedure is now primarily a vehicle for litigating “successive” habeas corpus petitions that are otherwise subject to severe jurisdictional limits in the federal courts.<sup>17</sup>

In this Article, I argue that *Davis* is not a blip in an otherwise constant state of original habeas inactivity. The original writ may be in the midst of a renaissance, emerging as a last-resort means of averting wrongful executions. In Part I, I observe that the availability of original habeas relief has historically exhibited two overarching characteristics: (1) that the Supreme Court’s Article III *appellate* power to grant it has expanded alongside the Article III *judicial* power to issue habeas writs common to all federal courts; and (2) that the Court does not exercise that authority when it may avail itself of jurisdictional alternatives. In Part II, I present data confirming that the availability of conventional appellate jurisdiction exerts the dominant influence on the composition of the mod-

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<sup>15</sup> *Id.* The district court has since denied relief on the merits. See *In re Davis*, No. CV409-130, 2010 WL 3385081, at \*1 (S.D. Ga. Aug. 24, 2010). The U.S. Court of Appeals for the Eleventh Circuit affirmed. See *Davis v. Terry*, 625 F.3d 716, 719 (11th Cir. 2010). As of this Article’s publication date, the Supreme Court is considering appellate review of this question. See *Davis v. Terry*, 625 F.3d 716 (11th Cir. 2010), petition for cert. filed, 79 U.S.L.W. 3442 (U.S. Jan. 21, 2011) (No. 10-949); *Petition for a Writ of Certiorari, Davis v. Humphrey*, No. 10-949 (Jan. 21, 2011).

<sup>16</sup> See *Davis*, 130 S. Ct. at 1; *Byrnes v. Walker*, 371 U.S. 937, 937 (1962); *Chaapel v. Cochran*, 369 U.S. 869, 869 (1962). Justice Douglas transferred a case in his capacity as an individual Justice in 1973. See *Ex parte Hayes*, 414 U.S. 1327, 1329 (1973). I discuss *Davis* much more extensively in Section III.A, *infra*.

<sup>17</sup> See *infra* Subsection II.B.4.

ern original habeas docket.<sup>18</sup> For over fifteen original habeas variables, I present twenty years of data, during which the number of petitions has increased tenfold. The data shows that most petitioners now seeking original writs are using the procedure to avoid restrictions on successive petitions filed with other courts in the federal judiciary. In Part III, I advance what I call the “capital safety valve paradigm”—the idea that, in light of the habeas writ’s current substantive scope and modern limits on appellate jurisdiction, original habeas should and likely will emerge as a means to ensure that the death penalty is not erroneously imposed.

### I. ORIGINAL HABEAS AS SUPREME COURT POWER OF LAST RESORT

Magna Carta provided that English kings be bound by law, and habeas corpus thereafter developed into the primary remedy for unlawful imprisonment.<sup>19</sup> The writ requires a jailor to show the authority under which it detains a prisoner.<sup>20</sup> Article I of the Constitution bars suspension of the habeas “privilege” except in cases of rebellion or invasion.<sup>21</sup> In England, habeas was first a prerogative writ that issued from the King’s Bench to a jailing custodian acting under color of the King’s legal franchise.<sup>22</sup> The word “privilege” actually referred (at least initially) to the prerogative of the King, not to some substantive right belonging to a prisoner.<sup>23</sup>

Both in England and in the early American Republic, the writ evolved from a Royal (executive) privilege into a prisoner’s remedial entitlement.<sup>24</sup> This conceptual drift means that the writ’s sub-

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<sup>18</sup> Technically speaking, there is no “original habeas docket.” Original habeas proceedings are docketed on the Court’s Miscellaneous Docket.

<sup>19</sup> See generally Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 582–88 (2008) (tracing the history of the habeas writ).

<sup>20</sup> 3 William Blackstone, *Commentaries* \*131 (stating that habeas corpus “run[s] into all parts of the king’s dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted”) (footnote omitted).

<sup>21</sup> “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. Const. art. I, § 9, cl. 2.

<sup>22</sup> See *Boumediene v. Bush*, 553 U.S. 723, 740–41 (2008); Halliday & White, *supra* note 19, at 593–94.

<sup>23</sup> See *Boumediene*, 553 U.S. at 740–41; Halliday & White, *supra* note 19, at 593.

<sup>24</sup> See *Boumediene*, 553 U.S. at 741; Halliday & White, *supra* note 19, at 593–607.

stantive scope at any given time remains a source of considerable academic disagreement.<sup>25</sup> Generally speaking, the American writ issues to test the legality of detention.<sup>26</sup> The Judiciary Act of 1789 made the writ available to federal prisoners,<sup>27</sup> and the Habeas Corpus Act of 1867 made it available to prisoners in state custody.<sup>28</sup> Prisoners usually petition for habeas writs in federal district court, and the modern Supreme Court ordinarily uses its statutory certiorari jurisdiction to review habeas decisions.<sup>29</sup> A prisoner, however, may also petition the Court for original habeas relief.

Whether the Supreme Court has original habeas *jurisdiction* and whether it should grant habeas *relief on the merits* are two separate concepts. In practice, however, that taxonomy is hardly as neat as it sounds. The jurisdictional issue subdivides into at least three different inquiries that constitute the backbone of Part I. First, is original habeas relief unconstitutional under *Marbury v. Madison*?<sup>30</sup> because it is an exercise of original jurisdiction not specified in Article III, Section 2?<sup>31</sup> Second, even if original habeas relief is an appellate remedy, has Congress statutorily authorized the Court to issue it?<sup>32</sup> Finally, when the Court does identify a limit on original habeas jurisdiction, is it a limit common to all federal courts or is it unique to the Court's appellate jurisdiction to revise use of Article III judicial power?<sup>33</sup>

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<sup>25</sup> See generally 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.2 (5th ed. 2005) (discussing and providing extensive sourcing for the proposition that habeas is inconsistently characterized).

<sup>26</sup> See *Walker v. Wainwright*, 390 U.S. 335, 336–37 (1968).

<sup>27</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82. What modern criminally confined federal prisoners currently seek under 28 U.S.C. § 2255 is not, technically speaking, habeas corpus relief. It is denominated as a motion to vacate a judgment. The § 2255 remedy is nonetheless functionally equivalent to the remedies available to criminally confined state claimants in virtually all meaningful respects. See *Mackey v. United States*, 401 U.S. 667, 681 n.1 (1971) (Harlan, J., concurring in part and dissenting in part).

<sup>28</sup> Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–86.

<sup>29</sup> See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (military commission); *Dodd v. United States*, 545 U.S. 353, 355–56 (2005) (§ 2255 challenge to federal criminal confinement); *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (§ 2254 challenge to state criminal confinement); *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 293 (2001) (immigration).

<sup>30</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>31</sup> See *infra* Section I.A.

<sup>32</sup> See *infra* Section I.B.

<sup>33</sup> See *infra* Section I.C.

The Supreme Court and Congress have forged original habeas law in the crucible of America's most significant political, military, and legal conflicts: the struggle between Thomas Jefferson and Aaron Burr,<sup>34</sup> the Civil War and Reconstruction,<sup>35</sup> the punishment of German and Japanese combatants after World War II,<sup>36</sup> and in the wake of the Oklahoma City bombing.<sup>37</sup> Extracting from these cases anything that might be called a unifying jurisdictional rule is impossible because the Court almost always exercises its original habeas power to resolve nationally important questions for which some practical consideration arguably dominates more formal legal concerns.

There are nonetheless at least two important patterns that emerge from the formative cases. First, since the end of the Civil War, the Supreme Court has usually phrased limits on its original habeas jurisdiction as limits on the judicial power common to all federal courts. As a result, the substantive scope of the Supreme Court's appellate remedy has grown in rough proportion to the substantive scope of the writ sought in any other federal court.<sup>38</sup> Second, the Court does not actually exercise original habeas au-

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<sup>34</sup> See generally *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); Eric M. Freedman, *Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 Ala. L. Rev. 531, 558–61 (2000).

<sup>35</sup> See *Ex parte Siebold*, 100 U.S. 371, 374–75 (1879); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102–03 (1868); Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. Sch. J. Hum. Rts. 375, 403–09 (1998); Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 Law & Hist. Rev. 1, 53–56 (2008).

<sup>36</sup> See *infra* notes 73–99 and accompanying text.

<sup>37</sup> See *Felker v. Turpin*, 518 U.S. 651, 656–61 (1996) (discussing whether the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) eliminated original habeas review); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 Tul. L. Rev. 443, 459–68 (2007) (discussing AEDPA's legislative history and the Oklahoma City bombing).

<sup>38</sup> In other words, limits on jurisdiction are usually phrased as limits that would be applicable without respect to which federal court's authority is being analyzed. For example, cases barring Supreme Court jurisdiction over certain military commissions are framed in terms of limits on the *federal* judicial power to review certain types of military detention, rather than as limits on the *Supreme Court's* power to exercise appellate review. See *infra* Section I.C. There exists a complicated question as to whether the substantive scope of the Supreme Court remedy is curtailed when Congress restricts the substantive scope of the federal district court writ by statute. To my knowledge, there is no scholarship on this question.

thority in the presence of conventional jurisdictional alternatives. Together, these patterns should help readers understand the meaning of the data in Part II: the exploding number and composition of original habeas cases is attributable both to growth in the habeas writ's substantive scope and to restrictions on other appellate jurisdiction.

### A. Original Habeas as an Appellate Remedy

*Marbury's* holding that Congress could not augment the Supreme Court's Article III original jurisdiction appeared to be the death knell for the Court's power to issue habeas writs, which Section 2 does not specify as part of the Court's original authority.<sup>39</sup> In 1807, however, the Court rejected *Marbury's* implication when it decided *Ex parte Bollman*.<sup>40</sup> Like any other appellate tribunal, the Supreme Court must have both authority to decide the subject matter and some jurisdictional vehicle by which it may review the case. *Bollman* characterized original habeas relief as an appellate remedy, thereby preserving its constitutionality.<sup>41</sup>

*Bollman* was an associate of fierce Thomas Jefferson opponent Aaron Burr and was seized in New Orleans on suspicion of participating in the famous Burr-Wilkinson plot to establish an alternate empire in the United States.<sup>42</sup> When the government returned *Bollman* to Washington, D.C., the D.C. Circuit Court (which was primarily a trial court) issued a bench warrant charging him with treason.<sup>43</sup> With two Jefferson appointees in the majority,<sup>44</sup> that

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<sup>39</sup> See U.S. Const. art. III, § 2, cl. 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803). Of course, habeas cases could conceivably constitute cases “in which a State shall be Party.” U.S. Const. art. III, § 2, cl. 2. After all, habeas developed as a claim the Crown asserted against its franchisee on the ground that the franchisee was abusing the franchise. See authority cited *supra* notes 22–24. Despite the conceptual possibilities in the “State as a Party” formulation, it has been pursued in only one case and was rejected. See *Ex parte Virginia*, 100 U.S. 339, 341 (1879).

<sup>40</sup> 8 U.S. (4 Cranch) 75, 100–01 (1807).

<sup>41</sup> *Id.*

<sup>42</sup> See generally Freedman, *supra* note 34, at 558–61 (setting forth relevant parts of the affair). The case actually involved original petitions sought on behalf of *Bollman* and a man named Swartwout. See *Bollman*, 8 U.S. (4 Cranch) at 75.

<sup>43</sup> *United States v. Bollman*, 24 F. Cas. 1189, 1190 (C.C.D.C. 1807) (No. 14,622).

<sup>44</sup> The two Jefferson appointees in the lower court majority were Allen Bowie Duckett and Nicholas Battalle Fitzhugh. See *id.* Chief Judge William Cranch, whom Jefferson had elevated to Chief Judge, dissented here. See *id.*



court ordered *Bollman* to be held for trial.<sup>45</sup> *Bollman* sought, and in an opinion by Chief Justice Marshall was granted, an original habeas writ.<sup>46</sup> In characterizing original habeas relief as a quintessentially appellate remedy, *Bollman* established as the touchstone of appellate jurisdiction the principle that the Court must be “revis[ing]” the decision of an inferior tribunal.<sup>47</sup> After *Bollman*, the Court could issue habeas writs, but only when some other federal court had taken judicial action on a petition litigated in its jurisdiction.

In 1833, the Supreme Court decided *Ex parte Watkins*, which expanded the revised decision concept to include any judicial act of an inferior court.<sup>48</sup> *Ex parte Yerger*, decided in 1869, further enlarged that concept to include military confinement, as long as some inferior Article III court had denied habeas relief.<sup>49</sup> In 1880, *Ex parte Siebold* held that the Court could use original habeas authority to revise decisions in cases over which it ultimately lacked writ-of-error jurisdiction over the final order.<sup>50</sup> *Marbury* might have precluded the Court from issuing a habeas writ pursuant to its original jurisdiction, but *Bollman*, *Watkins*, *Yerger*, and *Siebold* re-established the practice as a robust Article III appellate remedy. Modern jurisdictional questions therefore center not on whether original habeas relief would revise an exercise of judicial power, but on the scope of congressional appellate authorization and on limits to habeas jurisdiction common to all federal courts. I discuss the historical treatment of these issues in the two Sections that follow.

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<sup>45</sup> *Id.* at 1192.

<sup>46</sup> *Bollman*, 8 U.S. (4 Cranch) at 101.

<sup>47</sup> *Id.* at 86.

<sup>48</sup> 32 U.S. (7 Pet.) 568, 572–73 (1833).

<sup>49</sup> 75 U.S. (8 Wall.) 85, 102–03 (1869); see also *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514–15 (1868) (holding that Supreme Court lacked original habeas jurisdiction over a detention pursuant to the 1867 Military Reconstruction Act because Congress had, during the pendency of the case, passed legislation effectively repealing the grant of jurisdiction over these types of cases putatively contained in the 1867 Habeas Corpus Act). *Yerger* and *McCardle* receive more extensive treatment in my discussion of the Exceptions Clause. See *infra* Section III.B.

<sup>50</sup> 100 U.S. 371, 374–76 (1880) (holding that the Court could consider a statute’s constitutionality even if its authority arose only out of the prisoner’s commitment for trial and if it could not issue a writ of error on the final order).

### B. Statutory Sources of Original Habeas Jurisdiction

Congress must statutorily authorize any exercise of Supreme Court appellate power.<sup>51</sup> In addition to deciding that original habeas writs issued as Article III, Section 2 appellate remedies, *Bollman* also held that Congress had authorized the Court to issue them.<sup>52</sup> A number of commentators have argued that *Bollman's*

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<sup>51</sup> See *Bollman*, 8 U.S. (4 Cranch) at 93–94.

<sup>52</sup> See *id.* at 94–100 (discussing the Judiciary Act of 1789, ch. 20, §14, 1 Stat. 73, 81–82). Section 14 of the 1789 Judiciary Act, the statutory ancestor to the modern-day U.S. Code's habeas and "All Writs" provisions, stated:

[All U. S. courts] shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, 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.

1 Stat. at 81–82. Understanding *Bollman's* statutory holding requires a short digression involving habeas nomenclature. What we commonly refer to as the "Great Writ" (of habeas corpus) is actually a writ of habeas corpus *ad subjiciendum*, and it is only one of several English common law habeas writs. Each had a specialized purpose, and most were simply jurisdictional auxiliaries that did not authorize inquiry into the cause of a prisoner's detention. See *Bollman*, 8 U.S. (4 Cranch) at 101, 103–07 (Johnson, J., dissenting). Chief Justice Marshall, writing in *Bollman*, ultimately read congressional authorization to issue the Great Writ into § 14 of the Judiciary Act. *Id.* at 94–101. He did so even though the textual case against that interpretation was particularly strong. Section 14's first sentence, which expressly empowers the Court with some form of habeas authority, reads *ejusdem generis* not to authorize habeas corpus *ad subjiciendum* but to authorize the Court to issue only auxiliary habeas writs necessary to supplement some other appellate power. Although the second sentence of § 14 confers habeas authority to scrutinize the cause of a detention, it vests that power expressly only in Justices individually, rather than in the Court itself. Chief Justice Marshall provided three reasons in support of his interpretation. See *id.* at 96–101. First, he reasoned that Congress would not have granted Great Writ authority to individual Justices without granting it to the Court itself. See *id.* at 96. Second, he argued that the first sentence, which did grant writ authority to the Court, must refer to habeas corpus *ad subjiciendum* because that was the form of habeas that predominated in federal courts of the Founding era. See *id.* at 96–99. Third, because another 1789 Judiciary Act provision created Supreme Court authority to admit bail in capital cases and because habeas corpus *ad subjiciendum* was the appropriate procedural vehicle for bringing prisoners for bail, he contended that § 14 must vest the Court with that habeas authority. See *id.* at 99–100. Under this interpretation, the second sentence of § 14 was designed only to ensure the availability of habeas relief when the Supreme Court was not in session. See *id.* at 96.

statutory holding was wrong,<sup>53</sup> but that discussion is purely academic at this point. Over the last two centuries, Congress has crafted habeas and “All Writs” provisions that plainly authorize the Court to grant the form of habeas relief that *Bollman* contemplated.<sup>54</sup> Even though *Bollman* and subsequent legislation established original habeas as a potentially robust vehicle of appellate jurisdiction over criminal confinement, the Court has not issued such a writ since 1925. Why?

The answer involves the creation of viable appellate alternatives to original habeas writs. A writ of error issues from an appellate court to an inferior court that has entered a final judgment and directs the inferior court to send the record up so that the appellate court may scrutinize it for error. The 1789 Judiciary Act authorized the Supreme Court to issue writs of error only in civil matters,<sup>55</sup> and there was no mandatory (as-of-right) appeal in criminal cases whatsoever.<sup>56</sup> The 1789 Act did authorize the Court to issue the common law writ of certiorari, but the common law certiorari writ could only be used as a record-producing auxiliary to jurisdiction already acquired.<sup>57</sup> From a practical perspective, a contrary ruling in *Bollman*—which would have eliminated original habeas authority—would have simply left the Court without any appellate jurisdiction over federal criminal confinement. After *Bollman*, the writ’s substantive scope was defined largely by its common law us-

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<sup>53</sup> See, e.g., James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 2058–59 (1992) (observing the failure of § 14 to confer habeas power expressly, and that *Bollman* created it); Francis Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 605, 627–32 (1970) (criticizing *Bollman*’s statutory ruling on multiple fronts).

<sup>54</sup> See 28 U.S.C. § 1651(a) (2006) (All Writs provision); *Id.* § 2241(a) (2006) (organic provision authorizing the Supreme Court to grant habeas writs). The All Writs provision authorizes federal courts to issue writs “necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” § 1651(a). This language statutorily empowers courts to exercise powers implied by their creation. See *Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 40–43 (1985).

<sup>55</sup> See Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84; *United States v. More*, 7 U.S. (3 Cranch) 159, 170 (1805).

<sup>56</sup> A right of appeal in admiralty and equity was added in 1803. See 2 Stat. 244 (1803).

<sup>57</sup> See *In re Chetwood*, 165 U.S. 443, 462 (1897).

age and function at the time Congress enacted the 1789 legislation.<sup>58</sup>

The 1867 Habeas Corpus Act did three things to expand the substantive scope of habeas relief available in Article III courts: (1) it allowed a federal court to look beyond the written return (the jailor's response) and to conduct its own fact-finding; (2) it permitted relief in any instance where a person's detention was in violation of federal law; and (3) it established relief for state prisoners.<sup>59</sup> At this historical juncture, both the Court's appellate jurisdiction to issue original writs and federal courts' more general authority to grant habeas relief were constitutionally maximal.<sup>60</sup> Moreover, Congress had not yet enacted modern jurisdictional vehicles by which the Supreme Court reviewed issues in criminal cases. The period between *Ex parte Lange* (1874) and the Evarts Act (1891)—the legislation that created the federal courts of appeal—might be considered the high-water mark of original habeas jurisdiction.<sup>61</sup> During this period, the Court granted original habeas relief in at least ten cases and received petitions in many more.<sup>62</sup>

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<sup>58</sup> Statutory language authorizing original habeas relief did not change meaningfully until 1867. In 1833, Congress authorized federal relief for state detention of federal officers detained for acts undertaken "in pursuance of a law of the United States." See Act of Mar. 2, 1833, ch. 67, §§ 3, 7, 4 Stat. 632, 633–35.

<sup>59</sup> See Habeas Corpus Act of 1867, chs. 27–28, 14 Stat. 385.

<sup>60</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 366, 373–74 (1886) (reviewing the California Supreme Court's denial of habeas relief and finding the ordinances under which the petitioner was detained to be unconstitutional); *Ex parte Royall*, 117 U.S. 241, 247–53 (1886) (holding that federal courts have jurisdiction to grant habeas relief to state prisoners when the imprisonment violates the Constitution); *Ex parte Tom Tong*, 108 U.S. 556, 560 (1883) (holding habeas corpus proceedings by a prisoner facing criminal prosecution to be civil in nature, governed in appellate jurisdiction questions by the statutes regulating civil proceedings, and thus reviewable by the Supreme Court upon a certificate of division of opinion by circuit judges following a final judgment); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1868) (holding that the Supreme Court has appellate jurisdiction to revise an exercise of a lower federal court's original jurisdiction, when the lower court decision imposes, affirms, or fails to modify an unlawful detention); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325–26 (1867) (holding that the Act of Feb. 5, 1867 (the Habeas Corpus Act of 1867) provided the Supreme Court with appellate jurisdiction to review constitutional questions presented by circuit court disposition of habeas petitions).

<sup>61</sup> See Circuit Court of Appeals (Evarts) Act, ch. 517, 26 Stat. 826, 826 (1891); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873); Hertz & Liebman, *supra* note 25, § 2.4d, at 52–54.

<sup>62</sup> See *In re Mayfield*, 141 U.S. 107, 116 (1891); *In re Burrus*, 136 U.S. 586, 597 (1890); *In re Savage*, 134 U.S. 176, 177–78 (1890); *In re Medley*, 134 U.S. 160, 174–75

Several legislative events brought this era to a close. First, in 1885, Congress created an as-of-right appeal from district court habeas decisions.<sup>63</sup> Second, in 1891, Congress empowered the Supreme Court to conduct direct writ-of-error review in federal criminal cases.<sup>64</sup> Third, legislation in 1891 and 1925 codified the statutory writ of certiorari, which established the Court's modern discretionary jurisdiction over the decisions of lower courts.<sup>65</sup> As Congress created appellate alternatives, the Supreme Court began to fashion complementary prudential limits on original habeas relief. In a series of cases, the Court ruled that, other than in exceptional circumstances, it would not exercise habeas jurisdiction where a writ of error was available.<sup>66</sup> By the middle of the twentieth century, original habeas had developed into a jurisdiction of last resort—available to decide only those habeas cases for which other appellate power was inadequate.

During the post-Civil War period of original habeas activity,<sup>67</sup> one might have expected the Supreme Court to distinguish between limits on its Article III jurisdiction to revise use of the judicial power and limits on habeas relief common to all federal courts. The Court, however, never answered that question. As the next Section explains, the Court again failed to distinguish between the two types of jurisdictional limits in its post-World War II military

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(1890); *In re Sawyer*, 124 U.S. 200, 221–22 (1888); *Ex parte Bain*, 121 U.S. 1, 14 (1887); *Ex parte Wilson*, 114 U.S. 417, 429 (1885); *Ex parte Fisk*, 113 U.S. 713, 726–27 (1885); *Ex parte Rowland*, 104 U.S. 604, 618 (1882).

<sup>63</sup> Specifically (and among other things), the Circuit Court of Appeals (Evarts) Act established certiorari jurisdiction over a narrow category of subject matter, and the Judiciary Act of 1925 extended that jurisdiction to all cases in the Supreme Court's appellate jurisdiction. See Judiciary Act of 1925, ch. 229, §§ 237–40, 43 Stat. 936, 937–39; Circuit Court of Appeals (Evarts) Act, ch. 517, § 6, 26 Stat. at 827–28; Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.

<sup>64</sup> See Circuit Court of Appeals (Evarts) Act, ch. 517, § 5, 26 Stat. at 827–28. Congress had actually created writ-of-error review for capital prisoners in 1889. See Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656.

<sup>65</sup> See Judiciary Act of 1925, ch. 229, §§ 237–40, 43 Stat. 936, 937–39; Circuit Court of Appeals (Evarts) Act, ch. 517, § 6, 26 Stat. at 828.

<sup>66</sup> See *In re Belt*, 159 U.S. 95, 100 (1895); *In re Chapman*, 156 U.S. 211, 215 (1895). Over time, the “exceptional circumstances” standard developed into a substantive limit on all original habeas relief, irrespective of availability or mix of alternative appellate jurisdiction. See *infra* Subsection III.C.2.

<sup>67</sup> See generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 465–77 (1963).

confinement cases. I discuss the importance of this trend—and what it means for death penalty challenges—in Part III.<sup>68</sup>

### C. Post-World War II Military Detention

After it lapsed as a preferred means of reviewing criminal confinement, original habeas resurfaced briefly as a potentially meaningful source of Supreme Court power over World War II military detention.<sup>69</sup> The World War II military commission cases illustrate this Part's two global themes. First, the cases illustrate the Court's strong preference for alternatives to original habeas jurisdiction. Second, the decisions—all of which denied relief—were invariably phrased as limits common to federal courts generally, rather than as limits on the Court's Article III appellate jurisdiction.

Understanding the full import of the World War II cases requires some understanding of the Supreme Court's review of military detention during the Civil War. In 1863, *Ex parte Vallandigham* rejected the Court's power to conduct direct certiorari review of a Northern military commission that had sentenced a Southern sympathizer.<sup>70</sup> *Vallandigham* formally disclaimed only certiorari, but the Court also suggested in dicta that it could not issue original habeas writs to accomplish that same review.<sup>71</sup> Several years later the Court refused to enforce that dicta as a holding,<sup>72</sup> and the extent of its original habeas jurisdiction over military confinement remained unclear.

The next significant original habeas questions involving military detention did not arise until World War II. Prior to 1948, the Supreme Court had granted review on the merits in only two military detention cases, *Ex parte Quirin* and *In re Yamashita*.<sup>73</sup> *Quirin* involved eight German-born men who had been living in the United States before they returned to the German Reich between 1933

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<sup>68</sup> See *infra* Subsection III.E.2.

<sup>69</sup> The discussion of military commissions could, conceptually speaking, belong in Section I.A, *supra*, which discusses the Court's decisions involving whether the writ can issue under the Court's Article II, § 2 appellate power. I treat the subject in this separate Section because the relevant cases present unique and recurring issues that are distinct from the issues the cases in the prior Section present.

<sup>70</sup> 68 U.S. (1 Wall.) 243, 252–53 (1863).

<sup>71</sup> *Id.* at 252.

<sup>72</sup> See *Ex parte Mason*, 105 U.S. 696, 697 (1881).

<sup>73</sup> *In re Yamashita*, 327 U.S. 1, 4–6 (1946); *Ex parte Quirin*, 317 U.S. 1, 18–19 (1942).

and 1941.<sup>74</sup> After receiving explosives training, they were captured trying to reenter the United States,<sup>75</sup> tried by a presidentially convened secret military commission,<sup>76</sup> and sentenced to death.<sup>77</sup> The detainees were to be executed on a fairly short timetable, and all officials involved preferred that the Court adjudicate the commission's legitimacy before capital punishment was actually imposed.

*Quirin* was first filed by seven of the eight detainees as an original habeas case, but, at the Court's behest, they perfected certiorari jurisdiction between the first and second days of oral argument.<sup>78</sup> (One commentator has insightfully observed that "the Court's jurisdiction caught up with the Court just at the finish line."<sup>79</sup>) The detainees argued that the military trial was unconstitutional because it did not afford them protections specified in the Bill of

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<sup>74</sup> 317 U.S. at 20–21.

<sup>75</sup> *Id.* at 21.

<sup>76</sup> *Id.* at 22.

<sup>77</sup> Jack Goldsmith, Justice Jackson's Unpublished Opinion in *Ex parte Quirin*, 9 Green Bag 2d 223, 224 (2006). Roosevelt ultimately commuted two of the sentences. *Id.*

<sup>78</sup> The Court's certiorari jurisdiction was not definitively established until after the first day of oral argument, and not without considerable off-the-record back and forth among the attorneys arguing the case, several of the Justices, and clerks in the lower courts. 39 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 498–504 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Landmark Briefs]; Boris I. Bittker, The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction, 14 Const. Comment. 431, 440, 441 n.21 (1997). As of the first day of argument, the saboteurs had made no appeal to the D.C. Circuit and sought review in the Supreme Court only by original habeas. On that day Justice Frankfurter made quite clear that he had problems with the notion that the Court had appellate jurisdiction, even through original habeas, over matters not presented to the relevant federal appeals court. Landmark Briefs, *supra*, at 498–99. Justice Jackson suggested that the parties perfect the appeal by filing "an additional piece of paper" (actually two). *Id.* at 504–06. Before the second day of argument, the saboteurs' lawyers filed documents to bring the case from the district court to the D.C. Circuit and a certiorari petition to bring the case from the D.C. Circuit to the Supreme Court. Bittker, *supra*, at 446. The D.C. Circuit clerk refused to accept, in place of the military commission transcript, a copy of the record that had been prepared for the Supreme Court proceeding. One of the saboteur's lawyers informed Chief Justice Stone of the unanticipated clerical problem, and within an hour those lawyers were assured that the clerk would accept the previously rejected record. Once the appropriate materials were on file with the D.C. Circuit, the Supreme Court immediately granted certiorari. *Id.* at 446–47.

<sup>79</sup> Robert E. Cushman, *Ex parte Quirin et al.—The Nazi Saboteur Case*, 28 Cornell L.Q. 54, 58 (1942).

Rights.<sup>80</sup> The Court granted certiorari, denied the original writ, and denied relief on the merits.<sup>81</sup> *Quirin*'s holding that Article I, Section 8, Clause 10 authorizes Congress to establish military commissions punishing war crimes remains an important precedent for contemporary War on Terror ("WoT") cases.<sup>82</sup> *Quirin* is also important, at least for my purposes, because it demonstrates the strength of the Court's preference for certiorari petitions as a vehicle for appellate review.

*In re Yamashita* involved an American military trial, conducted in Manila, of a Japanese Imperial Army General accused of allowing his troops to commit atrocities against civilians and prisoners of war.<sup>83</sup> Yamashita was given a death sentence, and after Douglas MacArthur and the Philippine Supreme Court both refused to overturn it, he sought writs of certiorari, prohibition, and habeas corpus in the U.S. Supreme Court.<sup>84</sup> The Court denied all three writs, ruling on the merits that the Manila military commissions had authority to hear the cases.<sup>85</sup>

The *Yamashita* opinion remarked that "the military tribunals . . . are not courts whose rulings and judgments are made subject to review by this Court."<sup>86</sup> Some influential scholars think this passage significant as to the reach of the Court's appellate jurisdiction,<sup>87</sup> but the wording of the entire paragraph in which that passage appears indicates that the Court was noting only that a habeas writ (sought either before the Supreme Court or a district court) does not function as a writ of error.<sup>88</sup> A narrower reading of *Yamashita* means that the Court again declined to distinguish between a limit on original habeas jurisdiction common to all federal courts and one specific to the Supreme Court's appellate authority to revise inferior use of the judicial power.

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<sup>80</sup> *Id.* at 60–61.

<sup>81</sup> *Quirin*, 317 U.S. at 18–19.

<sup>82</sup> U.S. Const. art. I, § 8, cl. 10; *Quirin*, 317 U.S. at 26. For example, *Quirin* is important precedent in *Hamdan v. Rumsfeld*, 548 U.S. 557, 588–90 (2006), which concerns the constitutionality of military commissions.

<sup>83</sup> 327 U.S. 1, 4–5, 14 (1946).

<sup>84</sup> *Id.* at 4.

<sup>85</sup> *Id.* at 25–26.

<sup>86</sup> *Id.* at 8 (citing *Vallandigham*, 68 U.S. (1 Wall.) at 248, 251–53).

<sup>87</sup> See, e.g., Oaks, *supra* note 8, at 171.

<sup>88</sup> See *Yamashita*, 327 U.S. at 8.



Taken together, *Quirin* and *Yamashita* established that the military commissions could legitimately impose punishment, but neither case directly addressed the question of whether the judicial power includes the jurisdiction to grant a habeas remedy.<sup>89</sup> In the late 1940s, the Supreme Court received somewhere between 120 and 130 additional original petitions from military detainees who failed to seek lower court habeas writs.<sup>90</sup> With slight variations, the post-war Court was divided into two four-Justice camps. Chief Justice Vinson, joined by Justices Reed, Frankfurter, and Burton, usually formed a block that voted to deny relief without argument for want of appellate jurisdiction. Justices Black, Murphy, Rutledge, and (usually) Douglas wanted argument on the jurisdictional question.<sup>91</sup> Justice Jackson, who was the lead prosecutor at Nuremberg, recused himself in all of the German cases.<sup>92</sup> Because the 4-4 results effectively denied relief, Justice Jackson felt pressure to vote for

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<sup>89</sup> *Quirin* and *Yamashita* represent crucial precedent for WoT cases involving military commission authority, but those issues are distinct from the question of original habeas jurisdiction. In fact, of the WoT cases, only *Hamdan v. Rumsfeld*, 548 U.S. 557, 575–76 (2006), mentions the original writ, and only to note that it would be implicated in a Suspension Clause challenge the Court declined to reach.

<sup>90</sup> *Oaks*, supra note 8, at 171. Most did not pursue such relief because *Ahrens v. Clark*, 335 U.S. 188, 192 (1948), held that prisoners confined in one district court's territorial jurisdiction could not seek habeas relief in another. The detainees seeking original habeas but no lower court relief read *Ahrens* to hold more broadly that, because they were detained abroad and outside the territorial jurisdiction of any district court, habeas relief was available only in original proceedings. A few years later the Court concluded that, in light of both practical and legislative developments, *Ahrens* was no longer good law. See *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 493–500 (1973). The post-*Ahrens* original petitions are nonetheless another example of how original habeas has historically operated as an important jurisdictional vehicle of last resort.

<sup>91</sup> The pre-*Hirota* lineup can be observed throughout 1947 and 1948 cases. See, e.g., *In re Heim*, 335 U.S. 856 (1948); *In re Eckstein*, 335 U.S. 851 (1948); *In re Hans*, 335 U.S. 841 (1948); *In re Wentzel*, 335 U.S. 805 (1948); *In re Gronwald*, 334 U.S. 857 (1948); *In re Ehlen*, 334 U.S. 836 (1948); *In re Girke*, 334 U.S. 836 (1948); *Everett v. Truman*, 334 U.S. 824 (1948); *Becker-Freyseng v. United States*, 333 U.S. 836 (1948); *Beigelboeck v. United States*, 333 U.S. 836 (1948); *Brack v. United States*, 333 U.S. 836 (1948); *Brandt v. United States*, 333 U.S. 836 (1948); *Fischer v. United States*, 333 U.S. 836 (1948); *Gebhardt v. United States*, 333 U.S. 836 (1948); *Genzken v. United States*, 333 U.S. 836 (1948); *Handloser v. United States*, 333 U.S. 836 (1948); *Hoven v. United States*, 333 U.S. 836 (1948); *Mrugowsky v. United States*, 333 U.S. 836 (1948); *Rose v. United States*, 333 U.S. 836 (1948); *Schroeder v. United States*, 333 U.S. 836 (1948); *Sievers v. United States*, 333 U.S. 836 (1948); *Milch v. United States*, 332 U.S. 789 (1947); see also *Oaks*, supra note 8, at 171.

<sup>92</sup> See 335 U.S. 876, 877, 879 (1948) (Jackson, J., accompanying memorandum).

argument in original habeas proceedings sought by Pacific theatre prisoners.<sup>93</sup>

In *Hirota v. MacArthur*,<sup>94</sup> Justice Jackson joined Justices Black, Douglas, Murphy, and Rutledge to request oral argument on the jurisdictional question.<sup>95</sup> *Hirota* was the former Japanese Premier and the named party in a joint petition filed by a number of Japanese prisoners sentenced by the International Military Tribunal for the Far East, which was constituted by the Allied powers.<sup>96</sup> The per curiam opinion states that “[u]nder the foregoing circumstances the courts of the United States have no power” to scrutinize the Japanese tribunal’s sentences because the tribunal was not a U.S. court.<sup>97</sup> *Hirota*, then, is premised expressly on habeas limits common to all federal courts, and not on the limits of the Supreme Court’s Article III appellate jurisdiction to revise inferior exercise of the judicial power.<sup>98</sup>

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<sup>93</sup> See *id.* at 879–81 (Jackson, J., accompanying memorandum). Some have written that whether the Supreme Court historically adhered to a rule of five or a rule of four in determining whether to hear original habeas cases is unclear. See Ira P. Robbins, Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?, 36 Suffolk U. L. Rev. 1, 6 n.27 (2002) (collecting periodical sources). I disagree with that proposition. The post-World War II configurations strongly suggest that the Court has always observed a rule of five on this issue.

<sup>94</sup> 338 U.S. 197 (1948).

<sup>95</sup> 335 U.S. at 881 (Jackson, J., accompanying memorandum). Justice Jackson took no part in the decision itself, which denied relief. Justice Douglas concurred in a separate opinion, Justice Murphy dissented, and Justice Rutledge reserved announcement of his vote until a later time. Justice Rutledge passed away before he could announce his vote. *Hirota*, 338 U.S. at 198–99.

<sup>96</sup> *Id.* at 199 (Douglas, J., concurring).

<sup>97</sup> *Id.* at 198.

<sup>98</sup> Reading *Hirota* as a categorical bar on lower or Supreme Court habeas review of military commissions, however, no longer seems plausible. First, *Hirota* was decided during an era in which *Ahrens v. Clark*, 335 U.S. 188 (1948)—which seemed to bar a claimant from seeking habeas relief from a district court if he was not confined in that court’s territorial jurisdiction—was considered more of a jurisdictional than a prudential obstacle to habeas relief. See *Rasul v. Bush*, 542 U.S. 466, 478–79 (2004); see also *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 499–500 (1973). The Court and Congress rejected that understanding of *Ahrens* several years later. See discussion *supra* note 90. Second, as early as 1950, even members of the *Hirota* majority appeared to regard that case as limited to the Far East military tribunal configuration. In the final German case, Justice Black, who joined the per curiam opinion in *Hirota*, voted to deny original habeas relief “without prejudice to making applications in a District Court.” *In re Hans*, 339 U.S. 976, 976 (1950).

If the end of the nineteenth century also represented the end of prolific original habeas review, then the World War II cases were a retrenchment of sorts. Despite *Vallandigham's* suggestion that the Supreme Court lacked original habeas jurisdiction to review military confinement directly, no case has formally imposed that restriction. Instead—as the World War II cases demonstrate—the Court has historically preferred to style the jurisdictional limits it does impose as limits on the judicial power common to all federal courts, rather than as unique to its Article III appellate jurisdiction. In short, the Supreme Court's authority to grant habeas relief is roughly coextensive with the jurisdiction of lower courts to do so.<sup>99</sup>

#### D. Modern Role of Original Habeas Jurisdiction

Modern original habeas jurisdiction flows from 28 U.S.C. § 2241,<sup>100</sup> which is the general grant of habeas authority to federal courts (and the descendant of the 1789 provision),<sup>101</sup> as well as from the All Writs provisions in 28 U.S.C. § 1651.<sup>102</sup> An original writ has not issued since 1925.<sup>103</sup> In 1948, the Supreme Court acquired the statutory authority to transfer an original habeas application to the district court with territorial jurisdiction to hear it.<sup>104</sup> The Court exercised that authority twice in 1962 and again in *Davis*.<sup>105</sup> Most modern discussion of the Court's Article III appellate jurisdiction occurs in Suspension and Exceptions Clause cases involving a lower court habeas disposition.

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<sup>99</sup> In fact, there are at least two instances (both discussed in text that follows) where the Supreme Court appears to consider its authority to grant habeas relief potentially broader than that of lower courts. First, the habeas data show that the Supreme Court withheld disposition of two Guantanamo petitions until it decided that federal district courts had jurisdiction to entertain them. Only after it decided *Boumediene v. Bush*, 553 U.S. 723 (2008), did it dismiss those petitions without prejudice to filing in district court. See *infra* note 199. Second, the Supreme Court transferred the petition in *Davis* even though, arguably, district courts do not have statutory authority to grant relief. See 130 S. Ct. 1, 2–4 (2009) (Scalia, J., dissenting).

<sup>100</sup> See 28 U.S.C. § 2241 (2006).

<sup>101</sup> See *Felker v. Turpin*, 518 U.S. 651, 659 n.1 (1996).

<sup>102</sup> See *infra* Subsection III.D.2.

<sup>103</sup> See *Ex parte Grossman*, 267 U.S. 87 (1925).

<sup>104</sup> See 28 U.S.C. § 2241(b).

<sup>105</sup> See *Davis*, 130 S. Ct. at 1; *Byrnes v. Walker*, 371 U.S. 937, 937 (1962); *Chaapel v. Cochran*, 369 U.S. 869, 869 (1962). Justice Douglas transferred a case in his capacity as an individual Justice in 1973. See *Ex parte Hayes*, 414 U.S. 1327, 1329 (1973).

Recall that Article I, Section 9 of the Constitution forbids Congress from suspending the privilege of habeas corpus.<sup>106</sup> How the original writ interacts with the Suspension Clause, however, has not been explored by the Supreme Court.<sup>107</sup> In *Felker v. Turpin*, the leading modern original writ case (if there is such a thing), the Court did consider a Suspension Clause question under its original writ jurisdiction.<sup>108</sup> The Court, however, merely used the original writ as a procedural vehicle to scrutinize restrictions on successive habeas petitions in lower courts.<sup>109</sup> It did not consider whether the availability of the original writ itself obviated Suspension Clause concerns, nor did it indicate whether the Suspension Clause figured prominently in its decision to insist on the original writ's availability.

*Felker* was really an Exceptions Clause case. As the data presented in Part II will show, most of the modern original habeas docket consists of petitions challenging criminal confinement in successive habeas proceedings. Successive *petitions* can contain *claims* that are either successive (claims brought in a prior petition) or abusive (claims that were not). The Antiterrorism and Effective Death Penalty Act ("AEDPA") enacted particularly restrictive rules for successive petitions under 28 U.S.C. § 2244(b).<sup>110</sup> Under 28 U.S.C. § 2244(b)(1), successive claims are categorically barred.<sup>111</sup> Under 28 U.S.C. § 2244(b)(2), abusive claims are also barred, with two narrow exceptions.<sup>112</sup> AEDPA's poor drafting is legendary,<sup>113</sup> and formalistic application of Section 2244(b)(1)–(2) is something that the Court has repeatedly rejected.<sup>114</sup>

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<sup>106</sup> See U.S. Const. art. I, § 9, cl. 2.

<sup>107</sup> *Hamdan v. Rumsfeld* briefly commented on the relationship between the two, but did not extensively consider the issue. See 548 U.S. 557, 575 (2006).

<sup>108</sup> 518 U.S. 651, 663–64 (1996).

<sup>109</sup> See *id.* at 664.

<sup>110</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106, 110 Stat. 1214, 1220–21.

<sup>111</sup> See § 2244(b)(1).

<sup>112</sup> See § 2244(b)(2); see also *infra* notes 146–48 and accompanying text (discussing content of two successive petition exceptions).

<sup>113</sup> See, e.g., *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (“[I]n a world of silk purses and pigs’ ears, the [AEDPA] is not a silk purse of the art of statutory drafting.”).

<sup>114</sup> See *Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007) (holding that, if a term in a statute is not self-defining, then you look to the prior successive petition law to determine its meaning); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–45 (1998)

Section 2244(b) contains not only the substantive provisions applicable to successive petitions, but also the procedure by which lower federal courts are to apply them.<sup>115</sup> Specifically, Section 2244(b)(3) provides for a “gatekeeping” or “authorization” system under which applications for leave to file successive petitions must be filed with an appeals court before a prisoner may proceed on the merits of his petition in district court.<sup>116</sup> If the appeals court determines that the prisoner has made a prima facie case for relief, only then may he proceed with the litigation.<sup>117</sup> Under Section 2244(b)(3)(E), orders denying authorization to file the successive petition may not be reviewed by appeal or by certiorari in the Supreme Court.

*Felker* contained three important legal holdings. First, the Supreme Court determined that AEDPA’s provisions stripping its jurisdiction to review authorization denials did not apply to its original habeas power.<sup>118</sup> Second, the Court decided that the substantive limits on successive petitions in Section 2244(b)(1) and (2) did not constitute a suspension of the writ.<sup>119</sup> Third, the Court held that the availability of original habeas pretermitted any controversy over whether the jurisdiction-stripping provisions constituted an Exceptions Clause violation.<sup>120</sup>

*Felker*, together with AEDPA, created a new source of pressure on the habeas docket. Before AEDPA, habeas relief was usually sought only as an out-of-time certiorari petition. AEDPA stripped the Supreme Court’s certiorari jurisdiction over orders denying authorization, however, and *Felker* established that prisoners could

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(holding that certain types of numerically successive petitions are not barred under § 2244(b) because doing so would functionally punish diligent claimants).

<sup>115</sup> See § 2244(b)(3) (circuit courts); § 2244(b)(4) (district courts).

<sup>116</sup> See § 2244(b)(3)(A).

<sup>117</sup> See § 2244(b)(3)(C).

<sup>118</sup> See *Felker*, 518 U.S. at 658.

<sup>119</sup> See *id.* at 664.

<sup>120</sup> See *id.* at 661–62. I use the term “pretermit” because it is not clear whether, even if § 2244(b)(3)(E) were held to strip the Court of original habeas jurisdiction, the provision might violate the Exceptions Clause. Under some Exceptions Clause theories, Congress may strip all of the Court’s appellate jurisdiction, but under other theories (sometimes called “Essential Functions” theories) Congress must leave at least some channels of Supreme Court review open. See *infra* notes 209–19 and accompanying text.

seek original habeas as an alternative form of Supreme Court review.

## II. ORIGINAL HABEAS DATASET (“OHD”)

There is no prior data on the modern Supreme Court’s original habeas docket, in any form. Nobody has undertaken serious scrutiny of the procedure since Professor Dallin Oaks in 1962,<sup>121</sup> and even Professor Oaks did not appear to be working with data from a single source.<sup>122</sup> This Part reports, for the first time, the original habeas data I have collected. I refer to the reported data as the “Original Habeas Dataset” or “OHD” for short. The OHD shows that original habeas has transformed largely into a vehicle for litigating and deciding habeas claims presented in successive petitions.

### A. OHD Study Design

The OHD consists of 1673 original habeas petitions, filed in the twenty years between the Supreme Court’s October 1988 and October 2007 terms. During this period, original habeas filings increased about tenfold.<sup>123</sup> Approximately twenty-eight percent of the petitions named the United States or an officer thereof as the respondent, and sixty-nine percent of the petitions named a state or its officer. The OHD dates back to the October 1988 term because, while I want to understand the change in original habeas activity over time generally, I am specifically interested in the post-1996 effects of AEDPA and *Felker*.

#### 1. Collection Methodology and Data Attributes

I compiled the OHD using materials previously stored in formats that made data acquisition, aggregation, and analysis difficult. Many educational institutions retain microfiche copies of certain Supreme Court filings, but those records usually include only certiorari pleadings and briefing in cases that the Court actually reviews. No electronic database has digitized copies of original habeas filings. Parties must ordinarily file forty copies of any pleading

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<sup>121</sup> See Oaks, *supra* note 8.

<sup>122</sup> See *id.* at 209–11 (appendix).

<sup>123</sup> See *infra* Table 1.

with the Court,<sup>124</sup> but the Supreme Court Rules relax this requirement if a party proceeds *in forma pauperis* (“*ifp*”)—meaning without having to incur ordinary filing expenses (literally, “in the form of a pauper”).<sup>125</sup> Because almost all original habeas claimants are prisoners without financial resources, over ninety-five percent of OHD prisoners proceed *ifp*, and they file only one copy of their original petitions with the Court. That single original petition is assigned a 5000+ docket number, placed on the Court’s Miscellaneous Docket, and ultimately routed to the National Archives in Washington, D.C. The petition is almost never available in any other location.<sup>126</sup>

Due to security protocols at the National Archives building, I created digital copies of the original petitions on site. After generating a digital library, I coded the petitions for a number of variables, including: docket number, Court Term, case name, date on which the disposition issued, date on which the petition was filed, whether it was filed *ifp*, whether the prisoner was in state or federal custody, the type of prisoner (for example, criminally confined), the respondent, the type of order issued by the last court to adjudicate the claim, whether the petitioners had sought or needed to seek authorization to file a successive petition, whether the government filed a brief in opposition, whether the petitioner is a capital prisoner, and whether the petitioner was represented. Where possible, I matched OHD entries with a petitioner’s litigation history to confirm values for each variable. The OHD is not a sample; it reports all petitions for the relevant period.

## 2. Self-Reporting Error

Before presenting the data, one source of error is worth explaining in greater detail. (I discuss the others in Section II.C.) “Self-reporting error” describes error associated with the flawed information that pro se prisoners provide in the original petitions themselves. There are virtually no authoritative accounts of any pris-

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<sup>124</sup> See Sup. Ct. R. 20.2.

<sup>125</sup> See Sup. Ct. R. 12.2, 20.2, 39.2, 39.5. In a very small fraction of cases (under six percent in the OHD), the Supreme Court denies the *ifp* petition before dismissing the habeas claims. See Sup. Ct. R. 39.8.

<sup>126</sup> These file copies are usually described as “original” filings, but I avoid referring to “originals” of “original petitions” in the obvious interest of clarity.

oner's procedural history, so OHD coding reflects the failure of some prisoners to state that material honestly, accurately, or precisely. Where possible, I verified or reconciled self-reported material with more reliable information, but much self-reporting error remains.<sup>127</sup>

Self-reporting error affects the coding of a petitioner's substantive and procedural attributes. The effect on *substantive* attribute coding is more pronounced, but the content of the petitions' underlying constitutional claims is not this Article's primary emphasis.<sup>128</sup> The most important *procedural* variables compromised by self-reporting error are: (1) the type of order issued by the last court to adjudicate the claim, and (2) whether the petitioner sought or needed to seek authorization to file a successive petition (together, the "Affected Variables").<sup>129</sup>

Although self-reporting error is unavoidable, it should not significantly affect the variously aggregated results that Section II.B reports—even for the Affected Variables. For individual entries that rely on Affected Variables, figures are unlikely to be off by more than a percentage point or two. The general trends that form the basis for my analysis in Part III are almost certainly unaffected.

### B. OHD Results

Table 1 reports the number of habeas petitions filed per term, for each OHD year. Original habeas activity during the October 2007 term was over ten times that of the October 1988 term. Because of the date parameters, petitioners in the OHD received no original habeas relief of any kind—either in the form of an original

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<sup>127</sup> Depending on the variable, self-reporting might account for either type I (false positive) or type II (false negative) error. I do not extensively discuss the incidence of each error type in the body of this Article.

<sup>128</sup> Fully correcting for self-reporting error in substantive attribute coding is almost impossible, and any serious effort to minimize it will require considerable resources. Massive evidentiary and conceptual difficulties inhere in determining what a prisoner's original habeas claim "really" is, and resolving those problems is beyond my ambition here.

<sup>129</sup> The variables for which self-reporting error is probably insignificant are: docket number, Court term, case name, date on which the disposition issued, date on which the petition was filed, whether it was filed *ifp*, whether the prisoner was in state or federal custody, the respondent, whether the government filed a brief in opposition, whether the petitioner is a capital prisoner, and whether the petitioner was represented.



writ or in the form of an order transferring the proceedings to district court for further determination. All instances of original habeas relief either pre- or post-date the OHD.<sup>130</sup>

The OHD is a vast source of information about the original habeas docket, but I limit myself to the observations most important to the capital safety valve paradigm I discuss in Part III. First, criminally confined prisoners generate almost all original habeas activity. Second, among criminally confined prisoners, state prisoners account for roughly two-thirds of that activity. Third, legal representation is limited almost exclusively to capital proceedings, with the exceptions usually occurring in WoT cases. Fourth, the majority of original petitions are successive.

Table 1: Summary by Year

<i>October Term</i>	<i>Total Petitions</i>	<i>Federal Prisoners</i>	<i>State Prisoners</i>	<i>Other</i> <sup>131</sup>
2007	145	51	93	1
2006	113	31	79	3
2005	131	52	74	5
2004	105	23	77	5
2003	123	35	85	3
2002	133	50	80	3
2001	100	31	68	1
2000	130	34	93	3
1999	137	21	112	4
1998	113	30	83	0
1997	89	18	66	5
1996	72	18	48	8
1995	75	6	69	0
1994	35	9	24	2
1993	40	8	28	4
1992	35	10	24	1
1991	30	9	20	1
1990	30	7	22	1
1989	23	14	7	2

<sup>130</sup> See cases cited *supra* note 105.

<sup>131</sup> "Other" usually refers to petitions that do not challenge confinement, but it also includes some docket entries for which a file or other data are missing.

1988	14	4	9	1
Totals (%)	100%	27.5%	69.4%	3.1%

### 1. Habeas Activity by Type of Confinement

The types of prisoners seeking the original writ in the Supreme Court should be the same types of prisoners seeking habeas relief generally. Historically, this group includes military detainees, aliens subject to exclusion and deportation orders in immigration cases, and prisoners subject to criminal confinement.<sup>132</sup> For a variety of reasons, however, these categories of prisoners do not seek original habeas relief in the same proportions that they seek habeas relief in district court.

In the OHD, over ninety-six percent of original habeas activity involves prisoners confined by order of either a state or federal court. Since the beginning of the WoT, a small fraction (under one percent) of original habeas petitions have been filed by military detainees. The OHD contains even fewer petitions filed in immigration proceedings. Table 2 presents the number of habeas petitions in the OHD, by year and by type of confinement. Because the OHD shows that original petitions are filed almost exclusively by criminally confined prisoners, Part III analyzes a framework for adjudicating petitions in that context.

Table 2: Type of Confinement by Year

<i>October Term</i>	<i>Total Petitions</i>	<i>Criminal Confinement</i>	<i>Military Confinement</i>	<i>Immigration Proceedings</i>	<i>Other</i>
2007	145	141	3	0	1
2006	113	108	1	0	4
2005	131	125	1	0	5
2004	105	100	0	0	5
2003	123	118	2	3	0
2002	133	129	0	1	3
2001	100	99	0	0	1
2000	130	126	0	1	3
1999	137	133	0	0	4

<sup>132</sup> See cases cited *supra* note 29.

1998	113	113	0	0	0
1997	89	81	0	0	8
1996	72	71	0	0	1
1995	75	75	0	0	0
1994	35	33	0	0	2
1993	40	35	0	1	4
1992	35	34	0	0	1
1991	30	29	0	0	1
1990	30	29	0	0	1
1989	23	21	0	0	2
1988	14	13	0	0	1
Totals (%)	100%	96.4%	0.4%	0.4%	2.8%

## 2. Criminal Post-Conviction Activity by Type of Petitioner

The group of criminally confined petitioners subdivides into state and federal prisoners. In the OHD, state prisoners constitute about seventy percent of the criminally confined original habeas petitioners, and federal prisoners constitute about thirty percent.<sup>133</sup> A criminally confined state prisoner usually invokes 28 U.S.C. § 2254 to challenge a conviction or sentence, and a criminally confined federal prisoner usually invokes Section 2255.<sup>134</sup> While both state and federal prisoners seeking original habeas generally will have completed direct review of their convictions, state prisoners must also exhaust all available state post-conviction remedies before seeking original habeas relief.<sup>135</sup>

Table 3 reports, by year and for criminally confined offenders, the number of original habeas petitions filed by state and federal prisoners. Depending on the year, state prisoners file somewhere between two and four times the number of original petitions that

<sup>133</sup> These percentages are slightly different than the percentages reported in Table 1 because the data that Table 2 describes do not include WoT detainees, aliens subject to exclusion or removal, and any other prisoners that are not criminally sentenced.

<sup>134</sup> As explained *supra* note 27, 28 U.S.C. § 2255 describes a remedy that is not technically denominated “habeas corpus” but is functionally almost identical to the writ. Also, there are certain instances where a prisoner may invoke only § 2241, including when a prisoner argues under § 2255(e) that the remedy for federal prisoners is “inadequate or ineffective” to test custody, or when a prisoner challenges a parole determination. These scenarios are not important to my analysis. See 28 U.S.C. § 2255(e) (2006).

<sup>135</sup> See 28 U.S.C. § 2254(b)(1).

federal petitioners file. The volume of federal prisoner litigation is nonetheless significant enough that the paradigm Part III presents need not involve distinctions based on which sovereign imposes criminal confinement.

Table 3: Criminal Confinement by Sovereign and by Year

<i>October Term</i>	<i>Total Criminally Confined Petitioners</i>	<i>State Criminally Confined Petitioners</i>	<i>Federal Crimi- nally Confined Petitioners</i>
2007	141	93	48
2006	108	79	29
2005	125	74	51
2004	100	77	23
2003	118	85	33
2002	129	80	49
2001	99	68	31
2000	126	93	33
1999	133	112	21
1998	113	83	30
1997	81	66	15
1996	71	48	23
1995	75	69	6
1994	33	24	9
1993	35	28	7
1992	34	24	10
1991	29	20	9
1990	29	22	7
1989	21	7	14
1988	13	9	4
Totals	100%	72.0%	28.0%

### 3. Representation and Capital Proceedings

Nine percent of the criminally confined prisoners in the OHD attack capital sentences. Of the criminally confined prisoners attacking capital sentences, almost ninety-five percent were represented by counsel.<sup>136</sup> By contrast, only about two percent of criminally con-

<sup>136</sup> The ones that were not represented had usually chosen to proceed pro se after declining representation.

fined, noncapital prisoners had lawyers. The disparity between capital and noncapital representation reflects the difference in appointment-of-counsel rules for petitioners attacking a death sentence.<sup>137</sup>

Under 18 U.S.C. § 3599(a)(2), any capital, criminally confined offender that is financially incapable of procuring representation is entitled to appointment of counsel in federal habeas proceedings,<sup>138</sup> and counsel's responsibilities are specified partially in Subsection (e). Those responsibilities include representation at "every subsequent stage of available judicial proceedings, including . . . all available post-conviction process."<sup>139</sup> Capital prisoners seeking original habeas relief are entitled to representation both because the original petition is itself a Section 2254 or Section 2255 attack on a death sentence under Section 3599(a)(2),<sup>140</sup> and because it is a "subsequent stage of . . . post-conviction process" under Section 3599(e).<sup>141</sup>

There is no express statutory right to counsel for noncapital prisoners seeking original habeas relief. Under 18 U.S.C. § 3006A, the "interests of justice" can entitle a prisoner to appointment of counsel in district court habeas proceedings, but there is no similar provision applicable to Supreme Court original habeas petitions. The absence of a statutory counsel requirement is the reason that noncapital prisoners almost always appear *pro se*.<sup>142</sup> Table 4 reports, by year and for criminally confined prisoners, the breakdown among: *pro se* capital petitioners, represented capital petitioners, *pro se* noncapital petitioners, and represented noncapital petitioners. Legal representation for death-sentenced prisoners is an important element of the capital safety valve paradigm that I describe in Part III.

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<sup>137</sup> I specify that these are "criminally imposed" death sentences because military commissions may also capitally sentence defendants.

<sup>138</sup> See 18 U.S.C. § 3599(a)(2).

<sup>139</sup> § 3599(e); see also *Harbison v. Bell*, 129 S. Ct. 1481, 1484–85 (2009) ("We conclude that a COA is not necessary and that § 3599 authorizes federally appointed counsel to represent clients in state clemency proceedings.").

<sup>140</sup> § 3599(a)(2).

<sup>141</sup> § 3599(e).

<sup>142</sup> Perhaps because of the high-profile nature of the cases, WoT detainees are the exception to this rule, and all appearing in the OHD had counsel.

Table 4: Criminally Confined Prisoners by Capital and Pro Se Status and by Year

<i>October Term</i>	<i>Criminally Confined Prisoners</i>	<i>Pro se Capital Prisoners</i>	<i>Repre-sented Capital Prisoners</i>	<i>Pro se Non-capital Prisoners</i>	<i>Repre-sented Non-capital Prisoners</i>
2007	141	0	5	134	2
2006	108	2	6	98	2
2005	125	1	14	108	2
2004	100	1	8	88	3
2003	118	0	9	108	1
2002	129	0	21	106	2
2001	99	0	19	77	3
2000	126	1	15	108	2
1999	133	0	29	103	1
1998	113	1	25	82	5
1997	82	0	21	54	7
1996	71	1	24	45	1
1995	75	0	2	73	0
1994	33	0	0	33	0
1993	35	1	1	33	0
1992	34	0	0	34	0
1991	29	0	0	28	1
1990	29	0	0	29	0
1989	21	0	1	20	0
1988	13	0	0	11	2
Totals (%)	100%	0.5%	12.4%	84.5%	2.1%

#### 4. Successive Petitions Under 28 U.S.C. § 2244(b)(3)

Original habeas is, by far, most frequently sought to litigate claims in successive habeas petitions. The OHD shows that over half of original petitioners are seeking to bypass successive petition requirements, including over eighty percent of reported capital prisoners.

As previously mentioned, the Section 2244(b) successive petition provisions apply almost identically to criminally confined state and

federal petitioners.<sup>143</sup> Section 2244(b) contains both substantive standards and procedures for adjudicating successive petitions. Sections 2244(b)(1) and (b)(2) set forth the substantive standards. Section 2244(b)(1) requires that any claim presented in a prior habeas petition (any successive claim) be dismissed.<sup>144</sup> Section 2244(b)(2) requires that any claim not presented in a prior petition (any abusive claim) be dismissed, with two exceptions.<sup>145</sup> First, a prisoner may litigate an abusive claim that was previously unavailable and that relies on a new rule of constitutional law that the Supreme Court has made retroactive to cases on collateral review.<sup>146</sup> Second, a prisoner may litigate an abusive claim if its factual predicate could not have been previously discovered through due diligence, and if those facts establish by clear and convincing evidence that no reasonable juror would find the petitioner guilty.<sup>147</sup> Because AEDPA largely codified common law successive petition rules, there is considerable debate over how flexibly the statutory rules may be interpreted.<sup>148</sup>

Section 2244(b)(3) and (4) set forth the trial and appellate procedures for deciding successive petitions. Section 2244(b)(3) requires that an appeals panel authorize any successive litigation before it proceeds<sup>149</sup> and states that litigation is authorized only when a petitioner makes a *prima facie* showing under Section

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<sup>143</sup> The terms of § 2244 are facially applicable only to § 2254 claims by state prisoners, but § 2255(h) makes § 2244 applicable to successive claims made by federal prisoners. See §§ 2244, 2255(h).

<sup>144</sup> § 2244(b)(1).

<sup>145</sup> § 2244(b)(2).

<sup>146</sup> § 2244(b)(2)(A).

<sup>147</sup> § 2244(b)(2)(B).

<sup>148</sup> See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 943–44 (2007) (stating that the meaning of § 2244(b) “is not self-defining” and “takes its full meaning from” the Court’s pre-AEDPA abusive petition law); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001) (rejecting a literalist interpretation of § 2244(b) and agreeing with other courts that the interpretation of the provision “involves the application of the pre-AEDPA abuse-of-the-writ principles”); see also *Jordan Steiker, Innocence and Federal Habeas*, 41 *UCLA L. Rev.* 303, 342 (1993) (“Despite this statutory guidance, the Court’s approach to ‘successive’ and ‘abusive’ petitions likewise has been fashioned without close attention to statutory language.... [B]oth the Warren and the Rehnquist Courts designed their own substantive standards governing such petitions wholly apart from statutory language.”).

<sup>149</sup> § 2244(b)(3)(A)–(B).

2244(b)(2)'s substantive provisions.<sup>150</sup> Section 2244(b)(4) requires that a district court dismiss any claim that does not satisfy any part of Section 2244, even if it appears in a petition that the appellate court authorized.<sup>151</sup> Insofar as original habeas authority is concerned, the crucial procedural provision appears in Section 2244(b)(3)(E): "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."<sup>152</sup> This provision is what creates the extraordinary demand for original habeas review of successive claims that I discuss in Part III.

Section 2244(b)(3)(E)'s bar on certiorari review of authorization denials has spawned two broad categories of jurisdictional litigation: whether certain chronologically subsequent federal habeas petitions are to be treated as statutorily successive,<sup>153</sup> and when the Supreme Court may exercise non-certiorari power over orders denying authorization.<sup>154</sup> I do not concern myself with the former category here, except to note generally that the Court frequently opts for plausibly narrow readings of the term "successive" in order to allow more robust certiorari review.<sup>155</sup> I focus instead on the second category of cases—those dealing with the conditions under which the Court may exercise non-certiorari jurisdiction. The leading case is *Felker v. Turpin*,<sup>156</sup> discussed briefly in Section I.D. *Felker* held that: (1) Section 2244(b)(3)(E) did not strip the Court's non-certiorari authority over authorization denials,<sup>157</sup> (2) because the Court retained original habeas authority, AEDPA did not unconstitutionally restrict Article III, Section 2 appellate power over

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<sup>150</sup> § 2244(b)(3)(C).

<sup>151</sup> § 2244(b)(4).

<sup>152</sup> § 2244(b)(3)(E).

<sup>153</sup> See *Panetti*, 551 U.S. at 942; *Castro v. United States*, 540 U.S. 375, 380–81 (2003); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–44 (1998).

<sup>154</sup> See *Felker v. Turpin*, 518 U.S. 651, 660–61 (1996).

<sup>155</sup> See cases cited *supra* note 153.

<sup>156</sup> 518 U.S. 651 (1996).

<sup>157</sup> *Id.* at 658–61. The Court actually invoked *Ex parte Yerger* for the proposition that it will generally not consider original habeas jurisdiction repealed without an express statutory directive to that effect. See *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105–06 (1869). Recall that in *Yerger*, the Court had determined that the 1867 and 1868 Habeas Acts did not effect a restriction on the original habeas authority that the 1787 Judiciary Act created. *Id.* at 106.



the relevant habeas dispositions,<sup>158</sup> (3) the Section 2244(b)(3) gate-keeping procedure did not apply to original habeas cases;<sup>159</sup> and (4) the substantive standards applicable to abusive and successive claims did not violate the Suspension Clause.<sup>160</sup>

The Court's ability to review issues presented by successive petitions is crucial for several reasons. First, powerful and previously unavailable DNA evidence is frequently invoked for the first time in successive habeas petitions.<sup>161</sup> The DNA issue is particularly salient in petitions filed by capital prisoners, around five percent of which are terminated as successive.<sup>162</sup> Second, new and retroactive capital eligibility rules, such as the *Atkins v. Virginia* bar on executing mentally retarded offenders,<sup>163</sup> are frequently the bases for claims in successive petitions.<sup>164</sup> Third, a vehicle for reviewing Section 2244(b) gateway determinations ensures that the Court can control how the gateway rules are themselves interpreted. Part III expands on the importance of original habeas jurisdiction over capital sentences, particularly in successive federal habeas litigation.

Table 5 shows, by year and confining authority, the number of original petitions that effectively seek review of successive or abusive claims. Because Table 5 presents an Affected Variable, it is probably prone to some small "type-II" error—the OHD underreports the number of original petitions with this procedural history. As Subsection II.A.2 explains, many pro se prisoners likely failed to understand or to precisely recount authorization proceedings. The magnitude of self-reporting error is unlikely to vary as between state and federal prisoners. For all of the OHD that post-dates AEDPA, over half of the docket entries involved successive

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<sup>158</sup> 518 U.S. at 661–62.

<sup>159</sup> *Id.* at 662–63.

<sup>160</sup> *Id.* at 663–64. The Court also denied relief on the merits. *Id.* at 665.

<sup>161</sup> See *infra* notes 228–38 and accompanying text.

<sup>162</sup> Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996, at 47 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

<sup>163</sup> 536 U.S. 304, 321 (2002).

<sup>164</sup> See *infra* notes 239–50 and accompanying text.

petitions.<sup>165</sup> The OHD shows that this successive litigation is, by a wide margin, the largest factor driving the explosion in original habeas filings.

Perhaps the most important piece of information relating to the OHD appearing in Table 5 involves the capital composition of the original habeas petitions attempting to bypass restrictions on successive habeas litigation. Over eighty percent of petitions filed by *capital* prisoners seek to bypass authorization proceedings. The number of death penalty cases that are otherwise the subject of unreviewable orders underscores the importance of the capital safety valve paradigm I discuss in Part III.

Table 5: Criminal Confinement by Authorization Bypass and by Year

<i>October Term</i>	<i>Criminally Confin- ed Offend- ers</i>	<i>Total Au- thoriza- tion Bypass</i>	<i>Total Capital Offend- ers</i>	<i>Federal Capital Offend- ers</i>	<i>State Capital Offend- ers</i>	<i>Capital Au- thoriza- tion Bypass</i>
2007	141	53	5	0	5	2
2006	108	59	8	0	8	6
2005	125	62	15	0	15	13
2004	100	54	9	0	9	6
2003	118	57	9	0	9	9
2002	129	73	21	1	20	17
2001	99	41	19	0	19	11
2000	126	97	16	1	15	16
1999	133	75	29	0	29	22
1998	113	79	26	0	26	21
1997	82	66	21	0	21	19
1996	71	35	25	0	25	19
Totals (%) <sup>166</sup>	100%	55.8%	15.1%	0.1%	14.9%	12.0%

<sup>165</sup> Coding for “involved successive petitions” was more of an art than a science. This category includes petitioners that either sought authorization or appeared to avoid an authorization proceeding because it would have been futile.

<sup>166</sup> The percentages in this row use the period’s sum of criminally confined offenders as the denominator.

*C. OHD Error and Subsequent Research Needs*

The OHD contains information about the Supreme Court's original habeas jurisdiction that is not available from any other source. The set of variables for which I coded the petitions was nonetheless limited in some important respects. I described the most important problem with the data—self-reporting error—in Subsection II.A.2. I specify five other important limitations below.

First, the OHD contains no entries for which any relief was granted. As a result, no regression analysis can show what attributes predict relief. The Supreme Court exercised its authority to transfer a petition in *In re Davis*,<sup>167</sup> but that data point is outside the OHD's date parameters. Moreover, even if the *Davis* result were part of the OHD, there would need to be more instances where relief was obtained (the dependent variable) before meaningfully assessing how different attributes of the original petitions (the independent variables) affect outcomes. Subsequent work may address this problem by extending OHD date parameters to include more instances where the Court granted some sort of relief.<sup>168</sup>

Second, I was unable to code many attributes of the substantive claims presented in the petitions. By “substantive claim,” I mean the underlying constitutional violation that the claim invokes. I was able to divide the claims up in certain ways—such as those in capital versus noncapital cases—but the classifications I was able to make were generally evident from the docket, and I was not forced to code them by interpreting the contents of the original habeas petition itself. The OHD does not describe, for example, the number of prisoners with claims that they were convicted in violation of some procedural rule, such as that in *Brady v. Maryland* (prosecution unconstitutionally withholding evidence)<sup>169</sup> or *Strickland v. Washington* (constitutionally ineffective assistance of counsel),<sup>170</sup> or sentenced in violation of a capital eligibility standard, such as that in *Atkins v. Virginia* (prohibition on execution of mentally retarded offenders).<sup>171</sup> The OHD does not even distinguish between peti-

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<sup>167</sup> 130 S. Ct. 1, 1 (2009).

<sup>168</sup> The incidence of relief would have to be considerably higher before the problem is effectively addressed.

<sup>169</sup> 373 U.S. 83, 87 (1963).

<sup>170</sup> 466 U.S. 668, 687 (1984).

<sup>171</sup> 536 U.S. 304, 321 (2002).

tions that contain so-called “freestanding” claims of actual innocence from petitions that contain claims of innocence alongside some other constitutional challenge.<sup>172</sup> Self-reporting error simply made it too difficult to extend the scope of this Article to include these classifications. Subsequent work can build on the OHD by coding reliable information about the underlying content of original habeas claims.

Third, the OHD does not reflect coding for many categories of lower court orders that usually precede habeas relief. The last orders issued prior to the filing of a habeas petition are, generally speaking, effectively the orders for which original habeas petitioners seek Supreme Court review. Once again, self-reporting error made this information too difficult to collect. Of course, the OHD does reflect the presence of a Section 2244(b)(3) order denying authorization, but lower court relief can be denied in any number of other procedural postures. In order to reliably acquire and tabulate this information, subsequent work will have to cross-reference the names of original habeas petitioners with other state and federal dockets to determine what a last prior order actually did.<sup>173</sup> Moreover, this information is necessary to understand how many prisoners are using original habeas only because their certiorari petitions would be time-barred.<sup>174</sup>

Fourth, subsequent work must link the date variables with other data points to make that information more meaningful. Specifically, the length during which categories of original habeas petitions are pending is important, but that information is not worth

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<sup>172</sup> For a discussion of freestanding innocence, see *infra* Subsection III.E.2.

<sup>173</sup> Again, the original petitions themselves do not reliably report the procedural history, and subsequent analysis would benefit from data regarding whether it issued from a state or federal court and—if it issued from a federal court—whether the issuing entity is a district or appeals court. For last prior orders from federal courts, other important attributes not described in the OHD include whether a certificate of appealability has been granted and whether the lower court disposition rested on a procedural ruling such as the statute of limitations. The Supreme Court Rules instruct original habeas petitioners to include prior opinions as appendices to their petitions, but the Court cannot possibly know whether they are in fact omitted. See Sup. Ct. R. 20.2, 14.1(i).

<sup>174</sup> This was in fact one of the main reasons for using original habeas procedure prior to AEDPA. Prisoners generally have ninety days, measured from the date of the last prior order, to file certiorari petitions. See Sup. Ct. R. 13.1. There is no corresponding time limit on seeking an original habeas writ. See Sup. Ct. R. 20.

reporting without cross-tabulations that I cannot construct with existing variables. Simply computing the average number of days between when petitions were filed and denied is not helpful. For starters, the OHD does not mark which petitions were pending during the Supreme Court's recess, and those petitions take longer to adjudicate. Moreover, information regarding the time to dispose of capital challenges is far more useful when not reported as an average. To be meaningful, an average capital disposition time should be grouped by whether a prisoner requests habeas relief alongside a motion to stay an execution.<sup>175</sup> The OHD, however, does not contain data on stay motions. Subsequent researchers can acquire such information fairly easily by cross-referencing the names of original habeas petitioners with prisoners seeking stays.

Fifth, the OHD does not contain comprehensive information about how the Supreme Court treated any original habeas petitions internally.<sup>176</sup> The famous secrecy with which the Court and its Clerk's Office guard internal rules prevents the public from understanding certain aspects of original habeas decisionmaking. For example, the OHD does not have a variable that marks whether an original habeas petition, which is addressed formally to a single Justice riding circuit in the jurisdiction of confinement, was referred to the Court as a whole. As a matter of practice, individual Justices almost always refer original petitions to the Court, although there is no publicly available information about whether the unanimity of referral protocol is imposed by rule or is a courtesy separately observed by nine different chambers.<sup>177</sup> The secrecy of internal protocol renders certain procedural events more difficult to recognize, but the passage of time might make these events—even for petitions currently in the OHD—easier for sub-

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<sup>175</sup> Because original relief sought in conjunction with stays takes only a day or two to decide (capital prisoners usually seek stays at the eleventh hour), and because I strongly suspect original petitions attacking capital sentences but not filed in conjunction with a stay take longer to adjudicate, an average pendency would reside near the bottom of U-shaped distribution for which the extremes are far more important.

<sup>176</sup> The major exception involves internal votes disclosed in the Blackmun Papers, which are now accessible online. See Lee Epstein et al., Digital Archive of the Papers of Justice Harry A. Blackmun, <http://epstein.law.northwestern.edu/blackmun.php?p=0>. To my knowledge, however, these papers do not disclose the internal clerk's rules themselves.

<sup>177</sup> Justice Douglas was an exception to this rule. See, e.g., *Ex parte Hayes*, 414 U.S. 1327, 1327 (1973).

sequent researchers to mark with variables. Inferences about otherwise unpublished procedural rules become stronger over time because the Court must occasionally disclose internal treatment to make or dispute certain rulings. For example, although there is no published rule on the subject, several dissents have made clear that the modern Court continues to adhere to the *Hirota*-era rule that five votes are required to even hear a case under its original habeas authority.<sup>178</sup> (Certiorari requires only four.<sup>179</sup>)

Despite these real limitations, the OHD is, by orders of magnitude, the most useful source of information about original habeas petitions. As my discussion of each limitation indicates, there is considerable room for subsequent research to both expand and refine the data. I now turn to the question of what, in light of the OHD, the modern Supreme Court can, should, and will do with its original habeas power to review criminal confinement.

### III. OHD IMPLICATIONS: A CAPITAL SAFETY VALVE PARADIGM

If original habeas relief has historically been used to review claims over which other appellate jurisdiction was lacking (as Part I argues), and if successive petitions now dominate the Supreme Court's original habeas docket (as Part II reports), then one would predict original habeas authority to be exercised in at least one of the eighty percent of OHD capital petitions that seeks to bypass Section 2244(b). Indeed, that is exactly what *In re Davis* did.<sup>180</sup> In this Part, I make both a normative and a positive argument: that *Davis* should not and is unlikely to remain an isolated occurrence. New questions about capital proceedings combine with severe restrictions on ordinary habeas review to create an environment in which the Court may increasingly lean on its original habeas power's jurisdictional, substantive, and remedial features in order

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<sup>178</sup> See Robbins, *supra* note 93, at 2–5 (discussing *In re Tarver*, 528 U.S. 1152 (2000)).

<sup>179</sup> See *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting); David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 211 (5th ed. 2000); Robbins, *supra* note 93, at 13 nn.69–72; accord *In re Smith*, 526 U.S. 1157 (1999) (three dissenting Justices voting to set the matter for full briefing); *In re Stanford*, 537 U.S. 968 (2002) (four dissenting Justices voting for argument).

<sup>180</sup> 130 S. Ct. 1, 1 (2009).

to avoid wrongful executions. In the interest of brevity, I describe this cluster of concepts as the “capital safety valve paradigm.”

### A. Davis and Successive Petitions

The Supreme Court neither granted nor transferred an original habeas petition within the OHD date parameters. In the summer of 2009, however, *Davis* ended the era of original habeas inactivity.<sup>181</sup> The State of Georgia convicted and capitally sentenced Troy Davis for murdering an off-duty police officer.<sup>182</sup> Davis had been arrested after a highly publicized manhunt.<sup>183</sup> After his conviction became final,<sup>184</sup> Davis unsuccessfully filed a state habeas petition alleging that another man, Sylvester “Redd” Coles, was the shooter.<sup>185</sup> Davis petitioned for federal habeas relief alleging that the prosecution failed to disclose material, exculpatory evidence in violation of *Brady v. Maryland*;<sup>186</sup> that the prosecution failed to disclose witness impeachment evidence in violation of *Giglio v. United States*;<sup>187</sup> and that his attorney was constitutionally ineffective under *Strickland v. Washington*.<sup>188</sup> The U.S. Court of Appeals for the Eleventh Circuit ultimately determined that Davis’s claims were procedurally defaulted.<sup>189</sup> After moving unsuccessfully for a new trial in state court, Davis sought Section 2244(b)(3) authorization to file a successive federal petition in which he would make a “freestanding” innocence claim.<sup>190</sup> The Eleventh Circuit denied au-

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<sup>181</sup> *Id.*

<sup>182</sup> See *Davis v. State*, 426 S.E.2d 844, 845–46 (Ga. 1993).

<sup>183</sup> See Ellis Cose, Actual Innocence: A Death-Row Case Tests Whether Swift Justice Can Also Be Certain, *Newsweek*, June 18, 2009, [http:// www.newsweek.com/2009/06/17/actual-innocence.html](http://www.newsweek.com/2009/06/17/actual-innocence.html).

<sup>184</sup> See *Davis*, 426 S.E.2d at 845.

<sup>185</sup> See Petition for Writ of Habeas Corpus at 6–7, *Davis v. Head*, No. 4:01-cv-00290 (S.D. Ga. Dec. 14, 2001).

<sup>186</sup> 373 U.S. 83, 87 (1963); see also Petition for Writ of Habeas Corpus at 19, *Davis v. Head*, No. 4:01-cv-00290 (S.D. Ga. Dec. 14, 2001) (stating *Brady* claim).

<sup>187</sup> 405 U.S. 150, 154–55 (1972); see also Petition for Writ of Habeas Corpus at 19, *Davis v. Head*, No. 4:01-cv-00290 (S.D. Ga. Dec. 14, 2001) (stating *Giglio* claim).

<sup>188</sup> 466 U.S. 668, 687 (1984); see also Petition for Writ of Habeas Corpus at 18, 37, *Davis v. Head*, No. 4:01-cv-00290 (S.D. Ga. Dec. 14, 2001) (stating *Strickland* claim).

<sup>189</sup> *Davis v. Terry*, 465 F.3d 1249, 1256 (11th Cir. 2006).

<sup>190</sup> For readers unfamiliar with the definition of a “freestanding” innocence claim, Subsection III.C.1, *infra*, explains.

thorization.<sup>191</sup> Davis then filed for original habeas relief, requesting that the Supreme Court transfer his petition to the U.S. District Court for the Southern District of Georgia.<sup>192</sup>

In his Supreme Court pleading, Davis argued that exceptional circumstances warranted the exercise of original habeas jurisdiction, that the Eleventh Circuit erred in denying authorization, that the state decision denying relief was unreasonable under 28 U.S.C. § 2254(d), and that executing him without an evidentiary hearing would raise “serious constitutional issues.”<sup>193</sup> All of these positions relied heavily on post-trial affidavits in which seven of nine eyewitnesses recanted their testimony and in which at least two other people implicated Coles as the shooter. Coles himself was one of the two non-recanting witnesses fingering Davis. Almost all of the State’s case against Davis was based on eyewitness testimony, with a single shell casing—connected to a gun that the police never found—offered as the only physical evidence that Davis was the shooter.<sup>194</sup> In response, the State argued that the original habeas petition was an impermissible substitute for a certiorari petition, that exceptional circumstances did not warrant relief, and that adequate state remedies had been available.<sup>195</sup>

The Supreme Court granted the transfer in a one-paragraph opinion.<sup>196</sup> Justice Stevens, joined by Justices Ginsburg and Breyer, concurred in the judgment.<sup>197</sup> The concurrence primarily engaged Justice Scalia’s dissent, which Justice Thomas joined and which argued that the transfer was a fool’s errand because the district court could not grant relief on a freestanding innocence claim.<sup>198</sup> *Davis* provides a useful framework to consider the original habeas writ’s role in capital proceedings. More specifically, *Davis* demonstrates: (1) that the Court is unlikely to observe anything other than express statutory limits on its original habeas jurisdiction; (2) that pe-

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<sup>191</sup> In re Davis, 565 F.3d 810, 813 (11th Cir. 2009).

<sup>192</sup> Petition for Writ of Habeas Corpus at 1, In re Davis, 130 S. Ct. 1 (2009) (No. 08-1443).

<sup>193</sup> Id. at 28.

<sup>194</sup> Id. at 15.

<sup>195</sup> Brief in Opposition on Behalf of Respondent at 21, 28–30, In re Davis, 130 S. Ct. 1 (2009) (No 08-1443).

<sup>196</sup> In re Davis, 130 S. Ct. 1, 1 (2009).

<sup>197</sup> See id. at 1–2 (Stevens, J., concurring).

<sup>198</sup> See id. at 2–4 (Scalia, J., dissenting).



titions attacking capital sentences fare well under substantive standards the Court applies in the exercise of that jurisdiction; and (3) that the transfer remedy is uniquely suited to the fact-intensive inquiries that wrongful execution claims present. I now consider each of these phenomena in turn.

### *B. The Persistence of Original Habeas Jurisdiction*

The resilience of the Supreme Court's original habeas authority is remarkable. That power is likely to remain a uniquely important means of adjudicating challenges to criminal confinement largely because of the way Congress configures and the Court interprets restrictions on the Court's appellate jurisdiction. Original habeas relief is not necessary where certiorari jurisdiction allows the Court to review the underlying claim, and criminal confinement is one of the only contexts in which Congress has limited the Court's certiorari authority.<sup>199</sup> Indeed, when a prisoner files an original habeas petition but is eligible to seek a writ of certiorari, the Court will

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<sup>199</sup> Both appeals under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2739, and from the Court of Appeals for the Armed Forces are now subject to certiorari review. See 28 U.S.C. §§ 1254(1), 1259 (2006); see also Brief for the Respondents in Opposition to the Petitions for Rehearing at 6, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195 and 06-1196) (stating that the Government would not challenge Supreme Court jurisdiction in DTA cases because certiorari review was available). There is therefore no routine need for original habeas jurisdiction in most military detainee cases. In one unusual instance, however, a detainee had sought an original writ, and the Government opposed in part on the ground that the Supreme Court lacked authority to issue such relief. See Motion to Dismiss at 7, *In re Ali*, 128 S. Ct. 2954 (2008) (No. 06-1194). After withholding disposition on the petition for well over a year, the Court dismissed it without prejudice to the detainee's ability to seek relief in district court. *In re Ali*, 128 S. Ct. 2954 (2008); see also *In re Al-Ghizzawi*, 128 S. Ct. 2954 (2008) (No. 07-6827) (dismissed on the same day and under the same conditions as *Ali*). The impetus for dismissing the petition was almost certainly the decision in *Boumediene v. Bush*, 553 U.S. 723, 732-33 (2008), which held that Guantanamo detainees could seek habeas relief in district court. The fact that the Court withheld disposition on the *Ali* petition until *Boumediene* suggests that the Court might have been willing to consider the availability of original habeas proceedings had it determined that district courts lacked jurisdiction to issue the writ. The potential use of the original writ in detainee cases appears to involve instances where a petitioner is held without any process, civil or military. Three members of the Court also suggested that an original writ may be appropriate in instances where the Government deliberately frustrates certiorari jurisdiction by shifting a prisoner's custodian. See *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Kennedy, J., concurring) (joined by Rehnquist, C.J., and Stevens, J.).

simply treat the original habeas pleading as a misnamed certiorari petition.<sup>200</sup>

A scenario under which the Court would exercise its original habeas power in lieu of its certiorari jurisdiction is difficult to imagine because of the number of votes each type of relief requires. A certiorari writ may issue upon receiving the votes of four Justices, but an original habeas writ requires five (and involves a more onerous substantive standard).<sup>201</sup> Original habeas is so important as a means of reviewing criminal confinement because the Court retains unfettered certiorari jurisdiction over all other types of habeas claims. Subsection II.B.2 reported that criminally confined offenders now account for over ninety-eight percent of original habeas activity.

Moreover, Congress has typically been unable or unwilling to strip original habeas authority. Recall that in *Ex parte Bollman*, the Court adopted—over Justice Johnson’s powerful dissent—an interpretation of the 1789 Act that affirmed its statutory authority to hear original habeas petitions.<sup>202</sup> In *Ex parte Yerger*, the Court rejected an interpretation of an 1868 statute that would have stripped its original habeas power generally, instead reading the statute as repealing only original habeas authority granted in 1867 legislation.<sup>203</sup> *Yerger* is also the source of a strong presumption against implied jurisdiction stripping, rejecting the argument that the 1867 statute’s jurisdictional grant implicitly repealed the authority the 1789 Act created.<sup>204</sup> The Court’s tendency to ignore all but the most express limits on its original habeas jurisdiction remains pronounced in the modern era, as *Felker v. Turpin* held that such power persists over authorization orders even though AEDPA provides that they “shall not be appealable and shall not be the subject of a petition for . . . writ of certiorari.”<sup>205</sup>

The animating logic of these cases runs the gamut of legal analysis, from practical necessity to constitutional avoidance. *Bollman*’s statutory ruling, for example, seems largely driven by the practical need to ensure that the Supreme Court could issue the same writs

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<sup>200</sup> See, e.g., *Dennett v. Hogan*, 414 U.S. 12, 13 (1973) (per curiam).

<sup>201</sup> See *Gressman et al.*, supra note 2, at 664.

<sup>202</sup> See 8 U.S. (4 Cranch) 75, 100–01 (1807).

<sup>203</sup> See 75 U.S. (8 Wall.) 85, 103–06 (1869).

<sup>204</sup> See *id.* at 105.

<sup>205</sup> 518 U.S. 651, 651, 660–61 (1996).

as could judges, inferior courts, and the Justices in their individual capacities.<sup>206</sup> *Yerger* expressed a similar emphasis on Court supremacy, as well as the aforementioned presumption against repeals by implication.<sup>207</sup> In holding that AEDPA did not strip original habeas jurisdiction over authorization orders, *Felker* established that nineteenth-century presumptions regarding original habeas jurisdiction remain viable today.<sup>208</sup>

*Felker* also suggests a jurisdiction-preserving principle of a more modern vintage, which involves the Exceptions Clause. Although the “traditional” view of the Exceptions Clause was that Congress’s authority to limit the Court’s jurisdiction was plenary,<sup>209</sup> in the mid- to late twentieth century a number of federal courts theorists argued that Congress could not eliminate all forms of the Court’s appellate jurisdiction.<sup>210</sup> *Felker* took no formal position on the issue, although the parties extensively briefed it.<sup>211</sup> The Exceptions Clause nonetheless appears to have influenced the Court’s decision to opt for the permissive statutory interpretation, espe-

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<sup>206</sup> See *Bollman*, 8 U.S. (4 Cranch) at 96.

<sup>207</sup> See *Yerger*, 75 U.S. (8 Wall.) at 105–06.

<sup>208</sup> See *Felker*, 518 U.S. at 660, 664.

<sup>209</sup> See, e.g., Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 908–09 (1984) (articulating the traditional view); William W. Van Alstyne, A Critical Guide to *Ex Parte McCardle*, 15 Ariz. L. Rev. 229, 258–60 (1973) (same); Herbert Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1005–06 (1965) (same); cf. Martin H. Redish, Text, Structure, and Common Sense in the Interpretation of Article III, 138 U. Pa. L. Rev. 1633, 1633–34 (1990) (rejecting newer theories of the Exceptions Clause).

<sup>210</sup> At the center of that discussion is Professor Henry Hart’s “essential function” test. See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953) (“[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”). “Essential functions” is a structural test for evaluating restrictions on Court jurisdiction by reference to (1) whether the Court constitutes a forum for resolving conflicting interpretations of federal law, and (2) whether the Court provides a vehicle for preserving the supremacy of federal law. See Leonard G. Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 161 (1960). Professor Akhil Amar has argued that plenary Exceptions Clause authority is limited only by the requirement that other federal courts must retain jurisdiction if it is stripped from the Supreme Court. See Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205, 255–57 (1985).

<sup>211</sup> See *Felker*, 518 U.S. at 661–62.

cially in light of some of the decision's dicta.<sup>212</sup> Moreover, Justice Souter's concurrence, joined by Justices Stevens and Breyer, expressly argued that a categorical bar on Supreme Court jurisdiction would starkly present Exceptions Clause problems.<sup>213</sup>

For these "new" theories, the most important case is *Ex parte McCardle*.<sup>214</sup> McCardle was a Confederate newspaper publisher and soldier who inflammatorily opposed Reconstruction.<sup>215</sup> After he was jailed for disturbing the peace, he sought and was denied federal habeas relief in Mississippi. He appealed to the Supreme Court, but before the Court decided the case, Congress stripped the Court's jurisdiction to hear appeals from denials of habeas relief in lower courts. The Court then dismissed the appeal for want of appellate jurisdiction.<sup>216</sup> In light of *Yerger*, which followed a year later,<sup>217</sup> *McCardle* is susceptible to two different readings: (1) as an affirmation of Congress's plenary power to control the Supreme Court's appellate jurisdiction,<sup>218</sup> or (2) as a limited ruling allowing exceptions to the Court's appellate jurisdiction only where other channels for review remain open.<sup>219</sup>

Although post-*Felker* cases have failed to resolve these Exceptions Clause questions formally, their mere existence fortifies original habeas jurisdiction in two ways. First, the Exceptions Clause issue is now thorny enough that, where the Supreme Court may avoid reading a statute in a way that eliminates its entire appellate jurisdiction over certain subject matter, the Court is likely to do so. Second, a statute eliminating original habeas jurisdiction would probably risk the constitutionality of any corresponding certiorari restriction. From Congress's perspective, foreclosing original habeas jurisdiction (five votes for relief) would only make practical sense if, for the same subject matter, Congress restricts certiorari jurisdiction (four votes). And, if Congress forces the Court to consider the Exceptions Clause question by eliminating original habeas as a backstop appellate jurisdiction, then the Court

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<sup>212</sup> See *id.* at 658–62.

<sup>213</sup> See *id.* at 667 (Souter, J., concurring).

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

<sup>215</sup> See Erwin Chemerinsky, *Federal Jurisdiction* 179 (3d ed. 1999).

<sup>216</sup> See *McCardle*, 74 U.S. (7 Wall.) at 515.

<sup>217</sup> See *Yerger*, 75 U.S. (8 Wall.) at 106.

<sup>218</sup> See Van Alstyne, *supra* note 209, at 259–60.

<sup>219</sup> See Hart, *supra* note 210, at 1365.

could resolve the question in a way that invalidates all jurisdictional limits over the relevant issues. In that scenario, a congressional attempt to limit more exotic forms of appellate jurisdiction would be counterproductive.

### *C. The Suitability of Capital Subject Matter*

A capital safety valve paradigm also makes sense because petitions attacking death sentences are uniquely amenable to review under the substantive standards that precedent and Supreme Court Rules prescribe for relief. Rule 20.4(a), which controls original habeas relief, requires: a statement of reasons for not seeking relief in the district court with territorial jurisdiction over the confined prisoner; if the petitioner is a state prisoner, that the prisoner have exhausted state remedies; that adequate relief cannot be obtained in any other form or from any other court; and that there be “exceptional circumstances” to warrant exercise of original habeas power.<sup>220</sup>

The OHD shows that the major source of petitions meeting the requirement that relief be available in no other form are petitions that effectively seek to bypass the authorization procedure in 28 U.S.C. § 2244(b)(3). Within that category of Section 2244(b)-related petitions, capital prisoners tend to present claims having the best chance of satisfying the exceptional circumstances standard of Rule 20.4(a).<sup>221</sup> I discuss the particular strength of claims attacking capital sentences in the two Subsections that immediately follow. The two types of claims that are most likely to trigger original habeas scrutiny are claims of crime innocence and claims of death ineligibility.<sup>222</sup>

#### *1. Crime Innocence and Death Ineligibility Claims*

The Supreme Court has almost surely become more sensitive to the risk of executing an offender who did not commit the murder

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<sup>220</sup> See Sup. Ct. R. 20.

<sup>221</sup> See Sup. Ct. R. 20.4.

<sup>222</sup> See Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 *Cornell L. Rev.* 329, 331–33 (2010) (distinguishing crime innocence and death ineligibility). What I call “crime innocence” is usually called “actual innocence”; what I call “death ineligibility” is usually called “actual innocence of the death penalty.” I favor the “crime innocence/death ineligibility” nomenclature in the interest of clarity.

for which he was convicted,<sup>223</sup> and original habeas petitions frequently contain claims that a prisoner is innocent.<sup>224</sup> These claims are usually referred to as “actual innocence” challenges, but I opt for the phrase “crime innocence” because actual innocence claims sometimes dispute only capital eligibility—not the prisoner’s guilt in the underlying murder.<sup>225</sup> I use the term “death ineligibility” to describe claims that dispute only whether the petitioner belongs to a category of offenders for which the Eighth Amendment bars execution.<sup>226</sup> Crime innocence and death ineligibility claims both appear disproportionately, for slightly different reasons, in successive petitions. They also, therefore, appear frequently on the Court’s original habeas docket. The “death is different” proposition has become one of the more contentious ideas in Justices’ chambers, but the Court nonetheless seems more willing to designate as “exceptional” cases that involve capital sentences.<sup>227</sup>

*Crime Innocence.* Original habeas is particularly central to adjudication of capital crime innocence challenges because so many of them involve new DNA evidence that was unavailable at the time of conviction or during the first round of habeas proceedings.<sup>228</sup> DNA exonerations are fairly recent phenomena,<sup>229</sup> and many DNA-based capital post-conviction challenges appear for the first time in successive petitions. DNA exonerations, along with other high profile cases where the existence of wrongful executions

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<sup>223</sup> See *infra* notes 228–32 and accompanying text.

<sup>224</sup> The OHD does not contain complete data regarding the incidence of innocence claims. The data that is available, however, unsurprisingly indicates that the number of such claims has increased along with the number of petitions actually filed.

<sup>225</sup> See, e.g., *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995) (applying the actual innocence rule to a successive petition); *Murray v. Carrier*, 477 U.S. 478, 495–96 (1986) (applying the actual innocence rule to a procedurally defaulted claim).

<sup>226</sup> See generally Kovarsky, *supra* note 222, at 346–56 (discussing variants of ineligibility claims).

<sup>227</sup> See *Davis*, 130 S. Ct. at 1.

<sup>228</sup> See Eric Desportes, *The Evidentiary Watershed: Recognizing a Post-Conviction Constitutional Right to Access DNA Evidence Under 42 U.S.C. § 1983*, 49 *Santa Clara L. Rev.* 821, 823–24 (2009).

<sup>229</sup> See Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 *Iowa L. Rev.* 119, 186–87 (2009); see also Innocence Project, *Facts on Post-Conviction DNA Exonerations*, <http://www.innocenceproject.org/Content/351.php> (reporting that there have been 250 post-conviction exonerations since 1989, with 17 of those coming in death penalty cases).

seems likely,<sup>230</sup> have ushered in a new era of Supreme Court capital scrutiny<sup>231</sup>—even for non-DNA crime innocence claims (as in *Davis*<sup>232</sup>).

An appeals panel might deny authorization of a potentially meritorious crime innocence claim for a number of reasons: because it considers the claim untimely under 28 U.S.C. § 2244(d),<sup>233</sup> because of some other technical defect, such as having been procedurally defaulted in state court;<sup>234</sup> because it construed the claim as having been “presented in a prior application” and ordered the petition dismissed under Section 2244(b)(1),<sup>235</sup> because it considered the claim a “freestanding” crime innocence challenge not cognizable on habeas review;<sup>236</sup> because the “factual predicate” could have been discovered with due diligence under Section 2244(b)(2)(B),<sup>237</sup> or because an authorization panel simply does not think that the new material constitutes clear and convincing evidence of crime innocence.<sup>238</sup> The important point here is not *why* potentially meritorious crime innocence claims are denied authorization, but that the Supreme Court appears increasingly likely to find such claims contained in original habeas petitions.

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<sup>230</sup> See, e.g., David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, *The New Yorker*, Sept. 7, 2009, [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann?printable=true](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?printable=true).

<sup>231</sup> See, e.g., *McDaniel v. Brown*, 130 S. Ct. 665, 670–72 (2010) (per curiam opinion conducting lengthy DNA analysis); *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2316 (2009) (“Modern DNA testing can provide powerful new evidence unlike anything known before.”).

<sup>232</sup> *Davis*, 130 S. Ct. at 1.

<sup>233</sup> See, e.g., *In re Lewis*, 484 F.3d 793, 797–98 (5th Cir. 2007) (time barring an *Atkins* claim in an authorization proceeding); *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (same).

<sup>234</sup> See *Graham v. Johnson*, 168 F.3d 762, 778–83 (5th Cir. 1999) (indicating that Congress permissibly “substitut[e]d the court of appeals for the district court as the gatekeeper against abusive or procedurally defaulted claims”).

<sup>235</sup> See, e.g., *In re Hutcherson*, 468 F.3d 747, 749 (11th Cir. 2006) (refusing to authorize a claim that the petitioner had raised in a previous habeas petition).

<sup>236</sup> See, e.g., *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009) (refusing to authorize a freestanding innocence claim).

<sup>237</sup> See, e.g., *In re Anderson*, 396 F.3d 1336, 1338 (11th Cir. 2005) (refusing to authorize a subset of the petitioner’s claims that did not satisfy § 2244(b)).

<sup>238</sup> See, e.g., *In re Diaz*, 471 F.3d 1262, 1263–64 (11th Cir. 2006) (refusing to authorize a claim because new material would not demonstrate crime innocence by clear and convincing evidence).

*Death Ineligibility.* Original habeas relief may also play an increasing role in the adjudication of death ineligibility claims, which also appear frequently in successive petitions subject to certiorari restrictions.<sup>239</sup> The most important death ineligibility challenges, for my purposes, are claims that a capital offender may not be executed because he is mentally retarded under *Atkins v. Virginia*,<sup>240</sup> or because he is not competent to be executed under *Ford v. Wainwright*<sup>241</sup> and *Panetti v. Quarterman*.<sup>242</sup> I do not discuss claims that *Roper v. Simmons* bars an offender's execution because he was under eighteen when he committed the offense because such claims,<sup>243</sup> to my knowledge, are always resolved satisfactorily in state post-conviction or clemency proceedings.<sup>244</sup>

Although appeals panels may deny authorization for meritorious ineligibility claims on many of the same grounds that appeals panels deny authorization for crime innocence claims, there are three additional complications that make ineligibility challenges particularly likely to require consideration in original petitions. First, ineligibility categories are usually announced as new rules of constitutional law made retroactive to cases on collateral review.<sup>245</sup> That means the ineligibility claim will frequently vest after an offender

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<sup>239</sup> See cases cited *infra* note 245.

<sup>240</sup> 536 U.S. 304, 321 (2002).

<sup>241</sup> 477 U.S. 399, 410 (1986).

<sup>242</sup> 551 U.S. 930, 934–35 (2007).

<sup>243</sup> See *Roper v. Simmons*, 543 U.S. 551, 568 (2005). I discuss *Atkins*, *Ford*, and *Roper* claims in text, but there are other ineligibility claims that would not, for various reasons, be as likely to invite the exercise of original habeas jurisdiction. For example, a claimant may argue that he cannot be executed without the presence of sufficient jury-found aggravators. See *Sawyer v. Whitley*, 505 U.S. 333, 349–50 (1992). In a different context, a claimant found guilty of felony murder cannot be executed without the requisite *mens rea*. See *Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

<sup>244</sup> See Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 *DePaul L. Rev.* 721, 723 (2008) (noting that the ban on executing juvenile offenders has prompted “virtually no litigation [because] offenders who committed the crime before turning eighteen have had their sentences commuted via judicial or clemency proceedings”).

<sup>245</sup> See, e.g., *Roper*, 543 U.S. at 559–60 (holding that the evolving national consensus counseled against the execution of juveniles and applying this rule retroactively to vacate a death penalty verdict); *Atkins*, 536 U.S. at 321 (holding that the “evolving standards of decency” prohibited the execution of a mentally retarded offender and vacating an existing death penalty verdict).



has completed one round of federal habeas proceedings, and that the offender will have to apply for authorization to litigate a successive petition.<sup>246</sup> There is an exception for new and retroactive criminal laws in 28 U.S.C. § 2244(b)(2)(A),<sup>247</sup> but many of these claims are not authorized because of some technical defect in the forthcoming petition, such as being untimely or procedurally defaulted.<sup>248</sup> Second, ineligibility claims must first be exhausted in state post-conviction proceedings, but there is no right to state post-conviction counsel and these claims are often defaulted.<sup>249</sup> Third, *Atkins* claims often appear in original habeas petitions because authorization panels frequently defer to decisions from some high-volume capital punishment states that use extraordinarily under-inclusive definitions of mental retardation.<sup>250</sup>

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<sup>246</sup> Although original habeas is not likely to be an important vehicle for enforcing every ineligibility rule, it is nonetheless a potentially important vehicle for announcing all of them. For example, four Justices dissented from the denial of an original habeas hearing that would have adjudicated the constitutionality of executing offenders that were minors at the time they committed the murder for which they were being capital punished. See *In re Stanford*, 537 U.S. 968, 968 (2002) (Stevens, J., dissenting). *Roper* declared such offenders ineligible for capital punishment three years later. See *Roper*, 543 U.S. at 568.

<sup>247</sup> 28 U.S.C. § 2244(b)(2)(A) (2006).

<sup>248</sup> See, e.g., *In re Lewis*, 484 F.3d 793, 797–98 (5th Cir. 2007) (refusing to equitably toll the limitations period because the petitioner's initial federal habeas petition had been resolved three months before the AEDPA limitations period expired); *Resendiz v. Quarterman*, 454 F.3d 456, 458–59 (5th Cir. 2006) (denying as successive and without merit an inquiry claim that the prisoner was not competent to be executed); *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (denying on procedural grounds and without merits an inquiry authorization to file a successive habeas petition containing an ineligibility claim); *Nance v. Norris*, 429 F.3d 809, 811 (8th Cir. 2005) (Melloy, J., dissenting) (dissenting from the court's denial of authorization to an offender who had made a prima facie showing of ineligibility); *Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004) (refusing to authorize a potentially meritorious claim of incompetence).

<sup>249</sup> See Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel*, 42 *Tulsa L. Rev.* 253, 256 & n.31 (2006).

<sup>250</sup> See John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 *Tenn. L. Rev.* 625, 629 (2009); see also, e.g., *Smith v. State*, No. CR-97-1258, 2009 Ala. Crim. App. LEXIS 2, at \*11 (Ala. Crim. App. Jan. 16, 2009) (emphasizing that the petitioner did not have adaptive deficits because he could function well in society, maintain a bank account, and perform other activities); *Brown v. State*, 959 So. 2d 146, 150 (Fla. 2007) (upholding state trial-court ruling because the state court found that defendant demonstrated ability to engage in romantic relationship, drive a car, and obtain employment); *Wiley v. State*, 890 So. 2d 892, 896–

## 2. The “Exceptional Circumstances” Standard

The capital safety valve paradigm is also consistent with the substantive standard that the Supreme Court applies in the exercise of its original habeas jurisdiction. Supreme Court Rule 20.4(a) requires a petitioner to state the “exceptional circumstances [that] warrant the exercise of the Court’s discretionary powers.”<sup>251</sup> Rule 20.4(a) contains the unusual admonition that “[t]his writ is rarely granted.”<sup>252</sup> For decades, the “exceptional circumstances” standard was considered a practically (if not formally) insurmountable impediment to original habeas relief. But as the OHD suggests and *Davis* demonstrates, capital claimants seeking relief in successive petitions are relatively well-positioned under Rule 20.4(a)’s substantive standard.<sup>253</sup>

First, reading the Rule 20.4(a) substantive standard more favorably for capital claimants is consistent with the way Rule 20.4 configures the accompanying *procedure*. For example, Rule 20.4(b) provides that all original habeas proceedings, absent a show cause order, proceed *ex parte*—except for capital cases.<sup>254</sup> Moreover, the OHD shows that capital claimants are, by orders of magnitude, the most well-represented category of habeas litigants.<sup>255</sup> As a result of these procedural features, capital cases are unique among original habeas proceedings in that they are the only ones in which a jailor

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97 (Miss. 2004) (upholding the lower court’s determination that the petitioner did not have adaptive deficits because the prisoner operated heavy machinery, was employed, was admitted to radio operator school, legally drove a car, and provided for his family); *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004). These state tests, often for psychiatric phenomena, almost always disqualify fewer offenders than do federal standards, and they risk sentences that are simply erroneous under federal law. See Steiker & Steiker, *supra* note 244, at 728–29; Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 Colum. L. Rev. 1396, 1409 (2005). Those rulings are nonetheless left undisturbed because, under the federal habeas statute, decisions need only be “reasonable” determinations of fact and interpretations of law to withstand federal habeas scrutiny. See 28 U.S.C. § 2254(d) (2006).

<sup>251</sup> Sup. Ct. R. 20.4(a).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Sup. Ct. R. 20.4(b).

<sup>255</sup> See *supra* Subsection II.B.3.

must respond and the only ones in which a prisoner must be represented.<sup>256</sup>

Moreover, the Rule 20.4(a) exceptional circumstances standard has historically been a screen for cases in which more conventional Supreme Court review was available—not for lower court decisions, such as orders denying authorization under Section 2244(b), which are otherwise unreviewable. Understanding why the exceptional circumstances standard reinforces a safety valve paradigm requires a short digression regarding the original habeas writ's relationship to the writ of error, which was the subject of several late nineteenth-century cases. As Section I.B explained, in 1885 Congress created, for state prisoners, a right of appeal from lower court dispositions in habeas cases. *Ex parte Royall* was the first state prisoner case under the 1885 Act.<sup>257</sup> In *Royall*, the Court held that the preferred form of Court review was a writ of error to the state courts, not its original habeas power.<sup>258</sup> Because the statute required that state criminal judgments be final before writs of error issued, *Royall's* status as a statement of preference, rather than a hard and fast rule, created pressure on the original habeas docket.<sup>259</sup> So that original habeas could not be used as an end run around the writ of error requirement that the state conviction be final, the Court transformed the “preference” into a much firmer requirement that prisoners challenging criminal confinement seek a writ of error first.<sup>260</sup> In a series of cases starting in 1895, the Court began to clarify that original habeas review could be used in place of a writ of error in “exceptional circumstances.”<sup>261</sup> In 1943, the

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<sup>256</sup> The Rule 20.4(b) exception for capital cases was added after *Felker*, 518 U.S. 651, reaffirmed the viability of original habeas proceedings, so the differential treatment of capital prisoners is not some artifact of an earlier era. See Sup. Ct. R. 20.4(b); Revisions to Rules of the Supreme Court of the United States, 169 F.R.D. 461, 463 (1997) (recording the clerk's comment to Sup. Ct. R. 20.4(b)).

<sup>257</sup> See *Ex parte Royall*, 117 U.S. 241, 247 (1886) (determining the meaning of the Act of Feb. 5, 1867 (the Habeas Corpus Act of 1867)).

<sup>258</sup> See *id.* at 253.

<sup>259</sup> See Hertz & Liebman, *supra* note 25, § 2.4d, at 57.

<sup>260</sup> See *In re Frederick*, 149 U.S. 70, 77 (1893). To ensure that the lower court habeas requirements mirrored those of the Supreme Court, the Court also made the exhaustion requirement mandatory. See *New York v. Eno*, 155 U.S. 89, 98 (1894).

<sup>261</sup> See *Ex parte Hudgings*, 249 U.S. 378, 379–80 (1919) (positioning the exceptional circumstances standard as an exception to the rule that “other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to

Court decided *Ex parte Abernathy*, holding that it “does not, save in exceptional circumstances, exercise [its statutory jurisdiction to issue writs of habeas corpus in aid of appellate jurisdiction] in cases where an adequate remedy may be had in a lower federal court . . . .”<sup>262</sup> *Abernathy* is the basis for the original habeas substantive standard.<sup>263</sup> In short, the cases on which the modern substantive standard is based demonstrate that the exceptional circumstances requirement was not meant to apply when conventional Supreme Court jurisdiction is restricted.

To be clear, Rule 20.4(a) expressly requires a prisoner to show both exceptional circumstances and the inadequacy of other forms of relief;<sup>264</sup> the Supreme Court no longer limits the exceptional circumstances test to instances in which routine jurisdiction is available.<sup>265</sup> But whatever the technical formulation of the modern standard, suffice it to say that there is a strong case that the exceptional circumstances requirement does not obstruct review in the same way it would if the Court could grant certiorari.

#### *D. Remedial Desirability*

Sections III.B and III.C explain why original habeas jurisdiction and the Rule 20.4 standards for relief uniquely suit a capital safety valve paradigm. This Section explains why original habeas remedies do the same. 28 U.S.C. § 2241(b) vests the Supreme Court or an individual Justice with the authority to “decline to entertain . . . [a habeas application and to] transfer the application for hearing and determination to the district court having jurisdiction

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the original jurisdiction of this court”); *In re Belt*, 159 U.S. 95, 100 (1895) (“Ordinarily the writ will not lie where there is a remedy by writ of error or appeal; but in rare and exceptional cases it may be issued although such remedy exists.”); *In re Chapman*, 156 U.S. 211, 215 (1895) (identical language from *Belt*) (internal citations omitted).

<sup>262</sup> 320 U.S. 219, 219–20 (1943).

<sup>263</sup> See Frederick Bernays Wiener, *The Supreme Court’s New Rules*, 68 Harv. L. Rev. 20, 71 (1954); see also Bennett Boskey & Eugene Gressman, *The Supreme Court’s New Rules for the Eighties*, 85 F.R.D. 487, 510 (1980) (citing generally to the exceptional circumstances standard).

<sup>264</sup> The text of the rule states: “To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.” Sup. Ct. R. 20.4(a).

<sup>265</sup> For a discussion of obscure potential exceptions in WoT cases, see *supra* note 199.

to entertain it.”<sup>266</sup> Congress created the transfer remedy in 1948, but the Court has used it only three times (*Davis* is one such instance).<sup>267</sup> Consistent with the understanding of original habeas as a safety valve, even in the two 1962 cases, the Court seemed willing to use the transfer authority only where certiorari jurisdiction was lacking.<sup>268</sup> Where a transfer issued from an individual Justice’s chambers, it was only because the appropriate territorial jurisdiction for a district court petition was unclear.<sup>269</sup>

The most compelling justification for a capital safety valve paradigm is the availability of this transfer remedy.<sup>270</sup> The transfer remedy was conceived as an alternative to denying petitions involving factual issues—precisely the role it would play in the capital context.<sup>271</sup> *Davis* illustrates two salient remedial features, discussed in the following two Subsections. First, a transfer allows a petitioner to bypass not only the application procedure for authorization, but also—arguably—the substantive restrictions on successive petitions. Second, the Court has other non-certiorari mechanisms to

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<sup>266</sup> 28 U.S.C. § 2241(b) (2006).

<sup>267</sup> See *Davis*, 130 S. Ct. at 1; *Hayes v. Maryland*, 370 U.S. 931, 931 (1962); *Chaapel v. Cochran*, 369 U.S. 869, 869 (1962). Justice Douglas transferred a case in his capacity as a Justice in 1973. See *Ex parte Hayes*, 414 U.S. 1327, 1327 (1973). Modern Justices generally do not issue these rulings out of chambers. Gressman et al., *supra* note 2, at 666 (explaining that original habeas petitions are now distributed to the Court).

<sup>268</sup> In *Hayes v. Maryland*, the Court actually denied the motion (back then, applications were made in motion form), granted certiorari on the motion papers, and transferred the case to the U.S. District Court for the District of Maryland. 370 U.S. at 931. In *Chaapel*, the Court simply transferred the case. 369 U.S. at 869. Commentators generally agree that the distinction was that, in *Hayes*, the original petition would have been timely as a certiorari petition. See *Oaks*, *supra* note 8, at 194.

<sup>269</sup> See *Ex parte Hayes*, 414 U.S. at 1327–28 (ordering transfer where officers in the chain of command were generally in Washington, D.C.).

<sup>270</sup> Because transfer authority kicks in only after the Court has declined to hear an original petition, a transfer order could theoretically require fewer than five votes. Because all four instances where the Court has exercised the transfer authority in the last fifty years fall outside the OHD date range, there is simply no data to report about this remedial power. See *Davis*, 130 S. Ct. at 1; *Ex parte Hayes*, 414 U.S. at 1327; *Hayes v. Maryland*, 370 U.S. at 931; *Chaapel*, 369 U.S. at 869. And even the out-of-range cases do not themselves indicate whether a transfer order requires five votes. The two 1962 cases ordered a transfer without comment, the 1973 case was an order that issued from Justice Douglas’s chambers, and *Davis* was a per curiam opinion in which the existence and/or identity of a fifth vote is not capable of determination from the face of the order. There is currently not even a way to know whether a petition is formally considered a candidate for transfer at all.

<sup>271</sup> See *Oaks*, *supra* note 8, at 194.

consider the important questions of statutory interpretation that arise out of authorization proceedings.

### 1. *The Successive Petition Bypass Function*

The first major reason that the transfer remedy is useful in capital cases is because it allows a prisoner to bypass certain substantive and procedural restrictions on successive petitions. Recall that 28 U.S.C. § 2244(b)(3) sets up the procedure for authorizing successive petitions in the federal circuit courts, but that Sections 2244(b)(1) and (b)(2) set forth the substantive standards for considering claims in those petitions. The Section 2244(b)(3) procedure requires an appeals court to authorize the entirety of a successive petition upon a prima facie showing that one of the claims it contains meets the substantive standards of Sections 2244(b)(1) and (b)(2). Section 2244(b)(4) requires that the district court dismiss claims that fail to satisfy any part of Section 2244, even if they appear in a petition authorized under Section 2244(b)(3).<sup>272</sup>

When the question of whether the substantive limits in Sections 2244(b)(1) and (b)(2) applied to original petitions arose, the Court declined to answer it.<sup>273</sup> The *Davis* transfer order instructs the district court to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.”<sup>274</sup> That order departs from what would be required in a Section 2244(b)(2) inquiry in a number of important ways. First, Section 2244(b)(2) requires the prisoner to show that the factual predicate for the claim was “previously unavailable,” but the *Davis* transfer order instructs the district court to consider any evidence discovered after trial, no matter what its prior availability.<sup>275</sup> Second, the *Davis* transfer order instructs the district court to determine if the extant body of evidence clearly establishes the petitioner’s innocence, whereas

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<sup>272</sup> See 28 U.S.C. § 2244(b)(1)–(4) (2006).

<sup>273</sup> See *Felker*, 518 U.S. at 662–63 (“Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions.”). Some members of the Court now view the *Felker* question more broadly to include whether AEDPA is applicable to original habeas petitions at all. See *Davis*, 130 S. Ct. at 2 (Stevens, J., concurring).

<sup>274</sup> *Davis*, 130 S. Ct. at 1.

<sup>275</sup> See 28 U.S.C. § 2244(b)(2)(B)(ii); *Davis*, 130 S. Ct. at 1.

Section 2244(b)(2) also requires that a petitioner prove some underlying constitutional error.<sup>276</sup>

In short, the *Davis* transfer order appears logically inconsistent with the notion that the substantive restrictions in Sections 2244(b)(1) and (b)(2) apply in original habeas proceedings.<sup>277</sup> Below this issue lurk some of the most complicated procedural questions that the transfer authority involves. Section III.E presents these problems in more detail but, generally speaking, the questions center around exactly what authority the district court exercises after the Supreme Court transfers an original habeas application.

However these statutory questions are ultimately resolved, the important point is that, by using its original habeas jurisdiction, the Court enables consideration of a claim's factual merit. Ordering a petition's transfer diminishes the likelihood that a claim it contains will be denied as abusive, successive, untimely, or otherwise technically defective.<sup>278</sup>

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<sup>276</sup> See 28 U.S.C. § 2244(b)(2)(B)(ii); *Davis*, 130 S. Ct. at 1. Indeed, this second feature of the *Davis* transfer order represents a potential earthquake for habeas corpus doctrine generally (more on that *infra* Subsection III.E.2).

<sup>277</sup> The Georgia district court recognized the implication of the Supreme Court order in a footnote. See *In re Davis*, No. CV409-130, 2009 WL 2750976, at \*1 n.3 (S.D. Ga. Aug. 26, 2009).

<sup>278</sup> Interestingly, § 2244(b)(4) requires district courts to dismiss claims running afoul of § 2244's substantive restrictions only if those claims appear in a petition that the appeals court has authorized. This seemingly minor point may actually represent an important incentive for the Court to favor its habeas jurisdiction over, say, its jurisdiction to award writs of mandamus (prisoners denied authorization will usually seek both types of Supreme Court relief). As Subsection III.D.2 explains, a petition for a writ of mandamus seeks an order from the Court instructing an inferior tribunal to comply with written law, and it is likewise considered an extraordinary remedy under Supreme Court Rule 20.4. If mandamus issued, it would presumably instruct the appeals court to authorize the successive petition. In such a procedural posture, the language in § 2244(b)(4) requiring the district court to dismiss all claims not meeting the substantive requirements in that Section would apply. Not only would the district court be bound to re-apply the statutory standard for successive and abusive claims that the Court had chosen to bypass, but it would also be bound to apply the statute of limitations, which appears in § 2244 as well. By opting for habeas jurisdiction over the mandamus writ, the Court could sidestep procedural hurdles in § 2244(b). (There is still a strong argument that § 2244(b)(1) and (2) apply of their own force, meaning that a district court is required to dismiss claims in authorized petitions under those provisions, and not under § 2244(b)(4).)

## 2. Alternatives for Resolving Statutory Disputes

Other nontraditional appellate remedies are better suited to resolving pure issues of statutory interpretation that arise in successive federal proceedings. In conjunction with their original habeas petitions, many prisoners will also seek a writ of mandamus under the “All Writs” provision, 28 U.S.C. § 1651. *Felker*’s specific holding was limited to original habeas petitions,<sup>279</sup> but its logic is equally applicable to petitions for mandamus writs. Three different *Felker* Justices, across two different concurrences, emphasized that Section 2244(b)(3)(E) does not foreclose mandamus jurisdiction.<sup>280</sup>

Generally speaking, a mandamus writ instructs a public official to perform a legal duty.<sup>281</sup> The criteria for mandamus relief are also set forth in Supreme Court Rule 20,<sup>282</sup> and a petitioner must make a similar showing to that required in seeking an original habeas writ: that the writ is in aid of the Court’s appellate jurisdiction, that exceptional circumstances warrant the exercise of discretionary power, and that he cannot obtain adequate relief in another form or from another court.<sup>283</sup> Aside from the resolution of the underlying habeas claim and questions of guilt, the major issues that arise under authorization proceedings involve the application of the authorization procedure itself.<sup>284</sup> For whatever reason, the Supreme Court has simply declined to resolve increasingly stark divisions over the authorization protocol in federal appeals courts. These divisions include whether Section 2244(b)(3) permits merits consideration of successive petition claims invoking new and retroactively applicable constitutional law,<sup>285</sup> as well as whether circuit courts

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<sup>279</sup> *Felker*, 518 U.S. at 654.

<sup>280</sup> See *id.* at 666 (Stevens, J., concurring); *id.* at 667 (Souter, J., concurring).

<sup>281</sup> See 28 U.S.C. § 1361.

<sup>282</sup> Sup. Ct. R. 20.

<sup>283</sup> See 28 U.S.C. § 1361.

<sup>284</sup> See *Felker*, 518 U.S. at 667 (Souter, J., concurring) (“The [Exceptions Clause] question could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard.”).

<sup>285</sup> Compare *In re McDonald*, 514 F.3d 539, 542–44 & n.3 (6th Cir. 2008) (ruling that an authorization panel should not consider limitations or exhaustion), and *Ochoa v. Sirmons*, 485 F.3d 538, 543–44 (10th Cir. 2007) (per curiam) (rejecting the argument that § 2244(b)(3)(C) allows an authorization panel to consider the merits of a claim based on new and retroactively applicable law), with *In re Bowling*, 422 F.3d 434, 436 (6th Cir. 2005) (permitting, on authorization, consideration of the merits of a § 2244(b)(2)(A) claim), *In re Morris*, 328 F.3d 739, 740–41 (5th Cir. 2003) (same), *In*



may decide any of the State's potential affirmative defenses at the authorization phase.<sup>286</sup>

With respect to deciding statutory interpretation questions that arise under authorization proceedings, mandamus is a better procedural vehicle than original habeas. Using its mandamus power, the Supreme Court can decide the underlying statutory questions without issuing separate instructions to a district court as to how to adjudicate the habeas claim. With mandamus, there are no questions involving whether or how a district court exercises jurisdiction granted to the Supreme Court. If mandamus issues, then the petition will be authorized and the district court proceeds according to normal criteria. Mandamus would be the vehicle for deciding questions of statutory interpretation in non-capital cases, or in cases where the Court is for some other reason agnostic as to the underlying constitutional claim's merit.

### *E. Problems with a Capital Safety Valve Paradigm*

The notion that original habeas could serve as a reliable safety valve for otherwise unreviewable claims by capital prisoners is not without its problems. I flag two of them below: (1) the questions associated with what type of authority a district court exercises when the Supreme Court transfers a case to it; and (2) what I call a "cognizability paradox," which arises when the Court invokes original habeas to resolve "freestanding" innocence claims.

#### *1. Organic and Delegated Transfer Models*

Recall that Section 2241(b) provides that the Supreme Court "may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it."<sup>287</sup> What kind of authority does the district court to which the case is transferred ex-

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re Williams, 330 F.3d 277, 281–82 (4th Cir. 2003) (same), and *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (same).

<sup>286</sup> Compare *Ochoa*, 485 F.3d at 545 (limiting authorization criteria to those specified in the statute), with *In re Lewis*, 484 F.3d 793, 797 (5th Cir. 2007) (permitting consideration of the statute of limitations), *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (same), and *Outlaw v. Sternes*, 233 F.3d 453, 455 (7th Cir. 2000) (same).

<sup>287</sup> 28 U.S.C. § 2241(b).

ercise—its own, organic power, or some power delegated by the Supreme Court?

The answer to that question is, as a practical matter, quite significant. If the district court exercises organic authority, then it should be bound by all ordinarily applicable Section 2244 restrictions, including the statutory limitations period and successive petition provisions.<sup>288</sup> If, however, the district court exercises delegated Supreme Court authority, then certain Section 2244 restrictions may not apply. Under the delegated-power theory, Section 2244 restrictions apply only to the extent that they would apply to an original petition adjudicated in the Supreme Court—and, based on *Felker*, Section 2244(b) may not govern original habeas proceedings in that forum.<sup>289</sup>

The *Davis* order assumes the delegated-power model, instructing the district court only to determine whether new evidence shows that Davis did not commit the murder for which he was convicted.<sup>290</sup> The Georgia district court receiving the petition concluded—based on the language of the transfer order, *Felker*, and Eleventh Circuit precedent—that Section 2244(b) did not apply in the transferred proceeding.<sup>291</sup> The Eleventh Circuit agreed, dismissing the appeal to it and holding that the appeal lay properly with the Supreme Court.<sup>292</sup>

There is no law on the organic-versus-delegated original habeas issue, but existing jurisdictional rules provide many reasons to be skeptical of the delegated-authority model that *Davis* seems to

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<sup>288</sup> See *id.* § 2244(b) (successive petitions); *id.* § 2244(d) (statute of limitations).

<sup>289</sup> See *Felker*, 518 U.S. at 662–63.

<sup>290</sup> The order in *Davis* instructed the district court to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.” *Davis*, 130 S. Ct. at 1.

<sup>291</sup> See *In re Davis*, No. CV409-130, 2010 WL 3385081, at \*1 n.1 (S.D. Ga. Aug. 24, 2010) (“Functionally, then, this Court is operating as a magistrate for the Supreme Court, which suggests appeal of this order would be directly to the Supreme Court. However, this Court has been unable to locate any legal precedent or legislative history on point.”); see also *In re Davis*, No. CV409-130, 2009 WL 2750976, at \*1 n.3 (S.D. Ga. Aug. 26, 2009) (citing *Felker*, 518 U.S. at 662–63; *In re Davis*, 565 F.3d 810, 826–27 (11th Cir. 2009)).

<sup>292</sup> See *Davis v. Terry*, 625 F.3d 716, 719 (11th Cir. 2010). At the time of publication, the Supreme Court is considering appellate review of the issue. See *Davis v. Terry*, 625 F.3d 716 (11th Cir. 2010), petition for cert. filed, 79 U.S.L.W. 3442 (U.S. Jan. 21, 2011) (No. 10-949); Petition for a Writ of Certiorari, *Davis v. Humphrey*, No. 10-949 (Jan. 21, 2011).

adopt. First, a Section 2241(b) transfer is not a conventional Supreme Court delegation, like the appointment of a Special Master in original jurisdiction cases.<sup>293</sup> Whereas a proceeding involving a Special Master remains on the Court's docket, a habeas petition is transferred under Section 2241(b) only after the Supreme Court has declined to entertain it.<sup>294</sup> Second, in concurrent original jurisdiction contexts—instances in which the Supreme Court shares original jurisdiction with other federal courts<sup>295</sup>—the Supreme Court can discretionarily decline jurisdiction, but it still cannot command a district court to hear the case.<sup>296</sup> Third, the Section 2241(b) delegated-power model lacks any analogue in other forms of Supreme Court appellate jurisdiction. With respect to certiorari specifically, the Court may: dismiss a petition as improvidently granted;<sup>297</sup> grant, vacate, and remand in light of some intervening decision that pre-dates argument;<sup>298</sup> or remand the case with

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<sup>293</sup> See, e.g., *Kansas v. Colorado*, 129 S. Ct. 1294, 1296 (2009) (adjudicating, in an original jurisdiction case, a dispute between Kansas and Colorado regarding the Arkansas River); *Arizona v. California*, 530 U.S. 392, 397 (2000) (determining, in an original jurisdiction case, state and tribal rights to the Colorado River); *New Jersey v. New York*, 526 U.S. 589, 589 (1999) (holding, in an original jurisdiction case, that New Jersey retained sovereignty over parts of Ellis Island). A Special Master issues subpoenas, adjudicates motions, procures witness testimony, collects evidence, and sometimes presides at a trial. See Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 *Minn. L. Rev.* 625, 654–55 (2002). Indeed, this is one of the theories Davis urged in his requests for review, filed roughly one month before the publication of this Article. See *Jurisdictional Statement and Petition for Habeas Corpus and a Common Law Writ of Certiorari*, *Davis v. Humphrey*, No. 10-950, at 33 (Jan. 21, 2011).

<sup>294</sup> 28 U.S.C. § 2241(b).

<sup>295</sup> See *Mississippi v. Louisiana*, 506 U.S. 73, 78 n.1 (1992). With respect to all subject matter constitutionally specified as within its original jurisdiction, the Supreme Court generally shares concurrent original jurisdiction with lower federal courts. 28 U.S.C. § 1251. The lone exception involves controversies between states, which are subject to the Supreme Court's exclusive and original jurisdiction. *Id.*

<sup>296</sup> See, e.g., *California v. West Virginia*, 454 U.S. 1027, 1027 (1981) (declining exclusive jurisdiction over an alleged breach of an agreement to play football games between state universities).

<sup>297</sup> See, e.g., *Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436, 1436 (2009) (dismissing certiorari petition in tobacco litigation).

<sup>298</sup> See, e.g., *Wellons v. Hall*, 130 S. Ct. 727, 731 (2010) (“A GVR is appropriate when intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may de-

instructions after deciding it.<sup>299</sup>

The original habeas transfer conundrum is this: by instructing district courts to conduct non-AEDPA inquiries, the Supreme Court is either directing inferior courts to ignore a statute or it is delegating its own authority without any clear precedent to do so. Of course the alternative—requiring district courts to apply AEDPA as though a court of appeals had authorized the petition under Section 2244(b)(3)—has its own major problems. Most importantly, it would effectively obliterate the transfer remedy as a viable means of circumventing any procedural obstacle other than the appellate authorization protocol. I flag these issues because the Section 2241(b) delegated-power question is likely to recur,<sup>300</sup> but it deserves more robust treatment than this Article allows.

## 2. *The Cognizability Paradox*

The major problem with using original habeas as a means of scrutinizing capital sentences actually has little to do with any distinction between the Supreme Court's powers and those of inferior federal tribunals, and it reflects a major theme from Part I. The most contentious issue in *Davis* was not a question about the Supreme Court's Article III appellate jurisdiction, but whether the underlying claim—freestanding crime innocence—is even cognizable under the federal habeas statute. I describe as the “cognizability paradox” the idea that original habeas is most likely to be used to reach many crime-innocence claims by capital prisoners for which, as I explain in the following paragraph, the statutory cognizability has not been definitively established. The cognizability paradox captures the gist of what Justice Scalia was disputing when he described the transfer order in *Davis* as a “fool’s errand.”<sup>301</sup>

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termine the ultimate outcome of the matter.”) (internal quotation marks and citations omitted).

<sup>299</sup> See, e.g., *Alvarez v. Smith*, 130 S. Ct. 576, 578 (2009) (vacating and remanding with instructions to dismiss the cause).

<sup>300</sup> In fact, at the time of this writing, the question seems to be presented to the Supreme Court in the *Davis* case itself. See *supra* notes 291–92. The district court held that, because the Supreme Court transferred the case, *Davis*'s appeal lies with the Supreme Court itself—not with the Eleventh Circuit. See *In re Davis*, No. CV409-130, 2010 WL 3385081, at \*1 n.1 (S.D. Ga. Aug. 24, 2010). The Eleventh Circuit affirmed that ruling. See *Davis v. Terry*, 625 F.3d 716, 719 (11th Cir. 2010).

<sup>301</sup> *Davis*, 130 S. Ct. at 4 (Scalia, J., dissenting).

A “freestanding” crime-innocence claim alleges that a prisoner is innocent of capital murder, and the innocence allegation does not supplement some other constitutional challenge.<sup>302</sup> Whether freestanding crime-innocence claims are even cognizable on federal habeas review remains an open question.<sup>303</sup> For example, in his first round of habeas proceedings, recall that Davis alleged his innocence alongside *Strickland*, *Brady*, and *Giglio* claims.<sup>304</sup> Because those familiar constitutional claims would be categorically barred under the successive claim rules in 28 U.S.C. § 2244(b)(1), his second federal habeas petition alleged only his innocence.

The habeas statute authorizes relief only for *constitutional* violations,<sup>305</sup> and the Court has been unable to resolve the question of which constitutional provision a freestanding crime-innocence claim actually invokes.<sup>306</sup> The central case on the freestanding crime-innocence issue is *Herrera v. Collins*.<sup>307</sup> A Texas state court capitally sentenced Herrera, who claimed in a successive federal

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<sup>302</sup> More precisely speaking, a claim is “freestanding” whenever a prisoner does not prove an accompanying constitutional violation. These situations include where the offender makes no accompanying constitutional claim, where the petitioner made the claim but its merits cannot be decided because it was subject to a successful procedural defense, or where the petitioner simply lost on the merits of the constitutional claim.

<sup>303</sup> See *Herrera v. Collins*, 506 U.S. 390, 424–27 (1993) (O’Connor, J., concurring). The *Herrera* majority opinion contained dicta suggesting that a freestanding innocence claim might not be cognizable. See *id.* at 401 (majority opinion) (“Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”). The Court passed on the freestanding innocence question again in *House v. Bell*, 547 U.S. 518, 554–55 (2006), and in *District Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2321–22 (2009).

<sup>304</sup> See *supra* notes 186–88 and accompanying text.

<sup>305</sup> See 28 U.S.C. § 2241(c)(3) (2006) (“The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . .”); 28 U.S.C. § 2254(a) (restricting relief for state prisoners to claims that they are “in custody in violation of the Constitution or laws or treaties of the United States”).

<sup>306</sup> Most freestanding innocence arguments involve some combination of the Eighth Amendment’s bar on cruel and unusual punishment, the Fourteenth Amendment’s guarantee of substantive due process, or the Fourteenth Amendment’s guarantee of procedural due process. See, e.g., *Herrera*, 506 U.S. at 431, 432 & n.2 (1993) (Blackmun, J., dissenting) (Eighth Amendment); *id.* at 435–36 (substantive due process); Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 Wm. & Mary L. Rev. 943, 1021–22 (1994) (procedural due process).

<sup>307</sup> 506 U.S. 390 (1993).

petition that he was actually innocent of the murder.<sup>308</sup> Herrera argued that the Eighth and Fourteenth Amendments forbid a state from executing an actually innocent offender and that he was therefore entitled to federal habeas relief.<sup>309</sup> The Supreme Court denied relief without reaching the broad question the case presented, holding only that Herrera's specific case did not involve an Eighth Amendment violation and, because some state corrective process was available, that Texas did not run afoul of procedural due process guarantees.<sup>310</sup> The Court, however, made clear that it was punting on the freestanding crime-innocence question.<sup>311</sup> The Court has conspicuously declined to decide the cognizability issue three times in the last four terms, including in *Davis*.<sup>312</sup>

What the Court did make clear in *Davis* is that it will locate any bar on crime-innocence relief—if any exists—in a jurisdictional limit common to all federal courts, not in a limit on its Article III appellate power. Even the two dissenting Justices did not seem to object to the Court's *power* to issue the transfer, just to the practical value of doing so in light of the authority of lower courts to grant ultimate relief. For that reason, original habeas is likely to remain a viable means of reviewing crime-innocence decisions in

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<sup>308</sup> Id. at 396.

<sup>309</sup> Id. at 398.

<sup>310</sup> Id. at 405–08, 411.

<sup>311</sup> See id. at 427 (O'Connor, J., concurring). The Court did state in dicta that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.” Id. at 400. Justice O'Connor, joined by Justice Kennedy, however, wrote a separate concurrence emphasizing that the Court had not resolved the freestanding innocence question. Id. at 427 (O'Connor, J., concurring). Justices Blackmun, Souter, Stevens, and White each wrote or joined in separate opinions that would have recognized the cognizability of freestanding innocence claims. See id. at 429 (White, J., concurring) (proposing a standard that would require a petitioner to show that “no rational trier of fact could find proof of guilt beyond a reasonable doubt”) (alterations, citations, and internal quotation marks omitted); id. at 442 (Blackmun, J., dissenting) (proposing a standard that would require a petitioner to “show that he probably is innocent”).

<sup>312</sup> See *Davis*, 130 S. Ct. at 3 (Scalia, J., dissenting); *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2321–22 (2009); *House v. Bell*, 547 U.S. 518, 555 (2006). The *Davis* district court, however, has determined that a prisoner alleging actual innocence states a cognizable constitutional challenge. See *In re Davis*, No. CV409-130, 2010 WL 3385081, at \*43 (S.D. Ga. Aug. 24, 2010) (“It can be said, then, that executing the ‘actually’ innocent violates the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution.”).

capital proceedings, at least as long as those claims are cognizable in federal habeas proceedings.

#### CONCLUSION

For most of the nineteenth century, original habeas empowered the Supreme Court to decide issues created by criminal confinement. Over the course of the twentieth century, the original habeas power evolved into a potential means of resolving important constitutional questions for which certiorari jurisdiction was unavailing. Until now, there has been no data about what sorts of cases required such resolution. The OHD, however, allows commentators to quantify what the Court and the parties before it *actually do* in original habeas proceedings.

In spite of its other theoretical uses, original habeas jurisdiction has evolved primarily into a vehicle for successive habeas litigation. Original habeas authority allows the Supreme Court to consider otherwise unreviewable challenges to criminal confinement—including new types of challenges to capital sentences. Specifically, the substantive standard for relief appears to carve out the special importance of capital petitions, and the transfer remedy makes original habeas a desirable means of bypassing procedural obstacles in cases that nonetheless present heavily contested evidentiary issues. The advent of DNA testing, renewed skepticism of guilt determinations, and Eighth Amendment capital eligibility restrictions all place pressure on the Court to use its original habeas authority in ways that were unnecessary just fifteen years ago. If the OHD and *Davis* are any indications, after almost a century-long period of virtual dormancy, the Supreme Court's original habeas power may be on a revival's precipice.

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